

## COMMENTS

### RIGHT TO COUNSEL DENIED: CORPORATE CRIMINAL PROSECUTIONS, ATTORNEY FEE AGREEMENTS, AND THE SIXTH AMENDMENT

On March 14, 2002, accounting firm Arthur Andersen was indicted for shredding documents in connection with the collapse of the Enron Corporation.<sup>1</sup> In response to the spate of corporate scandals following the Enron disaster, the Bush Administration increased efforts to uncover and punish corporate malfeasance and to rebuild public faith in market systems in a way that has “fundamentally changed the government’s relationship with industry and required companies to adapt accordingly.”<sup>2</sup> Although the Supreme Court unanimously overturned Arthur Andersen’s conviction,<sup>3</sup> it was too late to save the once-corporate giant from ruin.<sup>4</sup>

The lesson learned from Arthur Andersen’s demise is that, in the world of white-collar crime, indictment alone can be a death sentence for a large corporation, resulting in “potentially catastrophic collateral and reputational consequences to a corporation.”<sup>5</sup> Corporate scandals such as those involving Enron, Tyco, and WorldCom changed the landscape for enforcing white-collar

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<sup>1</sup> Larry D. Thompson, Deputy Attorney Gen., Remarks at News Conference (Mar. 14, 2002), <http://www.usdoj.gov/archive/dag/speeches/2002/031402newsconferncearthurandersen.htm>.

<sup>2</sup> 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, 1097 (2006).

<sup>3</sup> *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

<sup>4</sup> Carrie Johnson, *Justices Overturn Andersen Case Conviction*, WASH. POST, June 1, 2005, at A1; Andrew Parker, *Bathroom Metaphors Shed Light on KPMG Tax Avoidance Probe*, FIN. TIMES, July 11, 2005, at 26.

<sup>5</sup> Brandon L. Garrett, *United States v. Goliath*, 93 VA. L. REV. IN BRIEF 105, 105 (2007). Collapse is a very real possibility for corporations because exposure to criminal charges creates a stigma, and the potential for criminal sanctions (which are often steeper for corporations than civil sanctions) may frighten customers and creditors, deflating stock prices. Wilson Meeks, *Corporate and White-Collar Crime Enforcement: Should Regulation and Rehabilitation Spell an End to Corporate Criminal Liability?*, 40 COLUM. J.L. & SOC. PROBS. 77, 84 (2006).

crime.<sup>6</sup> Corporations suspected of criminal wrongdoing have adopted a new mantra: avoid indictment at all costs.<sup>7</sup>

Unfortunately, a corporation seeking to avoid indictment often finds the constitutional rights of its employees at odds with the company's interests because the government accepts no compromise.<sup>8</sup> This Comment examines U.S. Department of Justice (DOJ) policy and practice regarding corporate criminal prosecution with a specific focus on how the constitutional rights of individual corporate employees may be compromised when a corporation struggles to avoid indictment. The DOJ policy for prosecuting business organizations, articulated most forcefully in a guidance document by former U.S. Deputy Attorney General Larry Thompson ("Thompson Memorandum"),<sup>9</sup> was declared unconstitutional in a "landmark ruling"<sup>10</sup> by a federal district court in a tax shelter case against executives of the accounting giant KPMG.<sup>11</sup> In that case, the trial court's dismissal of the indictments against the executives was upheld by the Second Circuit Court of Appeals.<sup>12</sup> *United States v. Stein* received national attention because the decision challenged "government conduct in prosecuting companies and individuals accused of criminal wrongdoing."<sup>13</sup>

While the Thompson Memorandum had long been criticized because of the "downstream effect of the pressure exercised by prosecutors on companies . . . and the resulting myriad of implications for individual

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<sup>6</sup> Meeks, *supra* note 5, at 77.

<sup>7</sup> See Kathryn Hayes Tucker, *Ex-Prosecutor Dishes Up Advice to GCs on Government Probes*, DAILY REP. (Fulton County, GA), Oct. 17, 2006, at 4. Former U.S. Attorney and current Troutman Sanders partner Roscoe Howard noted how, when the U.S. Department of Justice (DOJ) brings a criminal complaint against a corporation, it is a "bet-the-company" situation because DOJ "will put you out of business." *Id.*

<sup>8</sup> In the words of one corporate defense attorney, "if necessary toss [the employees] under the bus . . . . The goal is to protect the company." Hayes Tucker, *supra* note 7, at 5 (quoting former U.S. Attorney and current Troutman Sanders partner Roscoe Howard).

<sup>9</sup> Memorandum from Larry D. Thompson, Deputy Att'y Gen., DOJ, to U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) [hereinafter Thompson Memorandum], available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm).

<sup>10</sup> Lynnley Browning, *In a Shift, Judge Demurs on Dismissing KPMG Case*, N.Y. TIMES, July 3, 2007, at C3.

<sup>11</sup> *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006), *aff'd*, 541 F.3d 130 (2d Cir. 2008). KPMG stands for Klynveld Peat Marwick Gordeler.

<sup>12</sup> *Stein*, 541 F.3d 130.

<sup>13</sup> Browning, *supra* note 10. The *Stein* courtroom has also been described as the place where "the most dramatic events in the battle over corporate cooperation policies" have been carried out. Sarah Helene Duggin, *The McNulty Memorandum, the KPMG Decision and Corporate Cooperation: Individual Rights and Legal Ethics*, 21 GEO. J. LEGAL ETHICS 341, 372 (2008).

employees,”<sup>14</sup> *Stein* was the first case to challenge directly certain controversial aspects of DOJ policy on prosecuting corporations, bringing the dispute over the controversial memo to a head.<sup>15</sup> Of particular concern to the court was the fact that some federal prosecutors were using the memo to pressure, if not coerce, corporations to stop paying legal fees for their employees also under investigation, even when doing so compromised the employees’ Fifth Amendment substantive due process rights and Sixth Amendment right to counsel protections.<sup>16</sup> *Stein* serves as a useful lens through which to evaluate the clash of values inherent in DOJ’s corporate prosecution tactics.

Scores of critics have challenged DOJ’s approach to corporate crime,<sup>17</sup> though no one has articulated a means by which the legitimate government interests in prosecuting crime and preventing obstruction of justice can be balanced against the constitutional rights of third-party employees who are harmed when the government strikes a deal with a corporation. In an effort to find such a balance, this Comment proposes a new standard for reviewing prosecutorial action during corporate investigations. It rejects substantive due process and its corollary of strict scrutiny review,<sup>18</sup> arguing that they are inappropriate for evaluating the claims at stake in such conflicts. The court in *Stein* reached the right conclusion—that KPMG employees’ constitutional rights were compromised—but for the wrong reasons. Rather than invoke the nebulous and controversial standard of substantive due process, this Comment evaluates the Thompson Memorandum and prosecutorial behavior<sup>19</sup> in corporate criminal investigations in light of how both can compromise

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<sup>14</sup> Madeleine E. Moise Cassetta, Note, *Wagon-Circling Prohibited: Forsaking Constitutional Rights as a Means to Prosecute Business Organizations*, 83 N.D. L. Rev. 767, 775 (2007).

<sup>15</sup> Noah D. Stein, Note, *Prosecutorial Ethics and the McNulty Memo: Should the Government Scrutinize an Organization’s Payment of Its Employees’ Attorneys’ Fees?*, 75 FORDHAM L. REV. 3245, 3256 (2007).

<sup>16</sup> *Stein*, 435 F. Supp. 2d at 336.

<sup>17</sup> See, e.g., *The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 80 (2006), <http://url.access.gpo.gov/GPO/LPS81265> [hereinafter *Hearing*] (statement of Karen J. Mathis, President, A.B.A.); *id.* at 71 (statement of Thomas J. Donohue, President–CEO, U.S. Chamber of Commerce); Brief of Amici Curiae of the New York Counsel of Defense Lawyers and the National Association of Criminal Defense Lawyers, *Stein*, 435 F. Supp. 2d 330 (No. S1 05 Crim. 888 (LAK)) [hereinafter Brief of Amici Curiae].

<sup>18</sup> *Stein*, 435 F. Supp. 2d at 360–65 (proposing strict scrutiny as the appropriate standard for reviewing substantive due process violations); see also *infra* note 125 and accompanying text.

<sup>19</sup> The Thompson Memorandum (DOJ policy) and prosecutorial behavior (DOJ practice) are both key to this analysis because, while DOJ’s internal guidelines have changed and evolved, there remains “little by way of systemic checks on the overly-aggressive, misinformed, or unethical prosecutor.” Andrew Weissmann, *A New Approach to Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 1319, 1323 (2007).

corporate employees' Sixth Amendment right to counsel. Because existing law,<sup>20</sup> and the *Stein* decision in particular, has failed to offer a satisfactory standard for reviewing government action under the Sixth Amendment, a new standard is proposed.

The analysis proceeds in four parts. After a brief overview of theories of corporate criminal liability, Part I examines DOJ policy for prosecuting business organizations. Part II sets out the facts of *Stein* and the basis for the court's decision, providing context for the discussion that follows. Part III rejects substantive due process as the appropriate constitutional concern, arguing instead that this issue falls squarely within the confines of the Sixth Amendment. Part IV offers a different standard, one derived from the Court's decision in *United States v. Wheat*,<sup>21</sup> for reviewing DOJ actions that implicate the Sixth Amendment rights of corporate employees.

## I. PROSECUTING CORPORATIONS

### A. *Theories of Corporate Criminal Liability*

Criminal culpability for corporations is well-established at common law.<sup>22</sup> Likewise, federal law declares that, absent clear congressional language to the contrary, all statutory uses of "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."<sup>23</sup>

The basic rule of corporate criminal liability borrows the concept of vicarious liability from tort law.<sup>24</sup> Under this theory, a corporation can be held liable for the criminal acts of its employees and agents so long as the illegal acts were within the scope of the employees' or agents' duties and were intended to benefit the corporation.<sup>25</sup> This doctrine was first laid out at the

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<sup>20</sup> See *Stein*, 435 F. Supp. 2d at 367 (observing that "[t]here is not much case law on the standard to be applied" when judging government interference with the Sixth Amendment right to counsel).

<sup>21</sup> 486 U.S. 153 (1988).

<sup>22</sup> See, e.g., *N.Y. Cent. R.R. v. United States*, 212 U.S. 481, 495 (1909) ("We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be punishable by fine because of the knowledge and intent of its agents to whom it has intrusted [sic] authority to act.").

<sup>23</sup> 1 U.S.C. § 1 (2006).

<sup>24</sup> Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 57 (2007).

<sup>25</sup> *Id.*

beginning of the twentieth century when the Supreme Court upheld the Elkins Act, which imputed misdemeanor liability to any common carrier involved in interstate commerce should an agent or employee of that carrier break the law.<sup>26</sup>

Courts have also relied at times upon a different theory of corporate criminal liability—the “collective knowledge” doctrine.<sup>27</sup> This theory is best articulated in a federal appellate case, *United States v. Bank of New England*.<sup>28</sup> There, the trial court had acquitted individual bank employees for violations of the Currency Transaction Reporting Act, but it convicted the bank for those same violations.<sup>29</sup> On appeal, the First Circuit reasoned that the knowledge of individual employees who are acting within the scope of their employment can be imputed to their employer.<sup>30</sup> As applied, this means that the employer’s knowledge is the sum of knowledge held by its employees.<sup>31</sup> Though employees may not know that they are involved in wrongdoing, “the aggregate of those components constitutes the corporation’s knowledge of a particular operation.”<sup>32</sup>

Combining the theories of vicarious liability and collective knowledge, prosecutors have several avenues by which they can find corporations potentially liable for the acts and omissions of their employees.<sup>33</sup> Despite the broad latitude prosecutors have in bringing charges, they rarely use the outer

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<sup>26</sup> *N.Y. Cent. R.R.*, 212 U.S. at 491–92.

<sup>27</sup> Bharara, *supra* note 24, at 63.

<sup>28</sup> *United States v. Bank of New Eng., N.A.*, 821 F.2d 844 (1st Cir. 1987).

<sup>29</sup> *Id.* at 848. The Currency Transaction Reporting Act and its regulations required banks to file Currency Transaction Reports (CTRs) within fifteen days of any customer currency transaction greater than \$10,000. *Id.* at 847. Banks could be held criminally liable for failing to file a CTR as part of an illegal scheme of transactions totaling more than \$100,000. *Id.*

<sup>30</sup> *Id.* at 855.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 856.

<sup>33</sup> Bharara, *supra* note 24, at 64–65. Bharara explains the ways a corporation may be deemed criminally liable:

A corporation is criminally liable even if the criminal conduct is undertaken without the knowledge of top management; the criminal activity was performed by a low level employee; the primary purpose was to benefit only the miscreant employee; there was no actual benefit to the corporation; the criminal acts were performed in direct violation of instructions from the company; there is a rigorous compliance program in place; no single individual had the requisite intent or knowledge sufficient to violate the law; it is never possible to identify the actual employee or agent responsible for this crime; or the offending employees are all acquitted of the same offense.

*Id.* (footnotes omitted).

limits of their discretion.<sup>34</sup> Some scholars have argued that this shows the existence of a “separate de facto substantive criminal law” known only to prosecutors, which guides and informs their decisions whether to bring charges.<sup>35</sup> Likewise, until 1999, DOJ had no formal policy on corporate prosecution even though corporate criminal liability was well-established.<sup>36</sup> However, numerous corporate scandals in recent years, including Enron’s bankruptcy and WorldCom’s accounting restatement fraud undermined public confidence in corporate America, forcing the government to take drastic legislative and regulatory measures to restore that confidence.<sup>37</sup> Congress responded by enacting the Sarbanes–Oxley Act of 2002.<sup>38</sup> The Bush Administration, acting through DOJ, responded by placing greater emphasis on prosecuting corporate corruption and by formalizing the factors prosecutors must consider when deciding whether to indict business organizations.<sup>39</sup>

*B. The Thompson Memorandum: DOJ Guidance to Federal Prosecutors Regarding Corporate Criminality*

In July 2002, President Bush issued an executive order<sup>40</sup> creating the Corporate Fraud Task Force to “strengthen the efforts of the Department of Justice and Federal, State, and local agencies to investigate and prosecute significant financial crimes, recover the proceeds of such crimes, and ensure just and effective punishment of those who perpetrate financial crimes.”<sup>41</sup> Central to this mission was restoring public confidence in corporations and the market by ferreting out corporate fraud.<sup>42</sup> The Bush Administration’s rhetoric became increasingly bold in an August 2002 statement declaring “war” on

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<sup>34</sup> *Id.* at 76.

<sup>35</sup> *Id.* at 76–77 (citing Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, LAW & CONTEMP. PROBS., Summer 1997, at 23, 61).

<sup>36</sup> Wray & Hur, *supra* note 2, at 1099.

<sup>37</sup> Lauren E. Taigue, Note, *Justice Department’s Policy on Corporate Prosecutions Under Attack: United States v. Stein Assails Thompson Memorandum*, 52 VILL. L. REV. 369, 369 (2007). The Securities and Exchange Commission (SEC) released the Seaboard Report in 2001, which reflects many of the same principles as the Thompson Memorandum and states that the SEC would consider many of the same factors for the purpose of SEC enforcement proceedings. Duggin, *supra* note 13, at 348.

<sup>38</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C.).

<sup>39</sup> Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 314 (2007).

<sup>40</sup> Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002).

<sup>41</sup> *Id.*

<sup>42</sup> Inna Dexter, *Regulating the Regulators: The Need for More Guidelines on Prosecutorial Conduct in Corporate Investigations*, 20 GEO. J. LEGAL ETHICS 515, 523 (2007).

corporate crime.<sup>43</sup> These efforts have been successful; in recent years, federal prosecutions have resulted in more than 1,100 convictions in corporate fraud cases.<sup>44</sup>

Soon after creating the task force, DOJ distributed the Thompson Memorandum to federal prosecutors, outlining several factors that must be considered when deciding whether to bring charges against a corporation.<sup>45</sup> The Thompson Memorandum and its predecessor, written by then-Deputy Attorney General Eric Holder (“Holder Memorandum”), were not completely new tools; rather, they simply “commit[ed] to paper what good prosecutors [had] been doing for decades.”<sup>46</sup> Both outlined factors for prosecutors to consider when deciding whether to bring charges against a corporation. However, the Holder Memorandum noted that the factors were “not outcome-determinative” and were to serve only as “guidelines.”<sup>47</sup> The Thompson Memorandum left many parts of the Holder Memorandum unchanged, but the primary departure was that it became binding on federal prosecutors.<sup>48</sup> In revising his predecessor’s guidance, Deputy Attorney General Thompson made it clear that DOJ “increased [its] emphasis on and scrutiny of the authenticity of a corporation’s cooperation.”<sup>49</sup> Because few companies, particularly after Arthur Andersen’s collapse, will risk indictment, prosecutors expect a company targeted for investigation to comply with all of DOJ’s demands.<sup>50</sup>

The Thompson Memorandum requires prosecutors to consider the degree of company cooperation with the government as well as “whether the

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<sup>43</sup> Griffin, *supra* note 39, at 314.

<sup>44</sup> Lynneley Browning, *U.S. Moves to Restrain Prosecutors*, N.Y. TIMES, Dec. 13, 2006, at C1.

<sup>45</sup> Thompson Memorandum, *supra* note 9, at 2–3.

<sup>46</sup> *Hearing*, *supra* note 17, at 113 (statement of Paul J. McNulty, Deputy Att’y Gen.). Four Deputy Attorneys General have issued guidance to federal prosecutors for bringing criminal charges against a corporation: Memorandum from Eric Holder, Deputy Att’y Gen., *Bringing Criminal Charges Against Corporations* (June 16, 1999) [hereinafter Holder Memorandum], available at <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html>; Thompson Memorandum, *supra* note 9; Memorandum from Paul J. McNulty, Deputy Att’y Gen., *Principles of Federal Prosecution of Business Organizations* (Jan. 26, 2007) [hereinafter McNulty Memorandum], available at [http://www.usdoj.gov/dag/speeches/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf); and Robert D. McCallum, Jr., Acting Deputy Att’y Gen., *Memorandum to U.S. Attorneys Re: Waiver of Corporate Attorney-Client and Work Product Protection* (Oct. 21, 2005) [hereinafter McCallum Memorandum], available at WL SL031 ALI\_ABA 1299.

<sup>47</sup> Holder Memorandum, *supra* note 46.

<sup>48</sup> DOJ, CRIMINAL RESOURCE MANUAL § 163 (2005), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00163.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm) (stating that federal prosecutors “must consider” the nine factors outlined in the Thompson Memorandum in deciding whether to bring charges against a corporation); Duggin, *supra* note 13, at 353.

<sup>49</sup> Thompson Memorandum, *supra* note 9, at 1.

<sup>50</sup> Griffin, *supra* note 39, at 327.

corporation appears to be protecting its culpable employees and agents.”<sup>51</sup> One factor prosecutors must consider as evidence of a corporation’s lack of cooperation is whether it seems to be protecting “culpable” employees targeted for investigation by “advancing” their attorneys’ fees.<sup>52</sup> While the Thompson Memorandum does not assign any one factor greater weight when deciding whether to bring criminal charges against a corporation, in practice the extent to which a corporation cooperates is likely to be given more weight than any other factor listed.<sup>53</sup>

With the Thompson Memorandum, DOJ shifted emphasis away from bringing corporations to justice and toward holding individual actors accountable.<sup>54</sup> The number of corporate prosecutions has decreased since 2003 (which was perhaps the goal of pressuring corporations to cooperate), but the number of individual prosecutions has increased.<sup>55</sup> This shift means not only that individual employees are no longer shielded by their companies, but that companies now “have an incentive to find scapegoats within their ranks.”<sup>56</sup>

The Thompson Memorandum is not without its good intentions and positive effects. It affords prosecutors flexibility to determine if cooperation or collateral effects may outweigh whatever deterrence would be accomplished through prosecution.<sup>57</sup> It also gives companies the chance to “earn credit” by cooperating.<sup>58</sup> As a result of DOJ’s heightened attention to corporate malfeasance, companies are more attentive to their duties to shareholders, and they are more likely to have effective compliance programs in place.<sup>59</sup> Administratively, DOJ spends less time investigating and prosecuting corporate criminal wrongdoing, which saves judicial resources.<sup>60</sup> Finally, public confidence in corporate governance was somewhat restored, even if

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<sup>51</sup> Thompson Memorandum, *supra* note 9, at 5.

<sup>52</sup> *Id.* The memorandum does state, in a footnote, that for corporations in states where legal fees are required to be paid by the employer in advance of any determination of the employee’s guilt, payment will not be considered a failure to cooperate. *Id.* at 10 n.4.

<sup>53</sup> Moise Cassetta, *supra* note 14, at 772 (citing Wray & Hur, *supra* note 2, at 1145–46); *see also* Dexter, *supra* note 42, at 524–25 (noting that, while it makes sense for there to be incentives for cooperation, “cooperation seem[s] like the main factor” that prosecutors consider in determining whether to bring charges).

<sup>54</sup> Dexter, *supra* note 42, at 525.

<sup>55</sup> *Id.* at 525–26.

<sup>56</sup> *Id.* at 526.

<sup>57</sup> *Id.* at 523.

<sup>58</sup> *Id.*

<sup>59</sup> Moise Cassetta, *supra* note 14, at 774.

<sup>60</sup> Dexter, *supra* note 42, at 523.

only temporarily, and there was arguably increased stability in the stock market.<sup>61</sup>

For good or bad, the Thompson Memorandum affords individual prosecutors a tremendous amount of discretion that is unconstrained by any clear standards of prosecutorial conduct.<sup>62</sup> A former high-ranking DOJ official, who served immediately under Thompson, has since called the memorandum a “state-sponsored shakedown scheme” that has moved the criminal process, at least where corporations are concerned, away from the traditional accusatorial system toward an inquisitorial system.<sup>63</sup> In *Stein*, Judge Lewis Kaplan of the Southern District of New York agreed, holding that the Thompson Memorandum unconstitutionally infringes on the rights of some corporate employees.<sup>64</sup>

## II. *UNITED STATES V. STEIN*

Accounting giant KPMG and several of its top executives have been under the microscope since 2002, in what the Internal Revenue Service (IRS) calls “the largest criminal tax case ever filed.”<sup>65</sup> To avoid indictment and inevitable ruin, KPMG did what any corporation in its position would have done: it cooperated with federal prosecutors and sought to identify individual employees who might have been culpable for the elaborate tax shelter scheme it devised on behalf of its wealthy clientele.<sup>66</sup> To demonstrate its obeisance to DOJ’s demands, KPMG was willing to throw several top-level executives “under the bus.”<sup>67</sup>

KPMG’s problems began in 2002 when it was being investigated by a Senate committee for marketing abusive tax shelters and resisted requests to

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<sup>61</sup> Moise Cassetta, *supra* note 14, at 774.

<sup>62</sup> Dexter, *supra* note 42, at 516.

<sup>63</sup> Wray & Hur, *supra* note 2, at 1095. Wray served as the Principal Associate Deputy Attorney General at DOJ from 2001 to 2003. *Id.* at 1095 n.A1.

<sup>64</sup> See *United States v. Stein*, 435 F. Supp. 2d 330, 336 (S.D.N.Y. 2006) (“The government . . . has let its zeal get in the way of its judgment. It has violated the Constitution it is sworn to defend.”).

<sup>65</sup> Press Release, IRS, *KPMG to Pay \$456 Million for Criminal Violations*, Nov. 1, 2007, <http://www.irs.gov/newsroom/article/0,,id=146999,00.html>.

<sup>66</sup> See Dexter, *supra* note 42, at 516 (noting that, to avoid indictment, companies are likely either to cut off payment of legal fees for their employees or to condition payment upon full cooperation with prosecutors).

<sup>67</sup> See Tucker, *supra* note 7, at 5 (quoting Roscoe Howard as saying that companies ferret out wrongdoers and “if necessary toss them under the bus . . . . The goal is to protect the company.”).

turn over documents.<sup>68</sup> This resulted in nine IRS summonses, to which KPMG again refused to respond, leading the government to file a petition in federal district court to enforce the summonses.<sup>69</sup> Around the same time, a Senate subcommittee began investigating corporate tax shelters and held a public hearing in November 2003 at which several KPMG senior partners testified.<sup>70</sup> The hearing revealed how KPMG had been marketing tax products that were designed to limit the tax liabilities of its clients.<sup>71</sup> As a result of the less-than-stellar performance of its partners at that hearing, KPMG decided to “clean house,” firing (among others) Jeffrey Stein, deputy chairman of KPMG’s U.S. business and prior vice chair of tax services.<sup>72</sup> Stein’s departure was “cushioned” by a three-year contract to serve as a KPMG “consultant” at a salary of \$100,000 per month, including legal representation “reasonably acceptable” to him at KPMG’s expense should he come under government scrutiny in a civil or criminal proceeding.<sup>73</sup>

In early 2004, the U.S. Attorney’s Office (USAO) for the Southern District of New York notified Stein and several other current and former KPMG employees that they were the subjects of a criminal investigation.<sup>74</sup> They were later indicted on several counts, including conspiracy to defraud the United States, evade taxes, and cause the filing of false and fraudulent tax returns; substantive tax evasion; and obstruction of the due administration of tax laws.<sup>75</sup> The conspiracy charge alleged that the defendants conspired to defraud

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<sup>68</sup> Patricia B. Hsue, Comment, *Lessons from United States v. Stein: Is the Line Between Criminal and Civil Sanctions for Illegal Tax Shelters a Dot?*, 102 NW. U. L. REV. 903, 920–21 (2008).

<sup>69</sup> *Stein*, 435 F. Supp. 2d at 338.

<sup>70</sup> *Id.*

<sup>71</sup> Andrew Parker, *KPMG Seeks End to Tax Scandal*, FIN. TIMES, Jan. 12, 2004, <http://search.ft.com/ftArticle?id=040112007704>. The Senate investigation revealed that KPMG had designed four types of tax shelters: Foreign Leverage Investment Program (FLIP), Offshore Portfolio Investment Strategy (OPIS), Bond Linked Investment Premium Strategy (BLIPS), and S-Corporation Charitable Contribution Strategy (SC2). Hsue, *supra* note 68, at 921. Taxpayers could choose the amount of income they wanted protected against taxation, and the KPMG defendants received a commission based on the sheltered income for designing a phony transaction. *Id.* at 923. To cover up the tax shelters, the defendants wrote opinion letters advising that the shelters would likely survive an IRS challenge. *Id.* The tax shelter products allowed KPMG clients to claim bogus losses totaling \$4.4 billion in their tax returns, which could be used to offset income and capital gains. Parker, *supra* note 4.

<sup>72</sup> *Stein*, 435 F. Supp. 2d at 338. Although the court found that Stein was fired, KPMG initially reported that he was retiring. *KPMG Tax Shelters Target of U.S. Investigation*, FIN. TIMES, Feb. 20, 2004, <http://search.ft.com/ftArticle?id=040220000266&ct=0>.

<sup>73</sup> *Stein*, 435 F. Supp. 2d at 339. Stein’s agreement explicitly stated that, were he named in any action based on his work for KPMG, the company would indemnify him. *Id.*

<sup>74</sup> *Id.* at 340–41.

<sup>75</sup> *United States v. KPMG*, No. 05 CR. 903(LAP), 2007 WL 541956, at \*2 (S.D.N.Y. Feb. 15, 2007).

the government by creating and selling illegal tax shelters designed for the sole purpose of producing tax losses.<sup>76</sup>

KPMG had an explicit contract to pay Stein's legal fees;<sup>77</sup> however, like many corporations, KPMG had a general policy of paying legal defense costs for its employees in matters related to their employment.<sup>78</sup> The other defendants in this action claimed that past practice justified the expectation that their fees would be covered as well.<sup>79</sup> This expectation was reasonable given that after the government decided to prosecute certain KPMG employees, KPMG's chief executive officer, Gene O'Kelly, informed all the partners that "[a]ny present or former members of the firm asked to appear will be represented by competent council [sic] at the firm's expense."<sup>80</sup> In fact, government prosecutors and the defense both stipulated that, prior to February 2004, "it had been the longstanding voluntary practice of KPMG to advance and pay legal fees, without a preset cap or condition of cooperation with the government, for . . . employees of the firm . . . in any civil, criminal or regulatory proceeding" involving the employees' activities arising within the scope of their employment.<sup>81</sup>

In early 2004, the IRS referred KPMG's suspected tax shelter scheme to DOJ for criminal investigation.<sup>82</sup> This got the attention of KPMG and provided a strong incentive for the corporation to comply with prosecutors' demands.<sup>83</sup> On February 25, 2004, one week after O'Kelly informed partners that they would be represented at KPMG's expense, federal prosecutors met with KPMG counsel to discuss indicting the corporation.<sup>84</sup> The content of this meeting played heavily in the court's evaluation of whether the government pressured KPMG to sever its obligation to Stein and the other employees receiving advancement of attorneys' fees. In preparation for the meeting, the

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<sup>76</sup> Hsue, *supra* note 68, at 906.

<sup>77</sup> *Stein*, 435 F. Supp. 2d at 339.

<sup>78</sup> *Id.* at 336.

<sup>79</sup> *Id.* at 356.

<sup>80</sup> *United States v. Stein (Stein III)*, 495 F. Supp. 2d 390, 407 (S.D.N.Y. 2007). Note that this is a later decision in the same matter by the same court.

<sup>81</sup> *Stein*, 435 F. Supp. 2d at 340. In previous unrelated litigation, KPMG paid the civil and criminal defense fees of four partners, totaling more than \$20 million. John J. Falvey, Jr. & Janet E. Taylor, *Federal Prosecutors and Advancement of Legal Defense Fees: Don't Ask, Don't Tell*, BOSTON B.J., Jan.–Feb. 2008, at 14, 15.

<sup>82</sup> *Stein*, 435 F. Supp. 2d at 339.

<sup>83</sup> *See id.* at 341 (explaining that KPMG was so motivated to "cooperate fully with the government's investigation" that it hired Skadden, Arps, Slate, Meagher and Flom, LLP as outside counsel).

<sup>84</sup> *Id.* at 340–41.

USAO prepared a list of “meeting points,” including finding out whether KPMG intended to pay the legal fees of its employees under investigation.<sup>85</sup> KPMG attorneys reported that “the object was to save KPMG, not to protect any individuals,” because they feared that an indictment against the company would result in the corporation’s demise.<sup>86</sup> When asked by the government whether KPMG intended to pay the legal fees of its employees, KPMG asked for the government’s perspective on the issue.<sup>87</sup> Prosecutors referred specifically to the Thompson Memorandum and responded that payment of fees would be considered<sup>88</sup> and would “not [be] a sign of cooperation.”<sup>89</sup> One Assistant U.S. Attorney informed KPMG counsel that avoiding indictment would be an “uphill battle.”<sup>90</sup>

Later in the meeting, after again referencing the payment of legal fees, one prosecutor told KPMG attorneys that “‘misconduct’ should not or cannot ‘be rewarded.’”<sup>91</sup> This statement was consistent with the directive of the Thompson Memorandum, which ordered prosecutors to ensure that corporations are not “protecting . . . culpable employees.”<sup>92</sup> The Thompson Memorandum encourages prosecutors to view legal fee advancement as a sign that the corporation is not cooperating and to factor that into a decision whether to bring charges.<sup>93</sup> Government prosecutors argued that the “rewarding misconduct” comment was not intended to be viewed as implying that, if KPMG paid legal fees, it would be rewarding misconduct, but the court determined that whatever prosecutors meant by the statement mattered less than how it was understood by KPMG.<sup>94</sup> The court found that “while the USAO did not say in so many words that it did not want KPMG to pay legal fees, no one at the meeting could have failed to draw that conclusion.”<sup>95</sup>

It was not until later that KPMG disclosed the severance package agreements to the government, and prosecutors responded that such packages

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<sup>85</sup> *Id.* at 341.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *United States v. Stein (Stein III)*, 495 F. Supp. 2d 390, 409 (S.D.N.Y. 2007) (quoting Assistant U.S. Attorney Weddle).

<sup>90</sup> *Id.* at 408 (quoting Shirah Neiman, chief counsel to the U.S. Attorney).

<sup>91</sup> *Stein*, 435 F. Supp. 2d at 342.

<sup>92</sup> Thompson Memorandum, *supra* note 9, at 5.

<sup>93</sup> *Id.*

<sup>94</sup> *Stein*, 435 F. Supp. 2d at 342–43.

<sup>95</sup> *Id.* at 344. In fact, one of the prosecutors at the meeting admitted that he personally believed KPMG should not pay the legal fees. *Id.* at 344 n.53.

were “a troubling issue” under the Thompson Memorandum.<sup>96</sup> KPMG continued to advance defense fees to Stein, totaling nearly \$650,000 by August 2004.<sup>97</sup> If any KPMG employee refused to cooperate with government investigators, the company threatened to stop paying for their legal representation,<sup>98</sup> even if cooperation meant admitting to criminal acts.<sup>99</sup> Because of consistent pressure from government prosecutors, KPMG eventually saw the agreement with Stein as “something of a ticking bomb.”<sup>100</sup> KPMG continued to plead with government prosecutors,<sup>101</sup> stressing its cooperation in other areas, which included pressuring other employees to cooperate fully with the investigation, even if that meant admitting wrongdoing.<sup>102</sup> In a March 2005 meeting with the U.S. Attorney, KPMG reiterated how cooperative it had been on every other point, but the U.S. Attorney made clear: “Let me put it this way. I’ve seen a lot better from big companies.”<sup>103</sup>

On May 5, 2005, only eight days before a scheduled meeting with DOJ, at which the Deputy Attorney General was expected to issue indictments, KPMG gave in to government pressure.<sup>104</sup> KPMG told prosecutors that it would no longer pay legal fees for individuals who refused to cooperate with the government by invoking their Fifth Amendment right against self-incrimination.<sup>105</sup> KPMG did so because it believed that severing the fee-advancement agreements would “help [the firm] with the government.”<sup>106</sup>

This time federal prosecutors gave KPMG what it was hoping for.<sup>107</sup> In August 2005, prosecutors entered into a Deferred Prosecution Agreement with KPMG that, among other things, waived the indictment, levied a \$465 million fine against the company, and charged it with one count of information to be dismissed upon full compliance with the Deferred Prosecution Agreement.<sup>108</sup> Additionally, KPMG had to disclose all information in its possession relevant

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<sup>96</sup> *Id.* at 344.

<sup>97</sup> *Id.* at 347.

<sup>98</sup> *United States v. Stein*, 541 F.3d 130, 137–39 (2d Cir. 2008).

<sup>99</sup> *Id.* at 138.

<sup>100</sup> *Stein*, 435 F. Supp. 2d at 347.

<sup>101</sup> *Id.* at 348.

<sup>102</sup> *Id.* at 345.

<sup>103</sup> *Id.* at 348 (quoting then-U.S. Attorney David N. Kelley).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 345.

<sup>106</sup> *Id.* at 348 (quoting Joseph Loonan, then-KPMG deputy general counsel).

<sup>107</sup> *Id.* at 349.

<sup>108</sup> *Id.*

to the investigation, including the activities, documents, and records of employees.<sup>109</sup> The company also agreed not to assert the attorney–client and work product privileges.<sup>110</sup> It was only after this agreement was reached, and KPMG ceased payment of attorneys’ fees for employees, that Stein and other former KPMG employees were formally indicted.<sup>111</sup>

Stein and the other defendants brought a civil action against KPMG for specific performance of the obligation to advance legal fees,<sup>112</sup> although they claimed that KPMG’s refusal to advance fees was because of government pressure.<sup>113</sup> In January 2006, the former employees moved to dismiss the criminal charges against them, stating that by interfering with the advancement of fees—which they were lawfully entitled to expect (either through explicit contract or past practice)—the government violated their constitutional rights.<sup>114</sup> The district court agreed with Stein and his colleagues, ruling in June 2006 that government attorneys had violated their Fifth Amendment substantive due process and Sixth Amendment right to counsel guarantees.<sup>115</sup> At the heart of the decision is the Thompson Memorandum itself, as this decision calls into question the constitutionality of the longstanding DOJ policy regarding corporate criminal investigations.<sup>116</sup>

### III. THE CONSTITUTIONAL CASE AGAINST THE GOVERNMENT

To evaluate the constitutionality of DOJ’s policy regarding fee advancement, section A compares the substantive due process framework invoked by the *Stein* court with the more appropriate Sixth Amendment right to counsel. Section B addresses whether, assuming the right to counsel does include access to fee-advancement arrangements, the Thompson Memorandum and its use by prosecutors improperly interferes with the exercise of that right by employees (or former employees) of corporations facing indictment.

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 350.

<sup>112</sup> *United States v. Stein (Stein II)*, 452 F. Supp. 2d 230 (S.D.N.Y. 2006). Federal Judge Lewis Kaplan claimed ancillary jurisdiction over the contractual claim. *Id.* at 242. However, the Second Circuit overturned that ruling, holding that ancillary jurisdiction was inappropriate because of the prejudice to KPMG of having the same court that decides the criminal matter also decide the civil matter. *Stein v. KPMG*, 486 F.3d 753, 761 (2d Cir. 2007).

<sup>113</sup> *Stein*, 435 F. Supp. 2d at 336.

<sup>114</sup> *Id.* at 350.

<sup>115</sup> *Id.* at 362–66.

<sup>116</sup> *Id.* at 362.

A. *The Sixth Amendment, Rather than the Fifth Amendment, Is the Proper Framework for Analyzing DOJ's Policy Regarding Fee Advancement.*

In recent years, the Supreme Court has sought to confine substantive due process protection only to those rights that are fundamental,<sup>117</sup> meaning those rights “deeply rooted in this Nation’s history and tradition” and “‘implicit in the concept of ordered liberty’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”<sup>118</sup> Scholars differ as to whether fundamental rights must be limited to those explicitly enumerated in the text of the Constitution.<sup>119</sup>

In evaluating DOJ’s policy, the *Stein* court relied primarily on the Due Process Clause of the Fifth Amendment—and, more specifically, on the right to fairness in criminal proceedings<sup>120</sup>—because government conduct would have “infect[ed] the trial with unfairness” had a trial on the merits proceeded.<sup>121</sup> Citing a Second Circuit decision and a constitutional law treatise, the court concluded that “the right to fairness in criminal proceedings is a fundamental liberty interest subject to substantive due process protection.”<sup>122</sup> The trial court found that, by invoking the Thompson Memorandum the way it did, the government forced KPMG to ignore its longstanding practice regarding attorneys’ fees and disregard its explicit contract with Stein and its implicit contractual obligation to the other employees, thereby depriving the defendants of effective assistance of counsel and the right to a fair trial.<sup>123</sup>

The specific question before the court was whether this right to fair procedure includes the right to obtain and use defense resources lawfully available to the defendant without government interference.<sup>124</sup> If the answer is yes, then it follows that the government interfered with a fundamental right of

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<sup>117</sup> Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1119 (2004).

<sup>118</sup> *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

<sup>119</sup> See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 795 (3d ed. 2006).

<sup>120</sup> *Stein*, 435 F. Supp. 2d at 360–62. The court addressed the Sixth Amendment claims and concluded that there were constitutional violations on those grounds as well. *Id.* at 369. However, the court ultimately failed to consider an appropriate standard of scrutiny for Sixth Amendment violations, concluding instead that government interference can never be justified “regardless of the legal standard of scrutiny applied.” *Id.*

<sup>121</sup> *Id.* at 359.

<sup>122</sup> *Id.* at 361 (referencing *Quill v. Vacco*, 80 F.3d 716, 724 (2d. Cir. 1996), *rev'd on other grounds*, 521 U.S. 793 (1997); RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 818 (4th ed. 2007)).

<sup>123</sup> *Stein*, 435 F. Supp. 2d at 365, 370.

<sup>124</sup> *Id.* at 361.

substantive due process, and strict scrutiny is the appropriate test by which to evaluate the government's action.<sup>125</sup>

However, substantive due process is an inappropriate framework for analyzing this issue. The right to use resources lawfully available to a defendant free from government interference is a Sixth Amendment inquiry, not a Fifth Amendment procedural fairness one. The Sixth Amendment states: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."<sup>126</sup> As DOJ correctly pointed out,<sup>127</sup> the Supreme Court has made it clear that if another amendment provides an "explicit textual source" for the constitutional protection being asserted, substantive due process analysis is inappropriate.<sup>128</sup> The Second Circuit, in reviewing the *Stein* decision, refused to resolve the substantive due process argument because the Sixth Amendment infringement provided sufficient grounds for affirming the dismissal of the indictments and because the court is "hesitant to resolve constitutional questions unnecessarily."<sup>129</sup>

Additionally, substantive due process is a highly controversial judicial construct, and it is increasingly threatened as a basis for upholding nebulously defined rights.<sup>130</sup> With the appointments of Chief Justice John Roberts and Justice Samuel Alito to the Supreme Court, both of whom are skeptical of substantive due process, the Court is likely to shy away from upholding constitutional challenges based on the doctrine,<sup>131</sup> especially if there is another,

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<sup>125</sup> *Id.* at 362.

<sup>126</sup> U.S. CONST. amend. VI.

<sup>127</sup> Brief for the United States of America at 30, *United States v. Stein*, 541 F.3d 130 (2d Cir. 2007) (No. 07-3042).

<sup>128</sup> *See Graham v. Connor*, 490 U.S. 386, 395 (1989) (holding that, where a claim can appropriately be brought under the Fourth Amendment's protection against unreasonable seizures, the "more generalized notion of 'substantive due process'" is inappropriate).

<sup>129</sup> *United States v. Stein*, 541 F.3d 130, 142 (2d Cir. 2008).

<sup>130</sup> *See* Brandon R. Johnson, Note, "Emerging Awareness" After the Emergence of Roberts: Reasonable Societal Reliance in Substantive Due Process Inquiry, 71 BROOK. L. REV. 1587, 1587-88 (2006) (noting that "a coalition of forces threatens substantive due process" because it is seen as legislating from the bench); *see also Philip Morris USA v. Williams*, 549 U.S. 346, 361 (2007) (Stevens, J., dissenting) (agreeing, in the most recent case before the Court implicating substantive due process, that significant judicial restraint should be used in expanding substantive due process). While the majority opinion in *Philip Morris* did not mention substantive due process, Justice Thomas expressed concern and dismay that the Court disguised as "procedural" what he said was really a substantive due process use of the Fifth Amendment. *Id.* (Thomas, J., dissenting). At least one federal district court, in a post-*Stein* decision, has already rejected the *Stein* logic regarding substantive due process, finding it without legal basis. *United States v. Stodder*, No. 2:05-CR-00027, 2006 WL 3066196, at \*2 (C.D. Cal. Oct. 4, 2006).

<sup>131</sup> Johnson, *supra* note 130, at 1588.

more appropriate constitutional framework available.<sup>132</sup> Justice Antonin Scalia has been particularly critical of substantive due process, arguing that it “cannot be used to impose additional requirements . . . as are already addressed . . . by the Bill of Rights.”<sup>133</sup>

Even when the *Stein* trial court, later in the opinion, considered whether the government also violated the Sixth Amendment, it examined only the extent to which the government’s conduct threatened both to “contaminate [the] proceeding”<sup>134</sup> and “fundamentally alter the structure of the adversary process.”<sup>135</sup> By emphasizing the Sixth Amendment’s role in assuring due process through a fair trial procedure (though that is certainly part of the function of the Sixth Amendment<sup>136</sup>), the court ignored the equally important role of the Sixth Amendment as outlined in *Faretta v. California*: “[I]t grants to the accused personally the right to make his defense.”<sup>137</sup> The Sixth Amendment has societal *as well as* individual value,<sup>138</sup> and resting its defense on substantive due process ignores the “personal character upon which the Amendment insists.”<sup>139</sup> Furthermore, the right to choose counsel under the Sixth Amendment is not a fundamental right; rather, it is a qualified right subject to limitation when there is a compelling reason.<sup>140</sup> It appears, then, that the court inappropriately subsumed any Sixth Amendment analysis under substantive due process.<sup>141</sup>

The Sixth Amendment is a more appropriate framework than substantive due process for analyzing DOJ’s fee advancement policy and still allows consideration of the *Stein* court’s concerns with adversarial fairness.

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<sup>132</sup> See *supra* notes 128–29 and accompanying text.

<sup>133</sup> *Albright v. Oliver*, 510 U.S. 266, 276 (1994) (Scalia, J., concurring). Justice Scalia went on to opine, “The Bill of Rights sets forth, in the Fifth and Sixth Amendments, procedural guarantees relating to the period before and during trial, including a guarantee (the Grand Jury Clause) regarding the manner of indictment. Those requirements are not to be supplemented through the device of ‘substantive due process.’” *Id.*

<sup>134</sup> *United States v. Stein*, 435 F. Supp. 2d 330, 371 (S.D.N.Y. 2006).

<sup>135</sup> *Id.* at 372.

<sup>136</sup> See *infra* notes 147–52 and accompanying text.

<sup>137</sup> *Faretta v. California*, 422 U.S. 806, 819 (1975); see *Stein*, 435 F. Supp. 2d at 362–69 (making no mention of the Sixth Amendment right of the accused to make his own defense).

<sup>138</sup> See *infra* notes 148–50 and accompanying text.

<sup>139</sup> *Faretta*, 422 U.S. at 820.

<sup>140</sup> See *infra* notes 143–45.

<sup>141</sup> See *Stein*, 435 F. Supp. 2d at 362 (concluding that the government’s actions violated the substantive due process right to fairness in the criminal process).

### 1. *The Scope of the Sixth Amendment*

The proper scope of the Sixth Amendment right to counsel (“Counsel Clause”) remains obscure in large part because the Supreme Court has not clearly defined how much autonomy an individual has in selecting representation.<sup>142</sup> While the Court has long held that the right to choose counsel falls within the scope of the Sixth Amendment,<sup>143</sup> that right is qualified because it can be trumped by the public’s interest in the “fair, orderly and efficient administration of justice,”<sup>144</sup> or a conflict of interest.<sup>145</sup> These qualifications, however, do not reduce the constitutional import of the right; rather, the right to choose counsel is an essential element of the fair trial process.<sup>146</sup>

Federal courts have an interest in making sure all criminal trials are fair.<sup>147</sup> The Counsel Clause ensures a fair trial in two ways: it guarantees the accused will be represented in criminal proceedings, and it lends credibility to the adversarial system of justice.<sup>148</sup> The first role of the Counsel Clause is personal, tied to an individual’s right to control the direction of his defense.<sup>149</sup> The second role is more complicated and relates to the “collective institutional role” served by defense counsel.<sup>150</sup> To the extent that “partisan advocacy produces the correct result,”<sup>151</sup> the concern is procedural rather than merely substantive, requiring “the prosecution’s case to survive the crucible of meaningful adversarial testing.”<sup>152</sup>

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<sup>142</sup> Kathleen F. Brickey, *Forfeiture of Attorneys’ Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493, 504–05 (1986).

<sup>143</sup> *Powell v. Alabama*, 287 U.S. 45, 53 (1932). *But see* Brickey, *supra* note 142, at 506 (arguing that *Powell* is consistently cited out of context and should be limited to its factual history). Professor Brickey argues the *Powell* Court only acknowledged a right to counsel of choice for capital offenses. *Id.*

<sup>144</sup> Brickey, *supra* note 142, at 509.

<sup>145</sup> *Wheat v. United States*, 486 U.S. 153, 162 (1988).

<sup>146</sup> *See Strickland v. Washington*, 466 U.S. 668, 684–85 (1984) (“The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause.”).

<sup>147</sup> *Wheat*, 486 U.S. at 160.

<sup>148</sup> Morgan Cloud, *Forfeiting Defense Attorneys’ Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 WIS. L. REV. 1, 7 (1987).

<sup>149</sup> *Wheat*, 486 U.S. at 165 (Marshall, J., dissenting).

<sup>150</sup> Cloud, *supra* note 148, at 34.

<sup>151</sup> *Id.* at 9.

<sup>152</sup> *United States v. Cronin*, 466 U.S. 648, 656 (1984).

The right to retain skilled counsel serves the goal of assuring that convictions are both procedurally and substantively fair.<sup>153</sup> White-collar criminal trials tend to be very lengthy, document intensive, and expensive.<sup>154</sup> Some argue that the nature, scale, and complexity of the criminal charges are irrelevant when conducting a Sixth Amendment analysis.<sup>155</sup> To hold otherwise, the argument goes, would be to render effective representation of counsel impossible for a pauper who has to rely on appointed counsel in a complex case.<sup>156</sup> As appealing as this red herring seems, it ignores the fundamental point of the adversarial process: to challenge the prosecution's proof and to assure society that the trial result is accurate.<sup>157</sup>

Preparing a legal defense in many white-collar criminal cases requires significant resources, and defendants are entitled to any lawful resources available to them.<sup>158</sup> The *Stein* case is the largest criminal tax case in history, as the government produced at least 5 to 6 million pages of documents, transcripts of 335 depositions, and 195 income tax returns, in addition to more than 1,000 pages of pretrial motion briefs<sup>159</sup> and 150,000 pages of trial exhibits.<sup>160</sup> The government expected its case-in-chief alone to last three months, and the defendants expected their case to last long as well.<sup>161</sup> Defendants, and society at large, have an interest in avoiding sham representation that is nothing more than “formal compliance” with the Constitution.<sup>162</sup> Instead, every criminal investigation—be it simple or complex—warrants a “near match in skills,” lest the process “lose[] its character as a confrontation between adversaries.”<sup>163</sup>

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<sup>153</sup> See Brief of Amici Curiae, *supra* note 17, at 7 (“It is the very fact that individuals charged with serious and complicated offenses can retain skilled counsel to challenge the prosecution’s proof that protects the government’s interest in securing convictions that are both procedurally and substantively . . . the hallmark of a free society.”).

<sup>154</sup> Stein, *supra* note 15, at 3271.

<sup>155</sup> See Caplin & Drysdale, *Chartered v. United States*, 491 U.S. 617, 630 (1989) (holding that courts should not allow the economic power of organized crime and drug enterprises to be used to retain private counsel); see also Brickey, *supra* note 142, at 520–22 (analyzing whether a defendant’s inability to pay for a private lawyer is constitutionally relevant).

<sup>156</sup> Brickey, *supra* note 142, at 521.

<sup>157</sup> Brief of Amici Curiae, *supra* note 17, at 7.

<sup>158</sup> *United States v. Stein*, 435 F. Supp. 2d 330, 362 (S.D.N.Y. 2006).

<sup>159</sup> *Id.*

<sup>160</sup> Falvey & Taylor, *supra* note 81, at 15.

<sup>161</sup> *Stein*, 435 F. Supp. 2d at 362.

<sup>162</sup> *United States v. Cronin*, 466 U.S. 648, 654 (1984).

<sup>163</sup> *Id.* at 656–57.

In some complicated cases, appointed counsel may be sufficient.<sup>164</sup> However, appointed counsel are the backstop of the criminal justice system, and reliance upon them “is not the adversary system contemplated by the [S]ixth [A]mendment.”<sup>165</sup> When the government interferes with a defendant’s opportunity to choose his representation, appointed counsel will not cure the Sixth Amendment violation.<sup>166</sup> Additionally, reliance upon appointed counsel should not guide DOJ policy because DOJ has no authority to assure the appointment of counsel for anyone.<sup>167</sup> Wealthier defendants will be unlikely to qualify for appointed counsel even though they may still be without sufficient means to mount the necessary defense, which can easily run into the millions of dollars for white-collar criminal trials.<sup>168</sup>

Courts generally require a defendant to prove prejudice to his case arising from a due process violation<sup>169</sup> or an interference with effectiveness of counsel.<sup>170</sup> The right to choose counsel concerns the overall fairness of the trial less than the procedural steps leading to its outcome,<sup>171</sup> so proof of prejudice is not needed.<sup>172</sup> If a defendant’s right to counsel of choice has been wrongly denied, the violation is complete regardless of the outcome of the trial or the quality of representation he receives.<sup>173</sup> It is a “structural error”

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<sup>164</sup> See *id.* at 663–64 (finding that where complicated transactions and documents fit into a single mold, the case may not be as complicated to refute as the sheer number of documents the government has produced would indicate).

<sup>165</sup> Bruce J. Winick, *Forfeiture of Attorneys’ Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765, 800 (1989).

<sup>166</sup> *Id.* at 800–01.

<sup>167</sup> Cloud, *supra* note 148, at 39.

<sup>168</sup> *United States v. Stein*, 435 F. Supp. 2d 330, 362 n.163 (S.D.N.Y. 2006). In fact, by August 2004 Stein’s legal fees totaled over \$646,000 for the criminal investigation alone. *Id.* at 348 n.74. In the more than four years since that date it is reasonable to speculate that they have grown considerably larger, and the case has not even proceeded to trial yet. By one estimate, costs for individual defendants in *Stein* are expected to range between \$10 million and \$44 million. Falvey & Taylor, *supra* note 81, at 16. The Second Circuit acknowledged that, while the *Stein* defendants had significant assets, their resources were inadequate to fund their defenses the way they would have had the government not interfered in their fee arrangements. *United States v. Stein*, 541 F.3d 130, 151 n.10 (2d Cir. 2008).

<sup>169</sup> *United States v. Lovasco*, 431 U.S. 783, 790 (1977).

<sup>170</sup> See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006) (noting that representation cannot be deemed “ineffective” unless the defendant can show that the attorney’s “mistakes have harmed the defense”).

<sup>171</sup> See *id.* at 146 (arguing in dictum that the purpose of the Sixth Amendment is not a “particular guarantee of fairness” but rather “that the accused be defended by the counsel he believes to be best”).

<sup>172</sup> See *id.* at 146 n.2 (“[T]he Sixth Amendment is violated when the erroneous disqualification of counsel ‘impair[s] the assistance that a defendant receives at trial [from the counsel that he chose].’” (second and third alterations in original)).

<sup>173</sup> *Id.* at 148. After KPMG ceased advancement of legal fees, at least one of the *Stein* defendants, former KPMG partner Mark Watson, could no longer afford the attorney who had represented him for more than a

affecting defense strategies, jury selection, the terms on which a defendant pleads or cooperates with the government, and other key defense choices throughout the criminal proceedings.<sup>174</sup> By a 5–4 margin, the Supreme Court recently clarified in *United States v. Gonzalez-Lopez* that this structural error is so significant that it warrants automatic reversal of a defendant’s conviction.<sup>175</sup>

## 2. *The Stein Defendants Had a Valid Sixth Amendment Claim*

The government defended its policy on fee advancement by claiming that, because defendants had no constitutional claim to “other people’s money,” the Thompson Memorandum and prosecutorial behavior did not compromise the Counsel Clause.<sup>176</sup> While it is beyond the scope of this Comment to draw factual conclusions about whether the defendants in *Stein* had a legitimate property expectation that KPMG would pay for their defenses, some principles from that case bear on the analysis here. The DOJ relied on dictum from *Caplin & Drysdale v. United States*, an asset forfeiture case, to support its argument that the Counsel Clause does not entitle a defendant to use another person’s money to pay for his defense.<sup>177</sup>

However, the government stopped short of acknowledging the context for that case. According to the Court in *Caplin & Drysdale*, a robbery suspect has no right to expect to use unlawfully obtained funds to hire a lawyer.<sup>178</sup> However, an indicted employee who has a contract with his employer for fee advancement is different from the bank robber who hopes to rely on ill-gotten gains to pay his legal fees because the robber never had a legal property interest in the money in the first place.<sup>179</sup> In a post-*Stein* decision, the District Court for the Eastern District of Virginia interpreted *Caplin & Drysdale* to

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year during the government’s investigation. Beth Bar, *Government Adopts Aggressive Posture in Tax-Fraud Appeal*, N.Y. L.J., Jan. 24, 2008, at 5.

<sup>174</sup> *Gonzalez-Lopez*, 548 U.S. at 150; see also *Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991) (Rehnquist, J., concurring) (defining structural errors as those “affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself”). Other structural errors include violation of the right to a public trial, unlawful exclusion of a member of a defendant’s race from a grand jury, and trial before a judge who is not impartial. *Id.*

<sup>175</sup> *Gonzalez-Lopez*, 548 U.S. at 140.

<sup>176</sup> *United States v. Stein*, 435 F. Supp. 2d 330, 367 (S.D.N.Y. 2006); see also Brief for the United States of America, *supra* note 127, at 29 (“[D]efendants had no legal right to receive legal fees from KPMG . . .”).

<sup>177</sup> Brief for the United States of America, *supra* note 127, at 63. In *Caplin & Drysdale*, the Court stated that “[a] defendant has no Sixth Amendment right to spend another person’s money for services rendered by an attorney.” *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626 (1989).

<sup>178</sup> *Caplin & Drysdale*, 491 U.S. at 626.

<sup>179</sup> *Id.* at 626–27.

mean that defendants have a right to spend not only their own money on their defense but also funds to which they have a legal right.<sup>180</sup> The Second Circuit, in reviewing *Stein*, agreed that *Caplin & Drysdale* should be narrowly construed and that it did not apply because, but for the government's interference, KPMG would have paid the legal fees of the defendants.<sup>181</sup>

At least one of the *Stein* defendants had an explicit, bargained-for contract that stated KPMG would bear the expenses of "counsel reasonably acceptable to [him]" in any suit brought against him.<sup>182</sup> Several other defendants had "at least an expectation"<sup>183</sup> that their defense fees would be paid by KPMG because the company had a solid past practice of advancing fees when separate counsel was needed to represent the employees in matters arising from their official duties.<sup>184</sup> If a defendant can prove that a contractual arrangement does exist, there is "an unconditional mandatory right to advancement."<sup>185</sup> While a defendant may not have a constitutional interest in having money made available to hire an attorney,<sup>186</sup> where the defendant can prove a valid contractual expectation of legal fee advancement, it is a protected property interest, rather than "other people's money" to which the defendant is laying claim.<sup>187</sup> The Second Circuit, in affirming the dismissal of the indictment

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<sup>180</sup> United States v. Rosen, 487 F. Supp. 2d 721, 727 (E.D. Va. 2007).

<sup>181</sup> United States v. Stein, 541 F.3d 130, 155 (2d Cir. 2008). The court likened the situation to one in which a defendant's fees are paid by a friend or family member, as opposed to the facts underlying *Caplin & Drysdale*, because the Sixth Amendment "protects against unjustified governmental interference with the right to defend oneself using whatever assets one has or might reasonably and lawfully obtain." *Id.* at 156.

<sup>182</sup> United States v. Stein, 435 F. Supp. 2d 330, 339 (S.D.N.Y. 2006).

<sup>183</sup> *Id.* at 367.

<sup>184</sup> Brief of Amici Curiae, *supra* note 17, at 3. In fact, prior to this case "this practice [of corporations paying legal fees for employees] was unwavering and was followed without regard to economic costs or considerations with respect to the individual counsel or firm chosen for representation." *Id.* The decision to advance legal fees was long considered a private matter rather than a federal concern. Falvey & Taylor, *supra* note 81, at 14. Further, KPMG is incorporated in Delaware, which has a strong public policy favoring the advancement of legal fees. Memorandum of Law in Support of Certain Defendants' Motion to Remedy the Violation of Defendants' Constitutional Rights to Counsel and a Fair Trial Resulting From the Prosecutors' Wrongful Interference with Defendants' Ability to Obtain Advancement of Legal Fees from KPMG at 4–10, *Stein*, 435 F. Supp. 2d 330 (No. S1 05 Crim. 888 (LAK)) [hereinafter Memorandum of Law]. Some of the defendants, who were residents of California, were entitled to advancement of their defense costs under California law. *Stein*, 435 F. Supp. 2d at 356 n.119.

<sup>185</sup> *Homestore v. Tafeen*, 888 A.2d 204, 212 (Del. 2005). While *Homestore* addressed a provision in the corporation's bylaws guaranteeing fee advancement, the same principle should apply where a valid contract is recognized. *See id.* at 214 (noting "a consistent line of authority upholding the contractual and statutory advancement and indemnification rights of corporate officials charged with serious misconduct").

<sup>186</sup> Brickey, *supra* note 142, at 532.

<sup>187</sup> *See* E. ALLAN FARNSWORTH, CONTRACTS 679 (4th ed. 2004) (noting that contract rights are a type of property); *see also* United States v. Rosen, 487 F. Supp. 2d 721, 730 n.14 (E.D. Va. 2007) (noting that contractual rights to attorneys' fees are property rights for constitutional purposes).

against the *Stein* defendants, agreed, stating that because the defendants reasonably expected to have their legal fees paid by KPMG, such fees “were, in every material sense, their property.”<sup>188</sup>

### 3. *The Stein Defendants’ Sixth Amendment Rights Were Invoked Before They Were Criminally Indicted*

Although interference with fee-advancement arrangements implicates the Counsel Clause long before indictment,<sup>189</sup> the right to counsel generally does not attach until the moment of criminal indictment.<sup>190</sup> In *Stein*, KPMG technically terminated payment of defense fees before the defendants were indicted.<sup>191</sup> Thus, the government maintains that because the defendants’ constitutional rights had not yet attached, no harm was done.<sup>192</sup>

This does not end the analysis, however. In some circumstances the right to counsel can be invoked prior to indictment.<sup>193</sup> Some courts, including the Seventh Circuit, have found that there is merely a rebuttable presumption rather than a *per se* rule that the right to counsel attaches only upon indictment.<sup>194</sup> If there is a close nexus between the government’s investigation leading up to indictment and the charges ultimately brought against the defendant, an ongoing attorney–client relationship that is known (or should have been known to the government) arguably invokes the defendant’s right to choose counsel long before indictment.<sup>195</sup> The government may not, for example, intentionally delay bringing an indictment against an individual in order to prejudice him<sup>196</sup> or to gain a tactical advantage.<sup>197</sup> If an individual is the target of a government investigation and is spending his own money (or money to which he is lawfully entitled) on his defense, the constitutional right

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<sup>188</sup> *United States v. Stein*, 541 F.3d 130, 151 (2d Cir. 2008) (citing *United States v. Stein*, 435 F. Supp. 2d 330, 367 (S.D.N.Y. 2006)).

<sup>189</sup> *See* *Cloud*, *supra* note 148, at 37 (describing how private sector defense attorneys may be unwilling to represent a defendant whose ability to pay fees is at risk).

<sup>190</sup> *Kirby v. Illinois*, 406 U.S. 682, 688 (1972).

<sup>191</sup> *Stein*, 435 F. Supp. 2d at 348.

<sup>192</sup> Brief for the United States of America, *supra* note 127, at 40.

<sup>193</sup> *See, e.g., United States v. Harrison*, 213 F.3d 1206, 1210 (9th Cir. 2000) (“[G]overnment interference with a defendant’s relationship with his attorney [before indictment] may render counsel’s assistance so ineffective as to violate his Sixth Amendment right to counsel.” (quoting *United States v. Irwin*, 612 F.2d 1182, 1185 (9th Cir. 1980))).

<sup>194</sup> *United States v. Rosen*, 487 F. Supp. 2d 721, 732 (E.D. Va. 2007) (citing *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992)).

<sup>195</sup> *Harrison*, 213 F.3d at 1213.

<sup>196</sup> *United States v. Lovasco*, 431 U.S. 783, 796 n.17 (1977); *Rosen*, 487 F. Supp. 2d at 733.

<sup>197</sup> *United States v. Marion*, 404 U.S. 307, 324 (1971).

to spend that money on defense counsel has already attached.<sup>198</sup> The government's motive is key to determining whether the right has attached. When the government acts "with the purpose of minimizing . . . defendants' access to resources," or when the government at least acts in "reckless disregard" that defendants' resources would be cut off, the Sixth Amendment is invoked prior to indictment.<sup>199</sup> In other words, the right attaches as soon as "the government commit[s] itself to prosecute."<sup>200</sup> The *Stein* court found that the government acted intentionally and methodically "to limit defendants' access to funds for their defense,"<sup>201</sup> evidencing the government's "desire to minimize the involvement of defense attorneys."<sup>202</sup> The Second Circuit, on review, agreed with this analysis because the government's pre-indictment conduct "impair[ed] the suspect's relationship with counsel post-indictment," thereby amounting to a complete Sixth Amendment violation.<sup>203</sup>

*B. The Government's Policy and Practice May Compromise the Sixth Amendment's Counsel Clause*

Having established that choice of counsel is a fundamental protection afforded by the Counsel Clause, this section questions whether prosecutorial action in accordance with the Thompson Memorandum constitutes "state action" that unlawfully interferes with the exercise of that constitutional right.<sup>204</sup> The Thompson Memorandum, like other weapons prosecutors have in their arsenal, has arguably led to the "emasculat[i]on of the defense bar."<sup>205</sup> Several organizations submitted briefs supporting the *Stein* defendants, including the Securities Industry Association, the Association of Corporate Counsel, the Chamber of Commerce, and the National Association of Criminal

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<sup>198</sup> *Rosen*, 487 F. Supp. 2d at 733.

<sup>199</sup> *United States v. Stein*, 435 F. Supp. 2d 330, 366 (S.D.N.Y. 2006); see also Brief of Amici Curiae, *supra* note 17, at 9 ("In determining when the Sixth Amendment right to counsel attaches, the focus should not be on the filing of a particular paper, but on the character of the prosecution's relationship to the individual at the specific time in question.").

<sup>200</sup> *Moran v. Burbine*, 475 U.S. 412, 432 (1986).

<sup>201</sup> *Stein*, 435 F. Supp. 2d at 366.

<sup>202</sup> *Id.* at 353.

<sup>203</sup> *United States v. Stein*, 541 F.3d 130, 153 (2d Cir. 2008). The court went on to stress that "the right to counsel in an adversarial legal system would mean little if defense counsel could be controlled by the government or vetoed without good reason." *Id.* at 154.

<sup>204</sup> Courts usually find "state action" on one of four grounds: (1) the actor is more an arm of the state than a private actor; (2) the actor is performing either a public or an inherently governmental function; (3) the government is so entangled with the action that the private conduct should be attributed to the government; or (4) the government has encouraged or facilitated the private activity. Duggin, *supra* note 13, at 383.

<sup>205</sup> Wray & Hur, *supra* note 2, at 1095.

Defense Lawyers. It may seem at first blush that the defense bar's unwillingness to represent clients whose fee arrangements are unknown is not constitutionally relevant.<sup>206</sup> However, by weakening the "collective strength of the defense bar," efforts to construct a wall between private defense attorneys and potential clients upset the adversary system "by skewing the balance of power in favor of the government."<sup>207</sup>

In the midst of the KPMG/Stein investigations in 2004, Deputy Attorney General Thompson defended DOJ policy of pressuring corporations to terminate payment of defense fees for its employees, saying that employees "don't need fancy legal representation" if they are not criminally culpable.<sup>208</sup> The DOJ denies that this "pressure" constitutes state action, arguing that even if defendants have a legitimate claim to the resources of the corporation in funding their defense, the decision to terminate legal fee advancement falls squarely with the corporation and cannot be attributed to any policy or action by DOJ.<sup>209</sup> Even if defendants have a legitimate claim to fee advancement, the government argues that it is not responsible for corporate "freedom of choice"—a company may do what it wishes in regard to attorneys' fees.<sup>210</sup> According to the government, there is no constitutional violation when DOJ "strongly encourages" a defendant or potential defendant (here, KPMG) to take an action, even when indictment can result from failure to do what the government is asking, so long as "the ultimate decision is left to the individual."<sup>211</sup>

However, this is something of a Hobson's choice because for corporations facing indictment there really is no alternative except to cooperate.<sup>212</sup> Because indictment alone means a corporation can be extirpated before it has an

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<sup>206</sup> See, e.g., Brickey, *supra* note 142, at 533 ("An attorney's decision not to represent a defendant whose assets are threatened with forfeiture seems constitutionally indistinguishable from his decision not to represent a defendant whose assets have been seized as contraband or subjected to an IRS levy, or a defendant who has no assets at all.").

<sup>207</sup> Cloud, *supra* note 148, at 35.

<sup>208</sup> Laurie P. Cohen, *In the Crossfire: Prosecutors' Tough New Tactics Turn Firms Against Employees*, WALL ST. J., June 4, 2004, at A1.

<sup>209</sup> Brief for the United States of America, *supra* note 127, at 31–34.

<sup>210</sup> *United States v. Stein*, 435 F. Supp. 2d 330, 350 (S.D.N.Y. 2006); Brief for the United States of America, *supra* note 127, at 35.

<sup>211</sup> Brief for the United States of America, *supra* note 127, at 49.

<sup>212</sup> Wray & Hur, *supra* note 2, at 1172. A Hobson's choice is one in which a person has "the option of taking the one thing offered or nothing." 3 OXFORD ENGLISH DICTIONARY 151 (2d ed. 1989); see also Dexter, *supra* note 42, at 515 (noting that "voluntary" means facing the choice of either abiding by DOJ guidelines or receiving an effective corporate death sentence via indictment).

opportunity to defend itself at trial, obedience to DOJ commands is anything but voluntary.<sup>213</sup> The Thompson Memorandum all but instructs prosecutors to exploit a company's fear of indictment, hinging the decision of whether to press criminal charges on the degree of corporate cooperation.<sup>214</sup> Former U.S. District Judge Sven Erik Holmes, who subsequently became KPMG's chief legal officer, testified in *Stein* that "[f]ew if any competent defense lawyers would advise a corporate client at risk of indictment that it should feel free to advance legal fees to individuals."<sup>215</sup>

KPMG viewed the fee-advancement contracts as "a ticking bomb" that would increase the likelihood that it would be indicted,<sup>216</sup> so it terminated the agreements "because [KPMG] thought it would help [the firm] with the government."<sup>217</sup> The *Stein* court found that, under these facts, there was a significant nexus between the government's actions and the decision to terminate payment of legal fees,<sup>218</sup> and in doing so "breathed new life into the state action doctrine in the context of corporate cooperation."<sup>219</sup> The government was unquestionably the "but for" cause of KPMG's decision to terminate the fee arrangement it had with its former employees.<sup>220</sup> The government's actions affected attorney selection and limited what defendants could afford to pay their attorneys.<sup>221</sup> Such government interference "fundamentally alters the structure of the adversary process."<sup>222</sup> The Second Circuit agreed, finding that KPMG's decision to cease advancing legal fees "followed as a direct consequence of the government's overwhelming influence," and thus "amounted to state action."<sup>223</sup>

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<sup>213</sup> See *Hearing*, *supra* note 17, at 72 (statement of Donohue); see also Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. TEX. L. REV. 111, 117 (2003) (arguing that the Thompson Memorandum creates an "uncomfortable choice" for corporations because the "four corners of the policy leave little room for compromise between . . . bipolar extremes").

<sup>214</sup> Taigue, *supra* note 37, at 393.

<sup>215</sup> *United States v. Stein*, 435 F. Supp. 2d 330, 364 (S.D.N.Y. 2006).

<sup>216</sup> *Id.* at 347–48.

<sup>217</sup> *Id.* at 348 (quoting the testimony of a KPMG official).

<sup>218</sup> See *id.* at 336 (finding that "the government held the proverbial gun to [KPMG's] head").

<sup>219</sup> Duggin, *supra* note 13, at 381.

<sup>220</sup> *Stein*, 435 F. Supp. 2d at 352; see also *id.* at 348 (noting how, after months of negotiation with prosecutors, KPMG terminated its contract to provide legal services for Stein only eight days before a scheduled meeting with DOJ officials, at which DOJ was expected to issue indictments).

<sup>221</sup> *Id.* at 371 (noting that most of the defendants will not be able to pay their attorneys even to review all of the documents the government has produced or interview the witnesses that the government has interviewed).

<sup>222</sup> *Id.* at 372.

<sup>223</sup> *United States v. Stein*, 541 F.3d 130, 136 (2d Cir. 2008). Prosecutors "forced KPMG to adopt its constricted Fees Policy," and are thus legally responsible for the Sixth Amendment violation. *Id.* at 148.

In addition to criticizing prosecutorial behavior in this case, the court found that the Thompson Memorandum itself “prevents companies from providing employees and former employees with the financial means to exercise their constitutional rights to defend themselves.”<sup>224</sup> In this way, prosecutors have used the Thompson Memorandum effectively to “deputize” corporations into doing their jobs for them,<sup>225</sup> forcing corporations to take certain actions and produce certain documents that would otherwise be beyond the government’s lawful reach.<sup>226</sup> Companies that otherwise would advance attorneys’ fees will hesitate to do so out of fear that they may appear to be protecting their employees.<sup>227</sup> Because a company will view its own interests as being at odds with the interests of its employees, it may choose to sacrifice the employees to save the company.<sup>228</sup>

Prosecutorial behavior in *Stein* “evidenced a desire to minimize the involvement of defense attorneys,”<sup>229</sup> thereby “tilt[ing] the playing field against [the] criminal defendant.”<sup>230</sup> It has long been clear that when government officials, acting under color of law, interfere with an individual’s access to representation, and especially when interference is wrongfully motivated or lacking justification, the government has infringed on his constitutional right to counsel.<sup>231</sup> When the government interferes with a defendant’s right to counsel, prejudice is presumed.<sup>232</sup> The *Stein* court felt that the government’s conduct was so offensive to the adversarial nature of the criminal justice system that immediate redress was warranted, without requiring any further proof of prejudice to the defendants.<sup>233</sup> The government’s action affected whom the defendants could hire as attorneys and

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<sup>224</sup> *Stein*, 435 F. Supp. 2d at 368.

<sup>225</sup> See generally N. RICHARD JANIS, DEPUTIZING COMPANY COUNSEL AS AGENTS OF THE FEDERAL GOVERNMENT (2008) (arguing that draconian sentences and heavy burdens on company counsel place our adversary system of justice at risk).

<sup>226</sup> Taigue, *supra* note 37, at 393.

<sup>227</sup> Wray & Hur, *supra* note 2, at 1181.

<sup>228</sup> *Id.* at 1182.

<sup>229</sup> *Stein*, 435 F. Supp. 2d at 353. As evidence to this effect, the court considered that the USAO accepted KPMG’s word that it had no obligation to pay legal fees despite the knowledge that such payments had been KPMG’s past practice, KPMG was trying to “curry favor” with prosecutors, and KPMG had a conflict of interest with the former employees regarding whether it had to pay legal fees. *Id.* The government should have been “less concerned with punishing those it deemed culpable right from the outset.” *Id.*

<sup>230</sup> *Id.* at 362 n.159.

<sup>231</sup> Memorandum of Law, *supra* note 184, at 19.

<sup>232</sup> Cloud, *supra* note 148, at 42.

<sup>233</sup> CHARLES DOYLE, CONG. RESEARCH SERV., THE THOMPSON MEMORANDUM: ATTORNEYS’ FEES AND WAIVER OF CORPORATE ATTORNEY-CLIENT AND WORK PRODUCT PROTECTION 21 (2007).

what they could pay their attorneys to do in their defense.<sup>234</sup> This obstruction “created a very high risk of contaminating the entire proceeding” such that “it would be impossible to know whether the defendants could have altered the outcome absent the limitations imposed by the government.”<sup>235</sup>

Despite the holding in *Gonzalez v. Lopez* that violation of the Counsel Clause is structural error,<sup>236</sup> some circuits persist in requiring a showing of prejudice.<sup>237</sup> In a post-*Stein* case, one district court developed a four-part test for a Sixth Amendment challenge, requiring the defendant to prove: (1) he hired counsel to represent him with funds to which he was legally entitled; (2) the government wrongfully interfered with his right to be represented by that counsel; (3) the right to counsel had attached at the time of the government interference; and (4) the interference prejudiced him.<sup>238</sup> Should a court find that the government violated a defendant’s Sixth Amendment right (regardless of whether the court requires a showing of prejudice), it will have to decide if, and under what circumstances, such state action can ever be justified.

#### IV. STANDARD OF REVIEW FOR GOVERNMENT INTERFERENCE WITH THE SIXTH AMENDMENT RIGHT TO CHOOSE COUNSEL

There are two parts to DOJ’s state action involving white-collar investigations: DOJ policy itself and the implementation of the policy. Since the Thompson Memorandum was issued, DOJ has taken a decidedly more aggressive approach to the pursuit of corporate obstruction,<sup>239</sup> though there is significant variation among federal prosecutors in terms of how corporations are pursued.<sup>240</sup> For this reason, it is important for DOJ to set out clear, constitutionally appropriate guidelines for prosecutors to follow, whether in the form of an official memorandum or not. It is also critical for courts to analyze

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<sup>234</sup> *United States v. Rosen*, 487 F. Supp. 2d 721, 730 (E.D. Va. 2007) (observing that some defense attorneys were not able to continue representation throughout trial without advancement of fees).

<sup>235</sup> Jonathan Bashi, *Other People’s Money: Drawing the Constitutional Line Between the Right to Counsel and Constraints on Obstructive Fee Advancement in the Wake of United States v. Stein*, 73 BROOK. L. REV. 1115, 1139 (2008).

<sup>236</sup> *See supra* note 174.

<sup>237</sup> *See Rosen*, 487 F. Supp. 2d at 734 (holding that, although the defendant proved all other elements necessary to prevail in his Sixth Amendment claim against the government, he could not demonstrate that the breach prejudiced his case).

<sup>238</sup> *Id.* at 727.

<sup>239</sup> Wray & Hur, *supra* note 2, at 1146.

<sup>240</sup> *Id.* at 1102. These differences are of concern because “a company’s fate should not depend on which of ninety-three judicial districts happens to be investigating.” *Id.* at 1187.

the government's behavior using a consistent standard of review when defendants bring a constitutional challenge. This Part argues that the district court in *Stein* court reached the correct conclusion—that a constitutional violation had occurred—but it did so by applying the wrong constitutional framework and using the wrong standard of scrutiny.

If a defendant has a lawful expectation that he will have access to resources that would allow him to exercise a constitutional right, any government interference must be justified.<sup>241</sup> The level of justification the government must demonstrate is dependent on the appropriate standard of review.<sup>242</sup> Section A proposes using the balancing test outlined in *Wheat v. United States*<sup>243</sup> as the new standard for reviewing government interference in the context of corporate criminal prosecutions. Section B analyzes DOJ policy and prosecutorial action under that test in an effort to guide the discussion of when, if ever, the government is justified in pressuring a corporation to terminate the advancement of legal fees to former employees.

#### A. Finding a Constitutionally Appropriate Standard of Review

When state action potentially restricts the exercise of those constitutional rights that are “fundamental,” courts will often apply strict scrutiny under the substantive due process clause.<sup>244</sup> Under this standard, government action must be narrowly tailored to serve a compelling government interest.<sup>245</sup> To evaluate government conduct, courts often invoke the *Rochin* standard,<sup>246</sup> which states that government action must not be so egregious that it “shocks the conscience” of the court.<sup>247</sup> The *Stein* court found that the prosecutors' behavior did “shock the conscience” of the court<sup>248</sup> and thus applied strict scrutiny.<sup>249</sup>

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<sup>241</sup> Winick, *supra* note 165, at 807–08.

<sup>242</sup> *Id.* at 808.

<sup>243</sup> 486 U.S. 153 (1988).

<sup>244</sup> ROTUNDA & NOWAK, *supra* note 122, at 427.

<sup>245</sup> *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Reno v. Flores*, 507 U.S. 292, 302 (1993).

<sup>246</sup> *Rochin v. California*, 342 U.S. 165, 172 (1952).

<sup>247</sup> *Id.*; *see also Chavez v. Martinez*, 538 U.S. 760, 774 (2003) (“Convictions based on evidence obtained by methods that are ‘so brutal and so offensive to human dignity’ that they ‘shoc[k]’ the conscience violate the Due Process Clause.” (alteration in original) (citing *Rochin*, 342 U.S. at 172, 174)); *Breithaupt v. Abram*, 352 U.S. 432, 437 (1957) (applying the *Rochin* rule to blood evidence taken while petitioner was unconscious).

<sup>248</sup> *United States v. Stein (Stein III)*, 495 F. Supp. 2d 390, 409, 414–15 (S.D.N.Y. 2007). Note that this is one of the later decisions by the trial court.

<sup>249</sup> *United States v. Stein*, 435 F. Supp. 2d 330, 360, 362–64 (S.D.N.Y. 2006).

Under traditional strict scrutiny analysis, the government rarely wins; at the opposite end of the continuum under rational basis review, the government rarely loses.<sup>250</sup> The Counsel Clause does not fit well in either camp because it is a qualified right, rather than a fundamental right.<sup>251</sup> The *Stein* court failed to set a constitutional standard of review for a Counsel Clause violation, relying instead on the law of tortious interference with contract.<sup>252</sup> According to this analysis, courts consider the nature of the actor's conduct, the actor's motive, the interests interfered with, society's interest in protecting the respective needs of the two parties, the proximity of the interferer's conduct to the interference, and the relations between the parties.<sup>253</sup> While this is a useful construct for courts when analyzing government behavior, it does not replace the need for a constitutional standard of review.

In reviewing violations of the Counsel Clause, the Supreme Court has required a lesser showing by the government than is required under substantive due process.<sup>254</sup> For Sixth Amendment purposes, courts need not determine whether the behavior of prosecutors "shocks the conscience,"<sup>255</sup> and defendants need not demonstrate prejudice by a lack of fairness in proceedings because fairness is not the aim of the Counsel Clause.<sup>256</sup> The right to counsel of choice can be limited when there is "an overriding interest of the judicial

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<sup>250</sup> Rational basis review requires only that there be a rational legislative purpose in the contested state action. Mary Helen Wimberly, *Rethinking the Substantive Due Process Right to Privacy: Grounding Privacy in the Fourth Amendment*, 60 VAND. L. REV. 283, 296 (2007); Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 29, 36 (John Charles Boger & Gary Orfield eds., 2005).

<sup>251</sup> Brickey, *supra* note 142, at 507.

<sup>252</sup> *Stein*, 435 F. Supp. 2d at 367 n.180; *see also* United States v. Rosen, 487 F. Supp. 2d 721, 731 (E.D. Va. 2007).

<sup>253</sup> *Rosen*, 487 F. Supp. 2d at 731; RESTATEMENT (SECOND) OF TORTS § 767 (1979).

<sup>254</sup> *See* Eugene L. Shapiro, *The Sixth Amendment Right to Counsel of Choice: An Exercise in the Weighing of Unarticulated Values*, 43 S.C. L. REV. 345, 347 (1992) (noting that the Court "squarely rejected" the opportunity to use substantive due process as the constitutional framework for evaluating the denial of a defendant's right to choose counsel).

<sup>255</sup> United States v. Stein (*Stein III*), 495 F. Supp. 2d 390, 409 & n.83 (S.D.N.Y. 2007). Judge Kaplan argued, somewhat hyperbolically, that prosecutor misconduct rose to conscience-shocking levels. *Id.* at 414–15. The *Rochin* standard was intended to apply to physical or psychological torture or other egregious techniques, including using a defendant's lawyer against him. Brief for the United States of America, *supra* note 127, at 31. While ethically questionable, it stretches the boundaries of the *Rochin* standard to include the government's pressure on KPMG as conscience-shocking behavior. *See id.* ("In advising KPMG that . . . its cooperation would be evaluated pursuant to the Thompson Memorandum . . . the Government did not, by any reasonable definition, 'shock the conscience.'").

<sup>256</sup> *See supra* notes 169–75 (discussing *Gonzalez-Lopez* and the Supreme Court's distinction between the prejudice requirement for due process violations and structural errors inherent in Sixth Amendment violations).

system,”<sup>257</sup> though there is a presumption in favor of honoring the defendant’s choice of counsel.<sup>258</sup> On reviewing the trial court’s decision in *Stein*, the Second Circuit agrees that, “absent justification,” the government cannot interfere with the defendant’s right to access fees for counsel.<sup>259</sup> This implies that there are some situations where such interference may be appropriate. This suggests that judges must make both a factual and legal determination regarding the government’s interference and its impact on the defendant’s ability to retain counsel of his choosing.

In *Wheat v. United States*, Chief Justice Rehnquist outlined a better test for evaluating whether government action impedes a defendant’s choice of counsel.<sup>260</sup> This approach uses a balancing test to weigh the types of interferences that will pass constitutional muster.<sup>261</sup> Under the *Wheat* approach, courts start with a rebuttable presumption in favor of upholding the right to counsel of choice,<sup>262</sup> which may be overcome by sufficient government interests.<sup>263</sup> This is in stark contrast to the nearly impossible requirement under strict scrutiny that the government objective be narrowly tailored and serve a compelling government interest.<sup>264</sup> Oddly, it is Justice Marshall’s dissent that clarifies the details of the majority’s test.<sup>265</sup> A trial court may not tip the balance in favor of the government when the government’s argument is merely speculative.<sup>266</sup> Rather, the government must demonstrate “particular facts and circumstances” that make its concerns likely to be actualized in order to overcome the presumption in favor of the defendant’s right to choose

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<sup>257</sup> WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 591 (4th ed. 2004). Examples of when the right to counsel of choice may be overridden include when a defendant chooses to be represented by a person who is not a member of the bar, by an attorney not licensed to practice in the state (and not appearing *pro hac vice*), or by a former prosecutor who was involved in the criminal matter at hand while still a prosecutor. *Id.*

<sup>258</sup> *Wheat v. United States*, 486 U.S. 153, 164 (1988).

<sup>259</sup> *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008).

<sup>260</sup> 486 U.S. 153 (1988).

<sup>261</sup> Shapiro, *supra* note 254, at 348.

<sup>262</sup> *Wheat*, 486 U.S. at 160 (showing that a significant attorney conflict of interest may be enough for the government’s interest to outweigh the defendant’s claim).

<sup>263</sup> *Id.* at 164.

<sup>264</sup> See Chemerinsky, *supra* note 250, at 36 (noting how the strict scrutiny test is so high that government rarely succeeds).

<sup>265</sup> *Wheat*, 486 U.S. at 165–72 (Marshall, J., dissenting). Justice Marshall did not object to the balancing approach outlined by Chief Justice Rehnquist. *Id.* at 166. Rather, he objected to the degree of deference the majority opinion affords a trial court’s decision on the facts and law of the inquiry. *Id.* Justice Marshall also objected to the application of the principles outlined in the majority opinion to the facts before the Court. Shapiro, *supra* note 254, at 355.

<sup>266</sup> *Wheat*, 486 U.S. at 166 (Marshall, J., dissenting).

counsel.<sup>267</sup> This fact-specific inquiry forces the court to weigh carefully the facts and interests in each case.<sup>268</sup> But it is also an inquiry of law, “requir[ing] and result[ing] from the application of a legal standard to the established facts of a case.”<sup>269</sup> Unfortunately, the *Wheat* majority opinion provides very little explanation to help courts assess government interests and weigh how those interests should be viewed in light of a defendant’s rights.<sup>270</sup>

Some argue that there may be circumstances where the government burdens the right to counsel to such a degree that strict scrutiny is appropriate.<sup>271</sup> For example, if the government seizes all of a defendant’s assets, thereby making it impossible for him to hire counsel of his choosing, an “important” or “significant” government interest is insufficient.<sup>272</sup> Under this argument, the *Wheat* balancing test is appropriate where the government has sought to limit a defendant’s access to counsel of choice or to resources that would help the defendant hire the counsel of his choice. Strict scrutiny is more appropriate, however, when the government prevents a defendant from hiring any lawyer at all.<sup>273</sup>

However, even under the *Wheat* test, egregious restrictions of the right to counsel will likely result in finding for the defendant because there is a presumption in favor of upholding the Sixth Amendment, and only the most compelling of government interests will overcome that presumption.<sup>274</sup> Seen in this light, when the balance weighs heavily in favor of the defendant, courts should reach the same outcome as they would under strict scrutiny review; but when the harm to the defendant is not as great and the government interest is significant, courts would have the flexibility to approve the government’s action. The *Wheat* test thus gives courts substantially more latitude to conduct the factual and legal inquiries necessary to settle Sixth Amendment claims.

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<sup>267</sup> *Id.* at 168.

<sup>268</sup> Shapiro, *supra* note 254, at 348.

<sup>269</sup> *Wheat*, 486 U.S. at 167 (Marshall, J., dissenting).

<sup>270</sup> Shapiro, *supra* note 254, at 350.

<sup>271</sup> *See, e.g.*, Winick, *supra* note 165, at 806–17 (describing the difference between reasonable regulations that limit a defendant’s ability to choose a particular counsel and total abridgement of the right to choose any counsel).

<sup>272</sup> *Id.* at 809.

<sup>273</sup> *Id.* at 811.

<sup>274</sup> *Wheat*, 486 U.S. at 160.

*B. Analyzing DOJ Policy and Practice Under the Wheat Balancing Test*

The *Stein* court implied that no government interest, regardless of the standard of scrutiny, is compelling enough to justify interfering with the right of a defendant to access resources available to him.<sup>275</sup> Such a rigid and inflexible test is inappropriate because it fails to recognize the value of DOJ's aggressive policy toward corporate crime and the substantial good that has resulted from that policy. The DOJ's emphasis on corporate cooperation has been particularly efficient at "leveraging" finite government resources in the ongoing effort to hold powerful corporations accountable.<sup>276</sup> The government's primary objective in issuing the Thompson Memorandum was to end corporate fraud by encouraging corporations to cooperate with the government.<sup>277</sup> Through the use of Deferred Prosecution Agreements, like the one entered into with KPMG, and other alternative resolutions to corporate malfeasance, the government furthers its goals of ensuring greater corporate compliance and purging bad actors, while sparing shareholders the collateral consequences were the corporation criminally indicted.<sup>278</sup> The Thompson Memorandum's suggestion to use alternative resolutions has dramatically increased the level of genuine cooperation and self-reporting from corporations.<sup>279</sup>

While the government wants to ensure corporate compliance, it also must be assured that cooperation is authentic.<sup>280</sup> Obstruction of justice is more commonly associated with drug rings and organized criminal syndicates, though corporations have also at times impeded investigations by "stonewalling."<sup>281</sup> Obstruction can occur in a variety of ways, including a corporation purposefully selecting particular attorneys to represent its indicted employees in order to further a criminal conspiracy,<sup>282</sup> or because it knows such attorneys will discourage the employees from cooperating with the government.<sup>283</sup> Both prosecutors and the public have a strong interest in

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<sup>275</sup> United States v. Stein, 435 F. Supp. 2d 330, 369 (S.D.N.Y. 2006).

<sup>276</sup> Duggin, *supra* note 13, at 345.

<sup>277</sup> Wray & Hur, *supra* note 2, at 1146.

<sup>278</sup> *Id.* at 1105. This is a particularly important public policy goal because more than half of all Americans own corporate securities in some form. Duggin, *supra* note 13, at 392. As such, "the economic well being of hundreds of millions of people depends on major corporations." *Id.* at 408.

<sup>279</sup> Wray & Hur, *supra* note 2, at 1138.

<sup>280</sup> Thompson Memorandum, *supra* note 9, at 1.

<sup>281</sup> Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 122-23 (1995).

<sup>282</sup> Stein, *supra* note 15, at 3284.

<sup>283</sup> Richman, *supra* note 281, at 122-23. McNulty described such behavior as "circling the wagons," where a corporation "us[es] or condition[s] the payment of attorneys' fees as a tool to limit or prevent the

ferreting out stonewalling because it interferes with their mutual interest in making sure criminals are brought to justice and corporate fraud is stopped.<sup>284</sup> Corporate fraud has a particularly harsh impact on the average unsophisticated investor.<sup>285</sup> Former Deputy Attorney General McNulty has argued that as a result of corporate prosecutions and prosecutorial powers, financial markets became more stable and investor confidence increased.<sup>286</sup>

Balanced against these strong public and prosecutorial interests in ending corporate corruption are the constitutional rights of individual defendants. Even former Deputy Attorney General Thompson has since acknowledged the need for “appropriate” revisions to the document.<sup>287</sup> The DOJ does not change its policy lightly,<sup>288</sup> though it has taken steps to soften the constitutional implications of its policy. The first attempt resulted in McNulty’s December 2006 revisions to the Thompson Memorandum.<sup>289</sup> The *Stein* decision appears to have been part of the impetus for the policy change,<sup>290</sup> along with opposition to the policy by Congress<sup>291</sup> and the legal, business, and media communities.<sup>292</sup> McNulty’s revisions maintained many of the same principles and much of the same language as the Thompson Memorandum.<sup>293</sup> However, under the new guidance, prosecutors were advised that they “generally should not take into account whether a corporation is advancing attorneys’ fees” to employees,

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communication of truthful information from current and former employees to the government in order to protect either the employees or the corporation itself.” Duggin, *supra* note 13, at 362.

<sup>284</sup> See Stein, *supra* note 15, at 3284 (observing that “stonewalling” keeps prosecutors from fulfilling their duty to seek justice, and that “the public expects its government to prosecute corporate crime”).

<sup>285</sup> Taigue, *supra* note 37, at 395.

<sup>286</sup> Moise Cassetta, *supra* note 14, at 800. Of course, this confidence was short lived. Following the Bernie Madoff scandal, the failure of the Securities and Exchange Commission to detect such a significant fraud, and the collapse of several investment banks and other private institutions in late 2008, investor confidence has once again been shaken. *SEC Top Cop Defends Agency in Madoff Hearing*, USA TODAY (online edition), Jan. 27, 2009, [http://www.usatoday.com/money/companies/regulation/2009-01-27-madoff-sec-hearings\\_N.htm](http://www.usatoday.com/money/companies/regulation/2009-01-27-madoff-sec-hearings_N.htm).

<sup>287</sup> Jessica Guynn, *Federal Tactics Under Assault: Prosecutors’ Tool to Investigate Fraud Draws Corporate Fire*, S.F. CHRON., Dec. 9, 2006, at C1.

<sup>288</sup> Katherine R. Brody & Chris Tatarowicz, *A Change of Heart for the DOJ: Policy Run Amok or Greater Respect for Ethical Norms?*, 20 GEO. J. LEGAL ETHICS 427, 436–37 (2007).

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 436.

<sup>291</sup> See Duggin, *supra* note 13, at 371 (“The threat of legislative action to constrain federal corporate cooperation strategies was undoubtedly a factor in persuading DOJ to modify the Thompson Memorandum.”).

<sup>292</sup> Brody & Tatarowicz, *supra* note 288, at 439.

<sup>293</sup> In particular, the revisions did not suggest departing from DOJ’s commitment to “protecting the integrity of the marketplace”; it states outright that “the fundamental principles that have guided our enforcement practices are sound.” McNulty Memorandum, *supra* note 46. Additionally, the tenets of the memorandum remained binding on federal prosecutors. Duggin, *supra* note 13, at 357.

except in “extremely rare cases . . . when the totality of circumstances show that it was intended to impede a criminal investigation.”<sup>294</sup>

The McNulty revisions did not appease critics, who argued that the new guidance retained the Thompson Memorandum’s rhetoric that DOJ will not tolerate corporations that “appear[] to be protecting . . . culpable employees and agents.”<sup>295</sup> It also puts the corporation in a precarious position, undercutting customs of corporate governance, by forcing companies to disregard the well-established practice of indemnification of legal fees for employees and agents until the government has proven their guilt.<sup>296</sup> This may compromise a company’s ability to attract top-tier employees who want assurance that they will not be financially responsible should they incur employment-related liability.<sup>297</sup> Some states go so far as to even require indemnification and advancement.<sup>298</sup>

The primary criticism of McNulty’s revisions to the Thompson Memorandum is that the changes seem disingenuous.<sup>299</sup> McNulty vigorously defended DOJ policy and the behavior of the USAO in *Stein*, immediately following the trial court’s decision in that case,<sup>300</sup> but changed his mind soon after Senator Arlen Specter, then-chair of the Senate Judiciary Committee, introduced legislation that would have undone some of the more controversial provisions of the Thompson Memorandum, including DOJ’s policy to consider legal fee advancement when choosing whether to indict a corporation.<sup>301</sup> Similar legislation passed under a suspension of the rules in the House, with no member rising to speak against it.<sup>302</sup>

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<sup>294</sup> McNulty Memorandum, *supra* note 46. The McNulty memorandum also requires prosecutors to seek approval from the Deputy Attorney General before considering a corporation’s decision to advance attorneys’ fees, which may deter overzealous prosecutors from taking anything but the strongest cases of stonewalling up to the second-highest authority in the Justice Department. Wray & Hur, *supra* note 2, at 1184.

<sup>295</sup> McNulty Memorandum, *supra* note 46. The memorandum discusses employees and agents as “culpable,” though these individuals most often will not yet have stood trial. This statement is fundamentally at odds with the foundational principle of the American legal system: all persons are presumed innocent until proven guilty beyond a reasonable doubt. *See Hearing, supra* note 17, at 93 (statement of Mathis).

<sup>296</sup> *Id.*

<sup>297</sup> Stein, *supra* note 15, at 3249.

<sup>298</sup> *Id.* at 3248.

<sup>299</sup> *See Brody & Tatarowicz, supra* note 288, at 442.

<sup>300</sup> *See Taigue, supra* note 37, at 404–05 (referencing a DOJ press release immediately following the *Stein* decision in which the Department defended its policy).

<sup>301</sup> Brody & Tatarowicz, *supra* note 288, at 442. For the most recent version of Senator Specter’s proposed legislation and the companion House Bill (introduced by Rep. Bobby Scott), see S. 186, 110th Cong. (2007); H.R. 3013, 110th Cong. (2007).

<sup>302</sup> CONG. REC. H13, 562–63 (2007).

The DOJ's most recent attempts to soften the Thompson Memorandum came on the heels of congressional action.<sup>303</sup> Deputy Attorney General, Mark Filip, completely revised the policy, and DOJ now advises prosecutors not to consider whether corporations advance legal fees.<sup>304</sup>

While some scholars argue that clarifying the Thompson Memorandum and solving the constitutional problems created by that policy would satisfy concerns over employees' right to counsel,<sup>305</sup> prosecutors still have wide discretion to pressure corporations to end fee-advancement arrangements.<sup>306</sup> Any significant impact the recent policy changes will have within DOJ may depend more on the implementation of the new guidance by prosecutors than the substantive changes that appear on paper.<sup>307</sup> Some scholars fear that, but for a prosecutor's own sense of integrity and decency, there remains little to prevent the government from seeking charges for improper reasons.<sup>308</sup> If this fear is warranted, getting the policy right on paper might not ensure that defendants are adequately protected from overzealous prosecutors.<sup>309</sup> While DOJ has developed regulations and guidance documents such as the Thompson Memorandum, "its role is seen more as setting boundaries rather than imposing restraint and moderation in individual cases in an age of increasing prosecutorial power and increasing public expectations."<sup>310</sup> It is appropriate, then, for analysis of state action to depend less on the formal DOJ policy and more on the actual behavior of prosecutors. Because individual prosecutorial behavior varies, and the facts of each case vary, judges need the flexibility to weigh competing factors in determining whether DOJ has violated the Sixth Amendment.

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<sup>303</sup> Eric Lichtblau, *US to Ease Pressure Tactic over Legal Help for Employees*, N.Y. TIMES, Aug. 28, 2008, at C1 ("The new guidelines are partly an effort to head off action by Congress.").

<sup>304</sup> Press Release, DOJ, Justice Department Revises Charging Guidelines for Prosecuting Corporate Fraud (Aug. 28, 2008), <http://www.usdoj.gov/opa/pr/2008/August/08-odag-757.html>. The most recent revisions to the policy, included in the U.S. Attorneys' Manual, can be viewed at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/28mcrm.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm) (last visited Mar. 27, 2009).

<sup>305</sup> Stein, *supra* note 15, at 3285-93.

<sup>306</sup> See Wray & Hur, *supra* note 2, at 1102 (noting significant variation in how prosecutors use the Thompson Memorandum); see also John Power, *Show Me the Money: The Thompson Memo, Stein, and an Employee's Right to the Advancement of Legal Fees Under the McNulty Memo*, 64 WASH. & LEE L. REV. 1205, 1234 (2007) ("While some worry about the vagaries in the McNulty Memo's language, others are more concerned about what it fails to say, and the unsaid pressure it allows prosecutors to retain.").

<sup>307</sup> Taigue, *supra* note 37, at 408.

<sup>308</sup> Weissmann, *supra* note 19, at 1324.

<sup>309</sup> See Moise Cassetta, *supra* note 14, at 780 (noting that the impact of the McNulty Memorandum depends on its implementation).

<sup>310</sup> Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 AM. CRIM. L. REV. 137, 155 (1995).

Prosecutors frequently use pressure to force cooperation, such as offering incentives for codefendants to cooperate.<sup>311</sup> While prosecutors have a duty of fairness in proceedings, they still possess broad latitude to use strategic tactics to compel cooperation.<sup>312</sup> It makes sense that it should fall to the courts, rather than the Executive, to determine when those tactics have crossed the line.<sup>313</sup> While the *Stein* decision implies that invocation of the Thompson Memorandum and prosecutorial pressure could never be justified,<sup>314</sup> other courts evaluating the same issues have reached different conclusions by making different factual findings.<sup>315</sup> This underscores the value of the *Wheat* balancing test because it allows courts the flexibility to consider the unique facts of each case and to weigh the government's interest in ferreting out corporate corruption and obstruction against the degree to which the termination of legal fee payment actually interfered with the defendant's right to choose counsel.<sup>316</sup>

The approach suggested in this Comment will allow judges to conduct the factual and legal inquiries envisioned by the *Wheat* Court.<sup>317</sup> Some factors that judges should consider include whether there is a contractual arrangement between employers and employees for legal fee advancement or indemnification (and if the contract is explicit or implicit, included in the corporate charter bylaws, capped at a certain dollar amount, etc.); the specific facts produced by the government to indicate the likelihood of stonewalling; whether there is a significant nexus between the government's actions and a corporation's decision to terminate legal fees;<sup>318</sup> and whether the defendant has

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<sup>311</sup> *Stein*, *supra* note 15, at 3267.

<sup>312</sup> *Id.*

<sup>313</sup> *See Dexter*, *supra* note 42, at 530 (noting that because the new cooperation agreements affect the rights of individual employees, judicial scrutiny is key to "maintaining an equitable balance between government objectives, corporate interests, and individual concerns").

<sup>314</sup> *United States v. Stein*, 435 F. Supp. 2d 330, 369 (S.D.N.Y. 2006).

<sup>315</sup> *See, e.g., United States v. Rosen*, 487 F. Supp. 2d 721 (E.D. Va. 2007); *United States v. Stodder*, No. 2:05-CR-00027, 2006 WL 3066196, at \*2 (C.D. Cal. Oct. 4, 2006).

<sup>316</sup> In *Stein*, for example, KPMG was "forced to cut all financial ties to these defendants—all this without the government even having to prove that the claimed tax losses were improperly taken." Robert Weisberg & David Mills, Op-Ed., *A Very Strange Indictment*, WALL ST. J., Oct. 12, 2005, at A16.

<sup>317</sup> *Wheat v. United States*, 486 U.S. 153, 167 (1988) (Marshall, J., dissenting).

<sup>318</sup> Courts may not always agree that prosecutorial pressure, by itself, caused the alleged rights violation. For example, the Tenth Circuit recently found that federal prosecutors did not unnecessarily pressure Qwest Communications International to reveal privileged information. *In re Qwest Commc'ns Int'l, Inc.*, 450 F.3d 1179 (10th Cir. 2006). That court found, instead, that Qwest ceded the information voluntarily. *Id.* at 1192. While that case dealt with the portion of the Thompson Memorandum concerning selective waiver rather than legal fee advancement, it still informs the point that it is up to the fact finder to determine the extent to which

sufficient resources to fund an adequate defense absent fee advancement from the corporation.<sup>319</sup>

## CONCLUSION

Legal fee advancement and indemnification remain an important part of the compensation package that business entities offer their executives and may continue to be a subject of dispute when those employees come under investigation. It remains to be seen whether the *Stein* decision and the revisions to the U.S. Attorneys' Manual will materially alter the way prosecutors evaluate the decision of whether to bring charges against a corporation, as they still have tremendous discretion.<sup>320</sup>

It is critical that, as corporate criminal cases grow in frequency, courts have an appropriate standard by which to judge DOJ actions in light of any interference it may have caused with defendants' constitutional rights. The *Stein* court was so repulsed by prosecutorial behavior that it judged the government by the highest standard of review. Rather than letting the facts guide the standard of review, Sixth Amendment jurisprudence should be the guide for judging government interference with access to legal representation. Not all cases will be as factually clear, and not all defendants will have stakes as high as in *Stein*. As argued in this Comment, judges deciding these matters presumptively should uphold the defendant's Sixth Amendment claim,<sup>321</sup> but should also have the flexibility to consider whether mitigating facts—such as stonewalling and other obstructive behavior by the corporation<sup>322</sup>—could justify government pressure on corporations to sever fee advancement arrangements.<sup>323</sup> The *Wheat* test for Sixth Amendment challenges proposed here offers judges that flexibility.

The Obama Administration may soften the approach taken by the Bush Administration, although former Attorney General Edwin Meese and Senate

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government behavior was the “but for” cause in a corporation's decision to compromise its, or its employees', constitutional rights.

<sup>319</sup> See *Stodder*, 2006 WL3066196, at \*2. Here, post-*Stein*, the court found that the defendant received as good a defense as he would have received had his employer advanced his legal fees. *Id.* The court found that the government did not deprive him of his constitutional rights. *Id.*

<sup>320</sup> Duggin, *supra* note 13, at 388 (“[I]t is unlikely that the *Stein* precedent will end the alliances of government and corporate authority that so often result in the compromise of individual rights.”).

<sup>321</sup> See *supra* text accompanying note 262.

<sup>322</sup> See *supra* notes 281–83.

<sup>323</sup> See *supra* Part IV.A.

Judiciary Committee Ranking Member Arlen Specter fear that the current Administration may prove even less defendant-friendly.<sup>324</sup> Even after the Filip Memorandum revisions, it is their hope that Attorney General Eric Holder will “review and reverse” DOJ’s policy, which he originated in 1999 while serving in the Clinton Administration.<sup>325</sup>

Some scholars have suggested limiting corporate criminal liability<sup>326</sup> or eliminating it altogether and turning corporate wrongdoers over to civil regulatory enforcers.<sup>327</sup> The criminal justice system, it is argued, is not well-equipped to deal with corporations, in part because punishments are “blunt, statutory, and often inflexible,” and inevitably leave the corporation in ruin.<sup>328</sup> Others believe that a more fundamental problem than DOJ’s policy is the prosecutors’ “win at all costs” attitude toward corporate criminal investigations—even if winning comes at the expense of constitutional rights.<sup>329</sup> In *Stein*, the judge certainly felt that the government “let its zeal get in the way of its judgment.”<sup>330</sup> Justice Sutherland offered guiding wisdom as to the appropriate boundaries for federal prosecutors:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially 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. . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.<sup>331</sup>

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<sup>324</sup> Arlen Specter & Edwin Meese III, Op-Ed., *Even Businessmen Deserve a Lawyer*, WALL ST. J., Jan. 15, 2009, at A11.

<sup>325</sup> *Id.*

<sup>326</sup> See Weissmann, *supra* note 19, at 1335–37 (making the case for limiting corporate criminal liability to those situations in which “a company reasonably should have taken steps to detect and deter the criminal action of its employee”).

<sup>327</sup> Meeks, *supra* note 5, at 112.

<sup>328</sup> *Id.* at 117.

<sup>329</sup> Brody & Tatarowicz, *supra* note 288, at 443. Even though prosecutors’ sworn duty is to serve justice, they “do not get ahead in the government, or further their own career ambitions, on the basis of decisions not to prosecute.” Duggin, *supra* note 13, at 393. Likewise, federal prosecutors considering elected office do not run on the platform that they were “reasonable” on crime. *Id.*

<sup>330</sup> *United States v. Stein*, 435 F. Supp. 2d 330, 336 (S.D.N.Y. 2006).

<sup>331</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935). The American Bar Association’s Criminal Justice standards reflect the philosophy that the “duty of the prosecutor is to seek justice, not merely to convict.” Standards for Criminal Justice, The Prosecution Function, Standard 3-1.2(c) (A.B.A. 3d ed. 1993), available at [http://www.abanet.org/crimjust/standards/pfunc\\_blk.html#1.3](http://www.abanet.org/crimjust/standards/pfunc_blk.html#1.3).

While zeal may be warranted in the face of widespread corporate corruption, justice is rarely served when prosecutors violate the very Constitution they have sworn to protect.<sup>332</sup>

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<sup>332</sup> *Stein*, 435 F. Supp. 2d at 336.

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