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Lauren E. Taigue

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JUSTICE DEPARTMENT'S POLICY ON CORPORATE PROSECUTIONS UNDER ATTACK: UNITED STATES V. STEIN ASSAILS THOMPSON MEMORANDUM

I. INTRODUCTION

The Enron scandal of 2001 shook confidence in corporate America so badly that the government took drastic regulatory steps to reassure American workers and investors. The Department of Justice also updated its guidelines for prosecuting corporations in a document commonly known as the "Thompson Memorandum." The Memorandum's most significant


It gives prosecutors and regulators new means to strengthen corporate governance, to improve corporate responsibility and disclosure, and to protect corporate employees and shareholders.

The act requires, upon pain of imprisonment, that the most senior officers of a corporation certify that the firm's financial statements truly and accurately reflect its financial condition and result of operations; that auditors exercise their responsibilities to provide an independent examination and certification of the accuracy and reliability of a corporation's financial statements; that employees are protected from retaliation for disclosing improprieties of corporate officials; and that the corporate information available to investors is true and accurate, and free from deception.

Id. at 13.

revision to the original guidelines made a corporation's cooperation during a government investigation absolutely critical to ensuring that corporation's survival.3 “Cooperation,” as defined by the government, is considered by many to be the most important of nine factors affecting the government's decision to indict a corporation.4

Federal Prosecution of Corporations, written by then-Deputy Attorney General Eric Holder and known as the "Holder Memorandum," was the government's first set of official guidelines for prosecutors to use when determining whether to criminally indict a corporation under investigation. See Memorandum from Eric Holder, Deputy Att'y Gen., U.S. Dep't of Justice, to All Component Heads and U.S. Att'ys, Bringing Criminal Charges Against Corporations (June 16, 1999), available at http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps .html [hereinafter Holder Memorandum]; see also Wray & Hur, supra note 1, at 1101 (discussing origins of Justice Department policy and noting in 2003, Department used three years' worth of recommendations from Task Force to revise Holder Memorandum).

3. See Thompson Memorandum, supra note 2, at intro (revising Holder Memorandum to make cooperation of corporations under investigation an absolute requirement if corporation has any hope of avoiding indictment); see also DOJ Revises Memorandum on Principles for Prosecution of Business Organizations, 72 Crim. L. Rep. (BNA) No. 22, at 468 (Mar. 5, 2003) (noting Thompson Memorandum largely incorporates language of Holder Memorandum but "increase[s] emphasis on and scrutiny of the authenticity of a corporation's cooperation").

4. For a further discussion of the allegation that the cooperation factor is the most important element in the prosecutor’s charging analysis, see infra note 6 and accompanying text. When deciding whether to indict a corporation, the Thompson Memorandum directs prosecutors to consider the following factors:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
2. the perspicacity of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management;
3. the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection;
5. the existence and adequacy of the corporation's compliance program;
6. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
7. collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution; and
8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; [and]
9. the adequacy of remedies such as civil or regulatory enforcement actions.
Since its inception, the Thompson Memorandum has alarmed lawyers generally and white collar criminal defense attorneys in particular. Critics complain that the “cooperation factor” of the Thompson Memorandum essentially mandates unfettered waivers of guaranteed legal

Thompson Memorandum, supra note 2, at pt. II, § A. Furthermore, the Thompson Memorandum instructs prosecutors to take into account whether the corporation is protecting its employees in the following way: 

[A] corporation’s promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government’s investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation’s cooperation. Id. at pt. VI, § B. The Thompson Memorandum justifies these factors as indicia of cooperation on the basis that “[t]oo often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation.” Id. at intro.

5. See The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) [hereinafter Leahy Testimony] (statement of Patrick Leahy, Member, Sen. Comm. on the Judiciary), available at http://judiciary.senate.gov/testimony.cfm?id=2054&wit_id=9986 (recounting growing number of critics, including American Bar Association and editorial board of Wall Street Journal, who argue Thompson Memorandum is “too heavy handed and . . . has created a dangerous ‘culture of waiver’”); Michael E. Horowitz & April Oliver, Foreword: The State of Federal Prosecution, 43 AM. CRIM. L. REV. 1033, 1033 (2006) (noting Thompson Memorandum has been “the focal point” of dialogue for white-collar criminal defense practitioners since 2003). Horowitz and Oliver have also criticized the Justice Department’s policy on the grounds that in assessing a corporation’s cooperation, “federal prosecutors expect corporations to both self-report wrongdoing and affirmatively assist the government in catching those who engaged in the crimes.” Id. at 1038-39. Furthermore, the scholars comment that “[i]nherent in this process . . . is a demand for full disclosure of all factual information, which often includes the corporation’s waiver of traditional privileges.” Id. at 1039; Earl J. Silbert & Demme Doufekias Joannou, Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System, 43 AM. CRIM. L. REV. 1225, 1229 (2006) (discussing Thompson Memorandum’s implicit demand for waivers if corporation hopes to receive cooperation credit); Stephanie Kirchgaessner, Hardline Justice Department Starts to Feel the Heat, FIN. TIMES Asia, Aug. 2, 2006, The Americas sec., at 2 (noting Justice Department’s policy “has been a sore point for legal experts and business lobbyists, who say it has unlawfully forced companies and individuals to forgo due process rights to avoid indictments against a whole company”); Pamela A. MacLean, Defense Bar Smells Blood: They’re Pushing Back Against DOJ Tactics on Legal and Political Fronts, NAT’L L.J., Aug. 21, 2006, at 56 (acknowledging there has been “lots of hand-wringing” about Thompson Memorandum over last three years). But cf. Christopher J. Christie & Robert M. Hanna, A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Myers Squibb Co., 43 AM. CRIM. L. REV. 1043, 1046 (2006) (arguing Thompson Memorandum brings unity to vast army of prosecutors who are separated by distance and differing jurisdictions and ensures all prosecutors are adhering to same underlying principles). “By identifying and discussing the factors federal prosecutors should consider in the corporate fraud context, the Thompson Memo promotes thoroughness and consistency throughout the far-flung Department of Justice and allows corporate counsel to take action to prevent wrongdoing from occurring in the first place.” Id.
protections by corporations under investigation, most notably the attorney-client and work product privileges.\(^6\) They lament that the guidelines

\(^6\) See, e.g., Horowitz & Oliver, supra note 5, at 1039 (noting Thompson Memorandum’s evisceration of attorney-client privilege and virtual mandate for waivers is more than alarming to many people, including U.S. Chamber of Commerce, several members of Congress, American Bar Association and ACLU); Wray & Hur, supra note 1, at 1178 (noting critics argue that in order to receive cooperation credit under Thompson Memorandum, corporations are virtually required to waive guaranteed rights like attorney-client privilege and work product doctrine); Carmen Couden, Note, The Thompson Memorandum: A Revised Solution or Just a Problem?, 30 J. Corp. L. 405, 415 (2005) (arguing that “[w]hile the [Thompson] Memorandum specifically states that waiver of attorney-client privilege and work-product doctrine is not an ‘absolute requirement’ in practice, the government is looking for a ‘blanket waiver of the [protections] before the company has completed its internal probe’”). Two commentators have stated:

[M]any members of the defense bar believe that, in reality, the Thompson Memo makes waiver a prerequisite of avoiding corporate criminal charges . . . . Many have viewed this development with alarm, accusing the government of undermining the attorney-client privilege and skewing the balance of power drastically and unfairly in the government’s favor. Wray & Hur, supra note 1, at 1172; accord John C. Danforth, Op-Ed, When Enforcement Becomes Harassment, N.Y. Times, May 6, 2003, at A31 (criticizing Justice Department policy of pressuring corporations to turn over complete results of internal investigations and waive attorney-client and work product protection if they want to avoid prosecution); Marvin G. Pickholz & Jason R. Pickholz, Investigations Put Employees in Tough Spot: Are ‘Cooperating’ Corporations Violating Constitutional Rights?, N.Y. L.J., July 24, 2006, at 10 (commenting that corporations essentially have no choice but to waive their attorney-client and work product privileges). Pickholz and Pickholz note that in the present environment it would be folly for a company with a serious issue to refuse to cooperate with the prosecutors. However, those prosecutors are demanding that companies agree, often before an internal investigation has begun or is concluded, to ferret out their own alleged wrongdoers, turn over their attorney-client privileged or attorney work product notes and memoranda of attorney interviews with those employees, and in some instances terminate any employees who refuse to cooperate with the company’s investigation.

Id.; see also Joel B. Harris & Andrew I. Stemmer, Risks and Rewards of Waiving the Attorney-Client Privilege, Metropolitan Corp. Couns., Sept. 2006, at 34 (stating current "trend is for prosecutors to place great weight on disclosure of protected information and that government investigators "request a privilege waiver almost out of hand"). In fact, some regulators have even "pressur[ed] corporations to sign privilege waivers before the internal investigation even started and any evidence of wrongdoing was discovered." Id.; cf. Couden, supra, at 422 (stating one way to interpret prosecutorial behavior is to consider that Justice Department is not charging corporation because that corporation refuses to waive its attorney-client privilege, but rather that it is charging corporation based on its non-cooperation with government investigation, among other factors). But see The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) [hereinafter McNulty Testimony] (statement of Paul J. McNulty, Deputy Att’y Gen., U.S. Dep’t of Justice), available at http://judiciary.senate.gov/testimony.cfm?id=2054&wit_id=2742 (saying cooperation is but one factor to which prosecutors look and characterizing Thompson Memorandum as “nothing more than a structured recitation of what common sense would lead a prosecutor to consider”). McNulty deemphasized the "cooperation" element of the Thompson Memorandum, stating:
have given prosecutors virtually unchecked power that undermines the very nature of our adversary system.\textsuperscript{7}

With respect to one of the nine factors listed in the Thompson Memo—cooperation—one factor or element a prosecutor may weigh in assessing the adequacy of cooperation is the completeness of the company's disclosure, including, whether the company identified the culprits, made witnesses available, disclosed the results of any internal investigation, and, if necessary, waived attorney-client and work product protections. Waiver then is one sub factor or element that might come into play in evaluating one of the nine factors in the Thompson analysis. Thus, recent criticisms of our position on waiver tend to distort its importance in the overall charging decision by inaccurately describing waiver as essential or the only thing prosecutors consider. Let me be very clear: a corporation that chooses not to waive the privilege will not necessarily be charged. Cooperation is but one factor in the analysis and waiver is considered in weighing the adequacy of the cooperation, but it is not a litmus test for cooperation.


\textit{7.} See, e.g., \textit{The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary, 109th Cong.} (2006) [hereinafter Sheppard Testimony] (statement of Mark B. Sheppard, Partner, Sprague & Sprague), available at http://judiciary.senate.gov/testimony.cfm?id=2054&wit_id=5744 (stating Thompson Memorandum policies have "so drastically altered the enforcement landscape that they threaten the very foundation of our adversarial system of justice"); Pickholz & Pickholz, \textit{supra} note 6 (stating Thompson Memorandum is degrading adversarial system of justice). "Little heed is paid to traditional notions of the right to counsel, right not to bear witness against oneself, or the prohibitions upon government punishment for the mere invocation of rights." \textit{Id.}; see also Ellard, \textit{supra} note 6, at 991 (stating Thompson Memorandum is moving justice system away from adversarial origins). "The approach to law enforcement embodied in the Thompson Memorandum can fairly be described as moving the process governing the American system away from the form the Founders expressly meant it to take—an accusatorial system—and toward something they feared—an inquisitorial system." \textit{Id.; cf. Congress Is Pressed to Halt Erosion of Corporate Attorney-Client Privilege}, 90 Antitrust & Trade Reg. Rep. (BNA) No. 2244, at 249-50 (Mar. 10, 2006) (criticizing Thompson Memorandum as destroying hallowed attorney-client privilege); Harris & Stemmer, \textit{supra} note 6 (noting widely held belief that Thompson Memorandum tramples on revered principles of American jurisprudence); Lorraine Woellert, \textit{Just Saying "No" to Uncle Sam—The Backlash Against Prosecutors Coaxing Companies to Waive Attorney-Client Privilege}, BUS. WEEK, Jan. 23, 2006, at 37, 38, available at http://www.businessweek.com/magazine/content/06_04/b3968064.htm (noting concern of civil liberties groups and business interests that Thompson Memorandum is sacrificing traditional legal protections).
In *United States v. Stein*, a federal district judge in New York invalidated part of the Memorandum because it violated the Fifth and Sixth Amendments. The invalidated portion directed prosecutors to consider the corporation's advancement of legal fees to employees under criminal investigation when deciding whether to indict the corporation. Judge Lewis A. Kaplan declared in no uncertain terms that a company's decision to pay its employees' defense costs should bear no relationship to whether that corporation is deemed to be "cooperating" with a government investigation. *Stein* is the first judicial strike against the Thompson Memorandum. The decision leaves the door wide open for future constitutional challenges to the most widely criticized aspects of the Thompson Memorandum, namely that corporations currently have a Hobson's choice: either waive the attorney-client and work product privileges or forfeit cooperation credit from prosecutors.

This Casenote discusses the impact of *Stein* on the Justice Department's ability to enforce its cooperation guidelines under the Thompson Memorandum. Part II provides the relevant history of the last decade, which led to the current culture surrounding corporate criminal investigations. Part III discusses the facts giving rise to *Stein* and explores Judge

9. See id. at 356 (describing constitutional violations).
10. See id. (stating that legal fee advancement provision of Thompson Memorandum violates Fifth and Sixth Amendment because, in effect, it forces corporation to waive right to counsel and right against self-incrimination).
11. See id. at 364 (noting corporation's decision to advance legal fees should not be indicative of whether corporation is "cooperating").
12. See Horowitz & Oliver, supra note 5, at 1034 (calling *Stein* "the first serious legal challenge to the Thompson Memorandum"); John C. Coffee, Jr., *The Envelope Please: Best Southern District Rulings*, N.Y. L.J., July 20, 2006, at 5 (stating *Stein* is "the first judicial decision questioning and curtailing federal prosecutorial actions under Thompson Memorandum"); Rodney Peck, United States v. Stein: DOJ Policy Threatening Companies with Indictment Based Upon Advancement of Employee Legal Fees Ruled Unconstitutional, *MONDAQ BUS. BRIEFING*, Aug. 9, 2006, available at 2006 WLNR 15714223 ("The ruling in the [Stein] case is the first major criticism from the bench of tactics that federal prosecutors have adopted since the wave of corporate scandals that erupted after the collapse of Enron.").
13. See, e.g., Horowitz & Oliver, supra note 5, at 1034 (opining that *Stein* leaves Thompson Memorandum vulnerable to further judicial scrutiny and saying it will "spawn similar litigation in other jurisdictions"); accord Timothy P. Harkness & Carmel E. Gabbay, U.S. v. Stein: *Rewriting the Rules of Corporate Cooperation with Government Investigations*, *METROPOLITAN CORP. COUNS.*, Aug. 2006, at 19 ("While [the *Stein* decision] was focused on the issue of advancement of legal fees, [Judge Kaplan's] analysis supports various arguments that other portions of the Thompson Memorandum, including demands for privilege waivers, are similarly unconstitutional."); MacLean, supra note 5 (noting that while *Stein* only dealt with legal fees aspect, "[w]hite-collar defense lawyers around the country believe other tactics outlined in the Thompson memo are just as vulnerable to constitutional attack, including demands that companies waive their attorney-client privilege during criminal investigations").
14. For a further discussion of why corporations are so willing to cooperate with government investigations, see infra notes 19-28 and accompanying text.
Kaplan's analysis of the case. Part IV explores the enthusiastic reception Stein has received in the legal community and elaborates on the most compelling criticisms of the Thompson Memorandum. Part V summarizes the most relevant developments since the decision, and Part VI discusses the likely short- and long-term impact of Stein.

II. JUSTICE DEPARTMENT POLICY: COOPERATE OR ELSE

Federal prosecutors are bound by law to use the Thompson Memorandum when determining whether a corporation is cooperating. Corporations facing a criminal investigation know that full cooperation with the government is often the only way to avoid indictment, which is regarded as a corporate death sentence. Even short of indictment, the

15. For a further discussion of the background of the KPMG case and Judge Kaplan's legal analysis, see infra notes 29-82 and accompanying text.

16. For a further discussion of the legal community's response to Stein and the most compelling criticisms of the Thompson Memorandum, see infra notes 83-118 and accompanying text.

17. For a further discussion of the most relevant developments since the Stein decision, see infra notes 119-33 and accompanying text.

18. For a further discussion of the likely impact of Stein, see infra notes 134-83 and accompanying text.

19. See United States v. Stein, 435 F. Supp. 2d 330, 338 (S.D.N.Y. 2006) (stating Thompson Memorandum, unlike Holder Memorandum, is binding on all federal prosecutors). Describing how the Thompson Memorandum became binding on all federal prosecutors, Judge Kaplan stated:

   In late 2001, Enron, Global Crossing, Tyco International, Adelphia Communications and ImClone, among other companies, found themselves in worlds of trouble, much of it apparently of their own making. Bankruptcies and criminal prosecutions followed including, notably, the indictment of Enron's auditors, Arthur Andersen LLP—an indictment that resulted in the collapse of the firm, well before the case was tried. And on July 11, 2002, the President issued Executive Order 13271, which established a Corporate Fraud Task Force . . . headed by United States Deputy Attorney General Larry D. Thompson . . . Unlike its predecessor, however, the Thompson Memorandum is binding on all federal prosecutors.

   Id. at 337-38; see also, Amalie L. Tuffin, Recent Ruling in KPMG Case Puts Government Tactics in the Spotlight, LOCALTECHWIRE.COM, July 12, 2006, http://www.localtechwire.com/article.cfm?u=14495 (stating “[f]ederal prosecutors are bound by the principles set forth in . . . the Thompson Memorandum, in deciding whether to indict a corporation or other business entity”). Since Stein, the Justice Department has updated its corporate prosecution guidelines in a document known as the “McNulty Memorandum,” which supersedes the Thompson Memorandum. For a further discussion of the Justice Department’s latest changes to its corporate prosecution policy, see infra notes 145-46 and 156-65 and accompanying text.

20. See Ellard, supra note 6, at 987 (describing criminal indictment as “lethal, even for venerable institutions”). Indictment often threatens the very existence of a corporation, as the post-Enron collapse of Arthur Anderson, a 90-year-old organization, illustrates. See id. (noting devastating impact of indictment on Arthur Anderson’s existence). Not even the reversal of Andersen’s conviction by a unanimous Supreme Court in 2005 could resurrect the firm, since Andersen was destroyed by the indictment alone. See id. (same). Therefore, it is “the possibility of avoiding indictment” that “creates a strong incentive for business organizations
bad press associated with a criminal investigation, in particular the firebrand reporting that haunts any company perceived by the media to be engaged in a cover-up, can have dire consequences to the financial health and viability of a firm. Moreover, the nature of the United States Sentencing Guidelines, which provide for a sentence reduction in accordance with the cooperation of a corporation under investigation, makes acquiescing to the government’s demands even more imperative.

21. See, e.g., Ken Brown et al., Called to Account: Indictment of Andersen in Shredding Case Puts Its Future in Question, WALL ST. J., Mar. 15, 2002, at A1 (noting severity of criminal indictment to corporation’s well-being is reflected in news media coverage of Arthur Anderson, that did not cooperate with government and imploded, versus KPMG, that did cooperate and survived); see also, Harris & Stemmer, supra note 6 (discussing impact bad press, let alone indictment, can have on corporations). Harris and Stemmer state:

The bad press alone cannot cause a severe loss of market share, but may also lead to executives and clients fleeing the corporation like a sinking ship. It can result in a bankruptcy filing or indeed, as witnessed in the case of Arthur Andersen, the organization may even be forced to close its doors forever.

Id.

22. See U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) (2004) (explaining Sentencing Guidelines, which apply to prosecution of corporations and business entities, contain structured reduction in punishment that lessens culpability of cor-
One of the guiding factors in the prosecution’s analysis of cooperation is how willingly the corporation cooperates with the government’s investigation of its agents and employees. The relevant portion of the Thompson Memorandum states:

Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents . . . either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government’s investigation . . . .

Wray & Hur, supra note 1, at 1117 (discussing Sentencing Guidelines). Since their inception, the Sentencing Guidelines have included a sentence reduction for those corporations whose cooperation is deemed “timely and thorough.” Id. (noting potential impact of cooperation). Timely cooperation is that which begins approximately “at the same time as the organization is officially notified of a criminal investigation.” U.S. SENTENCING GUIDELINES MANUAL § 8C2.5, cmt. n.12 (2004). Thorough cooperation is defined as “the disclosure of all pertinent information known by the organization.” Id. Therefore, cooperation is especially important to companies “indicted under post-Enron legislation increasing penalties for white-collar crime.” Ellard, supra note 6, at 988.

23. See Thompson Memorandum, supra note 2, at pt. VI, § B (noting that degree to which corporation “cooperates” impacts whether Justice Department will hand down indictment). The Thompson Memorandum sets forth many indicia of cooperation, including “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection.” Id. at pt. II, § A. Cooperation is chiefly defined as willingness by the corporation to “identify the culprits within the corporation, including senior executives; to make witnesses available; [and] to disclose the complete results of its internal investigation.” Id. at pt. VI, § A.

24. Id. at pt. VI, § B. Ironically, prosecutors thought indemnification and advancement of legal fees by corporations to their employees under investigation was proper before the adoption of the Thompson Memorandum. See Laurence A. Urgenson & Audrey Harris, Is the White-Collar Defense Attorney Headed for Extinction?, BUS. CRIMES BULL., May 2006, at 1 (discussing practices of prosecutors prior to Thompson Memorandum). Prior to the Thompson Memorandum, “[p]rosecutors generally viewed advancement and indemnification as proper” and did not think it was their role to interfere with a company’s decision. Id. “Indeed, when an FBI agent was indicted in 1997 in connection with the Ruby Rudge killing, the U.S. Department of Justice announced it would pay his legal fees.” Id. at 1-2; accord Press Release No. 97-342, U.S. Dep’t of Justice, Justice Department Press Release Regarding Charges Filed Against Lon Horiuchi (Aug. 21, 1997), available at http://www.usdoj.gov/opa/pr/1997/August97/342crm.htm (noting Justice Department would advance defense costs to FBI agent charged with murder). This attitude
In the last three years, corporations charged with criminal wrongdoing have been hyper-vigilant in their attempts to cooperate with the government because of the threats inherent in the Thompson Memorandum. Corporations are pressured to disclose the facts and results contained in reports of their internal investigations. Disclosure of these documents, typically compiled by the corporation's counsel, results in a waiver of the attorney-client and work product privileges and therefore leaves employees defenseless. Despite this, corporations believe—justifiably so—that an indictment spells doom.

III. THE SAGA OF STEIN AND JUDGE KAPLAN'S BLISTERING ASSAULT ON THE THOMPSON MEMORANDUM

The Stein case arose out of an IRS investigation into KPMG's involvement in suspected tax shelter fraud. Ultimately, KPMG entered into a deferred prosecution agreement (DPA) with the government regarding

changed, however, once the Thompson Memorandum's embargo on legal fees became Justice Department policy. See Urgenson & Harris, supra, at 2 (noting Justice Department's change in policy with respect to advancement of legal fees).

25. Cf. Sheppard Testimony, supra note 7 (noting "corporations are complying with [government] demands in ever increasing numbers"); Sue Reisinger, Cut Off Without a Cent, CORP. COUNS., July 2006, at 17 (noting that since Thompson Memorandum became effective in 2003, twenty-three companies have escaped indictment by submitting to deferred prosecution agreements and subjecting themselves to "cooperation" factors).

26. See Ellard, supra note 6, at 993 (noting corporations are often pressured to turn over product of internal investigation to government investigators).

27. See id. (explaining how privilege is waived as result of corporate counsel conducting internal investigations and then turning over that information to government). Ellard states:

Those investigations will almost certainly include conversations between counsel and company personnel. Companies are also pressured to waive the privilege with regard to conversations that occurred before wrongdoing was suspected. For example . . . [in the DPA KPMG entered into with the government, KPMG] waived the attorney-client privilege for conversations its lawyers . . . had with employees about tax products the company marketed many years before the government's investigation into the practice started.

Id.; see also Laurie P. Cohen, In the Crossfire: Prosecutors’ Tough New Tactics Turn Firms Against Employees, WALL ST. J., June 4, 2004, at A1 (discussing specific terms of KPMG's DPA whereby it strayed from traditional policy of paying employees' legal fees in attempt to appear cooperative).

28. For a further discussion of how companies believe that a criminal indictment results in the death of the corporation indicted, see supra note 20 (discussing demise of Arthur Andersen and lessons other corporations took from that company's implosion).

29. See generally Kenneth M. Breen & Thomas R. Fallati, 'KPMG' and the Future of Advancement of Legal Fees, N.Y. L.J., July 11, 2006, at 4 (discussing investigation of KPMG's involvement with tax shelters); Harkness & Gabbay, supra note 13 (discussing background facts of Stein case).

30. See Letter from David N. Kelley, U.S. Att’y for the S. Dist. of New York, U.S. Dep’t of Justice, to Robert S. Bennett, Skadden, Arps, Slate, Meagher & Flom, Counsel for KPMG, Deferred Prosecution Arrangement 1 (Aug. 26, 2005), availa-
its tax shelter activities, whereby it admitted wrongdoing, agreed to pay a $456 million fine and was subjected to a number of conditions, including the obligation to continue to cooperate in the investigation. Well aware that indictment often spells doom for a corporation, KPMG agreed to the DPA hoping that the firm would not be indicted. The Justice Department pressured KPMG to limit, and ultimately cut off, attorneys' fees to its employees who did not cooperate with the government's investigation or who were criminally indicted.

KPMG informed its employees in a memo that it would continue to advance attorneys' fees up to $400,000 only and that it would cut off fees if an employee failed to cooperate with the government or was indicted. At the insistence of the U.S. Attorney's Office for the Southern District of New York, KPMG issued a second memo that made it clear to employees that they had the right to speak with the government without an attor-

ble at http://www.usdoj.gov/usao/nys/pressreleases/August05/kpmgdpagmt.pdf (setting forth specific terms of arrangement whereby government agreed to postpone prosecution in exchange for concessions from KPMG). The Thompson Memorandum encourages prosecutors to consider the use of "pretrial diversion agreements," also known as deferred prosecution agreements (DPA). See Thompson Memorandum, supra note 2, at pt. VI, § B (encouraging prosecutors to make use of DPAs when negotiating with corporations facing prosecution in order to ensure cooperation). Under a DPA, a corporation is given a specific window of time during which the Justice Department will forbear from filing an indictment if the corporation concedes wrongdoing, pays fines and restitution, agrees to fully cooperate and enacts in-house reforms that conform with Sarbanes-Oxley. See Wray & Hur, supra note 1, at 1104-05 (discussing common requirements of corporation in DPA). Typically, the corporation must also agree to be monitored by the government. See id. (same). If the company can convince the Justice Department that it has followed all the terms of the agreement by the end of the probationary period, the charges will generally be dropped. See id. (noting common result of DPA if corporation complies with its terms). While DPAs are a more palatable alternative to criminal indictment, they are structured in such a way that puts the corporation very much at the mercy of the government; indeed, any perception by the government that the corporation is not "cooperating" according to the terms of the agreement can result in that corporation being indicted anyway. See Alonso, supra note 20 (cautioning that corporation may still be indicted if government is unconvinced it is cooperating).


32. For a further discussion of why corporations are so terrified of criminal indictment, see supra notes 20-21 and accompanying text.

33. See Ellard, supra note 6, at 988-89 (stating KPMG stopped paying legal fees upon pressure from government); Cohen, supra note 27 (same).

34. See Lynnley Browning, U.S. Tactic on KPMG Questioned, N.Y. TIMES, June 28, 2006, at C1 (saying KPMG first capped legal fees at $400,000 and then cut them off entirely in effort to appear cooperative); Harkness & Gabbay, supra note 13 (stating KPMG caved to government pressure by circulating new policy on legal fees).
ney. The government kept KPMG informed as to any employee who refused to submit to interviews, and in turn the firm made it clear to that employee that KPMG would cease advancing legal fees unless the individual cooperated with the government.

When the government indicted sixteen former KPMG employees, KPMG stopped advancing their attorneys’ fees. In January 2006, the KPMG defendants moved to dismiss the indictment or to compel the advancement of attorneys’ fees. This was the beginning of the Stein saga.

A. Legal Analysis: Judge Kaplan Says Justice Department Strong-Armed KPMG to Cut Off Legal Fees

Judge Kaplan held that by pressuring KPMG to refuse to advance defense costs to the KPMG defendants after they were indicted, the government violated their constitutional right to fairness in the criminal process guaranteed by the Due Process Clause of the Fifth Amendment and the right to counsel under the Sixth Amendment. Describing the issue as an “intersection of three principles of American law,” Kaplan declared the case centered around three discrete concepts. First, Kaplan stated that the Due Process Clause of the Fifth Amendment stands for the essential truth that “everyone accused of a crime is entitled to a fundamentally fair trial.” Next, he declared that the Sixth Amendment entitles those charged with a crime “to [the] assistance of a lawyer.” Finally, Kaplan discussed legal fees, stating, “[a]n employer often must reimburse an employee for legal expenses when the employee is sued, or even charged with a crime, as a result of doing his or her job.”

35. See Breen & Fallati, supra note 29 (saying KPMG circulated memo outlining new legal fees policy at insistence of government); Harkness & Gabbay, supra note 13 (stating government action that compelled KPMG to tell its employees they would not need separate counsel was taken “to increase the chances that employees would agree to interviews without obtaining representation”).

36. See Harkness & Gabbay, supra note 13 (stating “government notified KPMG’s outside counsel every time a KPMG employee refused to participate in an interview with the government”).

37. See Breen & Fallati, supra note 29 (laying forth background of KPMG case).

38. See id. (explaining how Stein case arose).

39. For a further discussion about how the KPMG case developed, see supra notes 29-38 and accompanying text.


41. Id. at 335 (enumerating rights at issue).

42. Id. (describing thrust of constitutional due process).

43. Id. (announcing right to assistance of counsel in criminal prosecutions).

44. Id. (discussing agency law principle that states when agent incurs losses as result of conducting business on behalf of principal, agent is entitled to compensation from principal); see also, e.g., Restatement (Second) of Agency § 438(2) & cmt. e (1958); Joseph Story, Story on Agency § 339, at 413 (Charles P. Green-
In complex corporate investigations like the KPMG case, attorneys' fees are extraordinarily expensive. The government's case against the KPMG defendants was certainly not run-of-the-mill, having been described by both the government and the media as "the largest investigation into tax fraud in United States history." Moreover, the sheer volume of material that must be reviewed in a case like the one against KPMG requires competent legal representation. Kaplan took issue with a statement made by Larry Thompson, author of the Memorandum, who was quoted by the Wall Street Journal as saying: "If employees really don't believe they acted with criminal intent, they don't need fancy legal representation," adding that "[t]here are lots of reasonably priced lawyers." To that, Kaplan issued this stinging retort:

The innocent need able legal representation in criminal matters perhaps even more than the guilty. In addition, defense costs in investigations and prosecutions arising out of complex business environments often are far greater than in less complex criminal

45. See Stein, 435 F. Supp. 2d at 338 n.13 (citing Cohen, supra note 27) (describing high cost of lawyers' fees); see also Urgenson & Harris, supra note 24, at 2 (noting few defendants can afford to pay vast legal bills that occur during corporate criminal investigations). "Even if an individual defendant is able to scrape together enough money to keep his counsel, few can afford the experts, accountants, investigators and support staff that it takes to sort through (much less, make sense of) the warehouses of material that their 'cooperating' employer gave the government." Id.

46. See Stein, 435 F. Supp. 2d at 362 (noting that KPMG case was "by no means a garden-variety criminal case"). Kaplan went on to state: "The government thus far has produced in discovery, in electronic or paper form, at least 5 million to 6 million pages of documents plus transcripts of 335 depositions and 195 income tax returns," making it even more essential that the KPMG defendants have substantial resources to prepare an adequate defense. Id. at 362 & n.163. "Yet the government has interfered with the ability of the KPMG defendants to obtain resources they otherwise would have had." Id. at 362.

47. See id. (noting awesome amount of discoverable material involved in KPMG case).

48. See Cohen, supra note 27 (quoting Larry Thompson dismissing need for defense counsel); see also Stein, 435 F. Supp. 2d at 338 n.13 (objecting to Larry Thompson's comment that innocent people do not require "fancy legal representation"); Urgenson & Harris, supra note 24, at 2 (discussing Larry Thompson's declaration to Wall Street Journal that innocent people do not need fancy legal representation as indication this stance undercuts significance of ability to pay legal fees).
matters. Counsel with the skills, business sophistication, and resources that are important to able representation in such matters often are more expensive than those in less complex criminal matters. Moreover, the need to review and analyze frequently voluminous documentary evidence increases the amount of attorney time required for, and thus the cost of, a competent defense. Thus, even the innocent need substantial resources to minimize the chance of an unjust indictment and conviction.49

Historically, KPMG paid its employees' legal fees regardless of cost.50 Based on this practice, Kaplan said the KPMG defendants had a reasonable expectation that KPMG would pay their defense costs.51 At the first

49. Stein, 435 F. Supp. 2d at 338 n.13 (assaulting logic of Larry Thompson's comment about innocent people not needing "fancy legal representation"); see also Norman B. Arnoff & Sue C. Jacobs, KPMG Bowed to Government Pressure in Not Providing Counsel, N.Y. L.J., Aug. 8, 2006, at 3 (noting there is sound justification for companies paying their employees' legal fees when criminal investigation centers on those employees' activities on behalf of corporation). Firms should provide legal fees so that "competent employees are protected against the cost of lawsuits." Id.; see also Reisinger, supra note 25, at 17 (noting common practice of many companies to advance legal bills for "workers who land in hot water for something they did as part of their job"). Reisinger observed that, according to the business groups' amicus brief in Stein, who included the Securities Industry Association, the Association of Corporate Counsel, the Bond Market Association, and the Chamber of Commerce "48 of the nations' 50 largest corporations cover fees for employees in trouble," although in many instances this is required by corporate bylaws. See id. (indicating uniformity of practice). This common practice is under attack by the government, however, and the general sense is that Justice Department currently "coerces corporate counsel to withhold previously promised support for employees' legal defense." See id. (noting government's reputation for coercive disallowance of advancement of employees' legal fees).

50. See Stein, 435 F. Supp. 2d at 336 (stating KPMG traditionally paid defense costs of its employees regardless of cost or criminal indictment).

51. See id. at 355-56 (discussing provisions of Delaware law that governed KPMG's discretion to advance attorneys' fees to current and former employees). The court stated:

The statute that governs KPMG gives it the authority "to indemnify and hold harmless any partner or other person from and against any and all claims and demands whatsoever." This includes the authority to advance defense costs prior to final judgment. KPMG had an unbroken track record of paying the legal expenses of its partners and employees incurred as a result of their jobs, without regard to cost. All of the KPMG defendants therefore had, at a minimum, every reason to expect that KPMG would pay their legal expenses in connection with the government's investigation and, if they were indicted, defending against any charges that arose out of their employment by KPMG.

Id. (quoting Del. Code Ann. tit. 6, § 15-110 (2006)). Furthermore, Kaplan noted that it was possible the KPMG defendants had "contractual and other legal rights to indemnification and advancement of defense costs" but declined to decide that issue. See id. at 356 (relying instead on employees' reasonable expectation that KPMG would pay their legal fees). While most corporations have provisions in their bylaws that require them to pay attorneys' fees, KPMG is a partnership and could not rely upon state indemnification provisions and its bylaws to resist pressure regarding advancement because it had discretion to pay fees. See Urgenson &
meeting between KPMG’s legal team and the U.S. Attorney’s Office, however, a lead prosecutor told KPMG that if the corporation had any discretion regarding whether to advance legal fees, the government would look at that choice “under a microscope.” KPMG’s defense counsel understood that comment to mean that any advancement of legal fees to employees under investigation, beyond what was required by law, would be construed as evidence by the government that KPMG was not cooperating. As KPMG had every interest to appear cooperative because of the terms of its DPA, the corporation did all it could to avoid the appearance

Harris, supra note 24, at 3 (explaining how Delaware statute affected KPMG’s advancement policy and noting corporation bylaws permitted but did not require it to pay legal fees). Kaplan noted with respect to each defendant: “All of the defendants save Stein, who has an express contract with KPMG, arguably are protected by a contract, implied in fact from KPMG’s uniform past practice and the circumstances of the business, pursuant to which they are entitled to have their defense costs paid by KPMG.” Stein, 435 F. Supp. 2d at 356 n.119; accord Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc., 448 F.3d 573, 582 (2d Cir. 2006) (“Under New York law, the conduct of the parties may lead to the inference of a binding agreement.”); Manchester Equip. Co. v. Am. Way Moving & Storage Co., 176 F. Supp. 2d 239, 245 (D. Del. 2001) (defining circumstances in which implied contract might arise).

52. See Stein, 435 F. Supp. 2d at 344 (describing meeting notes of KPMG counsel).

53. See id. at 341 (discussing facts of meeting between [U.S. Attorney’s Office] and KPMG’s defense team, where discussion focused on KPMG’s eagerness to appear cooperative with government’s investigation). When the meeting turned to the legal fees issue, the lead prosecutor asked whether KPMG had to pay them or was nonetheless planning to. See id. (same). A lawyer for KPMG asked for the government’s opinion on whether KPMG could continue its tradition of paying employees’ legal fees without being penalized. See id. (same). The U.S. Attorney’s Office told KPMG’s legal team it would take the company’s legal obligations into account but made specific references to the Thompson Memorandum. See id. (same). To this, the lawyer for KPMG responded:

[T]he partnership agreement was vague and that Delaware law gave the company the right to do whatever it wished, but said that KPMG still was checking on its legal obligations. It would not, however, pay legal fees for employees who declined to cooperate with the government, or who took the Fifth Amendment, as long as it had discretion to take that position.

Id. at 342. When KPMG’s defense team asked for a clarification on the government’s view of KPMG advancing legal fees, one of the prosecutors said “‘misconduct’ should not or cannot ‘be rewarded’ and referred to the federal guidelines [again].” See id. (describing government’s characterization of KPMG’s obligations regarding attorneys’ fees). This was understood by KPMG’s legal team to be a reference to the Thompson Memorandum and a clear implication that the government did not want KPMG to pay the legal fees. See id. at 342-44 (discussing KPMG’s reaction to government’s statements). Therefore, Kaplan concluded the government had intimated that any decision by KPMG to pay any legal fees other than those it was legally obligated to cover would count against it when the government decided whether to indict the firm. See id. at 344 (concluding that KPMG had no meaningful choice about whether to cover legal fees). This was hammered home by the comment that if KPMG had any discretion as to whether to pay the legal fees, the government would “look at that under a microscope.” See id. (finding that taken together, comments clearly conveyed that prosecution did not want KPMG to pay legal fees).
of non-cooperation out of fear of indictment. In the face of the pressure inherent in the Thompson Memorandum and of that exerted by the U.S. Attorney’s Office, “KPMG refused to pay because the government held the proverbial gun to its head.”

Kaplan reasoned that the corporation would have advanced its former employees’ legal fees if it had had any meaningful choice in the matter. KPMG attempted to get clarification from the government “that payment of fees in accordance with its settled practice would not be held against it.” The government, however, gave no such reassurances. Instead, the government “reinforced the threat inherent in the Thompson Memorandum” from the outset of its interactions with KPMG. Consistent with

54. See id. at 350 (discussing implications of KPMG’s DPA). Kaplan stated that:

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

Id. Further, Kaplan noted that although the Thompson Memorandum acknowledges that corporations legally obligated to pay legal fees must do so, it was nonetheless in KPMG’s interest to avoid paying the defendants’ fees if doing so might result in the government interpreting its advancement of fees as proof KPMG was protecting guilty employees. See id. at 344-45 n.54 (considering conflicting interests of KPMG and its employees).

55. See id. at 336 (concluding government pressured KPMG to refuse payment of employees’ legal fees).

56. See id. at 340 (“KPMG’s policy prior to this matter concerning the payment of legal fees of its partners and employees is clear.”). KPMG previously advanced legal fees to employees under investigation without consideration of the financial cost to the firm. See id. (noting KPMG’s established practice). In its brief, KPMG stated that it was “not aware of any current or former partner, principal or employee who has been indicted for conduct arising within the scope of the individual’s duties and responsibilities as a KPMG partner, principal or employee since [two partners] were indicted and convicted of violation of federal criminal law in 1974.” Id. (alteration in original). In that case, KPMG paid those individuals’ legal fees. See id. (detailing extent of KPMG’s prior payments of legal fees). KPMG also paid the legal fees of four partners being criminally investigated in connection with KPMG’s relationship with Xerox and related civil litigation brought by the SEC. See id. (same). But in the present litigation, the Thompson Memorandum prevented KPMG from paying its employees’ fees. See id. at 352 (noting threat inherent in Thompson Memorandum).

57. Id. (stating it was Thompson Memorandum that caused KPMG to consider departing from its long-standing policy of paying legal fees and expenses of its personnel in all cases and investigations even before it first met with prosecutors).

58. See id. (discussing how prosecutors played on KPMG’s legitimate fear of indictment by repeatedly bringing up subject of legal fees).

59. See id. at 352-53 (finding that prosecutors made their negative feelings about KPMG advancing legal fees perfectly clear in order to pressure KPMG into “cooperating”).
the Thompson Memorandum, prosecutors indicated that any payment of legal fees by KPMG beyond its legal obligations would be counted against the firm when the government made a decision about indictment. Therefore, under intense pressure from the government, KPMG departed from its customary and consistent policy of advancing legal fees.

KPMG communicated its policy change to counsel for the KPMG defendants in a letter that stated that the corporation would pay legal fees up to $400,000 only and that the payment of defense funds was conditioned upon full employee cooperation with the government. The government was displeased with the "tone" of this first memo, however, because while it explained the new company policy on legal fees, the memo also strongly advised KPMG employees to speak to government representatives only with a lawyer present. At the insistence of the government, KPMG issued a second memo stating that KPMG employees did not necessarily need the assistance of counsel in speaking with government agents and that the choice belonged to the employee.

Appalled by this, Kaplan stated: "It is entirely plain that the government's purpose in demanding the supplement was to increase the chances that KPMG employees would agree to interviews without consulting or being represented by counsel, whether provided by KPMG or otherwise." The government took advantage of KPMG's justifiable fear of indictment. Kaplan sternly criticized the government's conduct as

60. See id. See id. at 353 & n.97 See id. at 345 62. See id. at 345 (discussing letter KPMG sent to counsel for employees explaining new legal fees policy). "The form letter stated that KPMG would pay an individual's legal fees and expenses, up to a maximum of $400,000, on the condition that the individual 'cooperate with the government and . . . be prompt, complete and truthful.'" Id. (citation omitted).

63. See id. at 346 (discussing first memo sent to KPMG employees regarding potential contacts by government).

64. See id. (stating KPMG bowed to pressure from government and sent out second memo to its employees that suggested it was not necessary to have assistance of counsel when speaking with government investigators). After pressure from the U.S. Attorney's Office, KPMG put out a memo to its employees in the form of a Question and Answer document. See id. To the question, "do I have to have a lawyer?", the memo answered as follows:

No. Although we [KPMG] believe that it is probably in your best interests to consult with a lawyer before speaking to government representatives, whether you do so is entirely your choice. As we said in the March 12 OGC [Office of General Counsel] memorandum you may deal directly with government representatives without counsel.

Id. (first alteration added).

65. Id. at 347.

66. See id. (stating government "took full advantage" of KPMG's fear, and that KPMG's behavior was motivated by desire to prevent government from indicting it). Whenever KPMG failed to abide by the government's demands, the U.S. Attorney's office informed KPMG's outside counsel, Skadden, Arps, Meagher & Flom.
“evidenc[ing] a desire to minimize the involvement of defense attorneys.”

Furthermore, Kaplan concluded that the corporation’s decision “to cut off all payments of legal fees and expenses to anyone who was indicted and to limit and condition such payments prior to indictment upon cooperation with the government” was entirely the product of the pressure applied by the Thompson Memorandum and the prosecutors in the U.S. Attorney’s Office. Finally, Kaplan rejected the government’s argument that a company’s decision to advance former and current employees’ legal fees is indicative of that corporation’s cooperation. Kaplan thereby held that the government interfered with the KPMG defendants’ ability to defend themselves.

B. The Fifth Amendment: The Government Cannot Force the Cutoff of Legal Funds Available to Defendants

Turning to constitutional issues, Judge Kaplan stated the government coerced KPMG into withholding funds lawfully available to the defendants in violation of their fundamental right to fairness in a criminal trial.

See id. (discussing means by which government enforced its fee-payment demands). In every instance, Skadden informed the attorney of the individual who was refusing to cooperate that his or her legal fees would be cut off “absent an indication from the government within the next ten business days that [the individual in question] no longer refuse[d] to participate in an interview with the government.” Id. (footnote omitted) (first alteration in original).

67. Id. at 355 (expressing ire at behavior of government prosecutors who intended to minimize defendants’ legitimate access to resources lawfully available to them).

68. See id. (summarizing factual conclusions).

69. See id. at 364 (stating government’s objective was not sufficient to overcome strict scrutiny test). Kaplan further stated that the Thompson Memorandum “burdens excessively the constitutional rights of the individuals whose ability to defend themselves it impairs and, accordingly, fails strict scrutiny.” Id. at 364-65.

70. See id. at 362 (declaring government interfered with KPMG defendants’ ability to defend themselves by forcing KPMG to cut off resources that were lawfully available to them).

71. See id. at 357, 362 (declaring government violated Fifth and Sixth Amendment rights of KPMG defendants by pressuring KPMG to cut off their legal fees, thereby impairing on defendants’ ability to defend themselves); cf. U.S. Const. amend. V (articulating Due Process Clause that guarantees fairness in federal criminal proceedings); U.S. Const. amend. VI (laying forth Confrontation and Assistance of Counsel Clauses); U.S. Const. amend. XIV (articulating Due Process Clause that guarantees fairness in state criminal proceedings). Kaplan noted that, “[i]n short, fairness in criminal proceedings requires that the defendant be firmly in the driver’s seat, and that the prosecution not be a backseat driver.” Stein, 435 F. Supp. 2d at 358 (footnote omitted); see also, Chartered v. United States, 491 U.S. 617, 624 (1989) (stating defendant has right to be represented by qualified attorney and therefore reinforcing fairness requirement of equal access to legal protections); Faretta v. California, 422 U.S. 806, 820 (1975) (noting government must abstain from interfering with defendant’s right to counsel to meet fairness standard of Due Process Clause); Mayer v. City of Chi., 404 U.S. 189, 195-96 (1971) (maintaining prosecution cannot interfere with defendant’s effort to put forth best
The judge attacked the government’s interference with the KPMG defendants’ ability to put forth their best defense and was especially appalled at the prosecutorial meddling given the nature of complex corporate investigations and the type of legal representation necessary to prepare an adequate defense. Furthermore, Kaplan held that defendants have a fundamental right to “obtain and use” lawfully available resources without interference from the government when preparing their defenses.

Because the Thompson Memorandum and the behavior of the government violated the substantive due process rights of the defendants, its actions were therefore subject to strict scrutiny. Kaplan held that neither the language of the Thompson Memorandum advising prosecutors to consider advancement of legal fees a strike against a corporation nor the government’s exploitation of KPMG’s fear of indictment were narrowly tailored to satisfy the government’s goal of prosecuting corporate crime. The government’s actions failed the strict scrutiny test on the grounds that the Thompson Memorandum did not take the payment of legal expenses into account in making charging decisions only when such payments were part of a broader scheme to obstruct the government’s investigation. Rather, the policies reached situations even where a corporation was cooperating fully.

defense); Powell v. Alabama, 287 U.S. 45, 52-53 (1932) (holding defendant in capital case has right to counsel and more broadly, that due process demands fairness in criminal proceedings). Some scholars have categorized Kaplan’s interpretation of the Due Process Clause as a constitutional guarantee of a certain standard of fundamental fairness in criminal trials. See Harkness & Gabbay, supra note 13 (discussing constitutional dimensions of Kaplan’s holding). Indeed, the Fifth Amendment exists to preserve criminal defendants’ right “to present a complete defense, and [to] control the manner and substance of their defenses—including having counsel of their own choosing.”

72. For a further discussion of the extent to which the government interfered with the defense, see supra notes 50-70 and accompanying text.

73. See Stein, 435 F. Supp. 2d at 361-62 (observing that, if government prosecutes defendant, it may not simultaneously restrict defendant’s ability to craft defense); Harkness & Gabbay, supra note 15 (discussing Kaplan’s interpretation of Fifth Amendment Due Process Clause).

74. See Stein, 435 F. Supp. 2d at 362 (stating because fundamental rights were at issue, strict scrutiny test applied).

75. See id. (holding that government actions were subject to strict scrutiny because its interference “almost certainly . . . affect[s] what these defendants can afford to permit their counsel to do” and likely “impact[s] the defendants’ ability to present the defense they wish to present by limiting the means lawfully available to them”).

76. See id. at 363 (declaring that flaw in Thompson Memorandum is that it “does not say that payment of legal fees may cut in favor of indictment only if it is used as a means to obstruct an investigation”).

77. See id. (noting that text of Thompson Memorandum is flawed because it “strongly suggests that advancement of defense[ ] costs weighs against an organization independent of whether there is any ‘circling of the wagons’”).
C. Sixth Amendment: Government Is Not Allowed to Use Third Parties to Interfere with Defendants' Right to Counsel

Judge Kaplan also rejected the government's contention that the Sixth Amendment right to counsel had not yet attached at the time KPMG cut off payment of legal fees, even though the adversarial process had not technically begun.78 Because the government knew that both the Thompson Memorandum and the prosecutors' pre-indictment behavior would affect the KPMG defendants once they were indicted, Judge Kaplan held the Sixth Amendment was indeed implicated.79 He was especially galled by the government's behavior, noting that it was designed to minimize the KPMG defendants' ability to obtain resources necessary to pay their overwhelming legal costs.80 Kaplan further rejected the government's use of advancement of legal fees to measure corporate cooperation despite the possibility that payment of legal fees "occasionally might be part of an obstruction scheme or indicate a lack of full cooperation by a prospective defendant."81 Kaplan acknowledged that the doctrine of sovereign immunity prevented the court from compelling the government to pay the defendants' legal fees, but he invited them to sue KPMG directly for their defense costs.82

IV. Critics Smell Blood in the Water: Stein Leaves the Thompson Memorandum Vulnerable to Further Attack

The Stein decision has elated many people in the legal and business communities who are unhappy with the current state of government behavior and expectations during corporate criminal investigations.83 They

78. See id. at 366, 373 (dispelling government assertion that Sixth Amendment did not apply in KPMG case because time of questionable government action took place before defendants were indicted); see also Harkness & Gabbay, supra note 13 (discussing Kaplan's holding that in this instance, Sixth Amendment attached pre-indictment because government knew its behavior was likely to affect employees once they were indicted).

79. For a further discussion of the holding in Stein which stated the Sixth Amendment attached pre-indictment, see supra note 78 and accompanying text.

80. See Stein, 435 F. Supp. 2d at 366-67 (holding that government interfered with KPMG defendants' ability to pay legal costs).

81. See id. at 369 (declaring mere possibility of lack of full cooperation cannot overcome individual criminal defendants' constitutional rights).

82. See id. at 376, 378 (stating that KPMG defendants could not sue government directly for legal fees because of sovereign immunity but encouraging KPMG defendants to sue corporation directly for fees, assuring them motion would be handled swiftly); Arnoff & Jacobs, supra note 49, at 3 (noting KPMG defendants have since sued their former employer for legal fees).

83. See, e.g., Mark Hamblett, Kaplan Blasts U.S. Pressure on KPMG Case Fees: Judge Finds Government Violated Constitution It Was "Sworn to Defend", N.Y. L.J., June 28, 2006, at 1 (noting Stein was "eagerly anticipated by defense groups and business organizations such as the U.S. Chamber of Commerce and the Association of Corporate Counsel, who have become increasingly concerned at prosecutorial tactics they believe are eroding defendants' rights to counsel and a fair trial"); Terry Segal, Memo to Department of Justice: You Must Now Remove Your Thumb From the Scales,
have heralded it as the first blow to the oppressive prosecutorial tactics engendered by the Thompson Memorandum. While Stein is not binding on any other courts, its reasoning will likely affect Justice Department practice and the behavior of corporations under criminal investigation, and it may well be persuasive for other courts considering the same issues.

A. Thompson Memorandum Detractors Encouraged By Kaplan's Legal Analysis of the Fifth Amendment

Stein must be considered a victory for those who have argued that the Thompson Memorandum is flawed, particularly those who feel its assault on fundamental freedoms like the Fifth Amendment is misguided and is moving our system of justice away from its adversarial origins. The Supreme Court has stated that "while sometimes 'a shelter to the guilty,'" the Fifth Amendment often "protect[s]... the innocent" and reflects our legal system's "fundamental values and most noble aspirations." The Fifth Amendment represents the guiding principle that in a free society, using just procedures to determine guilt or innocence "[is] more important than punishing the guilty." Critics feel the Thompson Memorandum's dictates vastly increased the power of federal prosecutors and the

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84. For a further discussion of Stein representing the first judicial strike against prosecutorial tactics under the Thompson Memorandum, see supra notes 8-13.

85. See Hamblett, supra note 83 (stating Stein will change government policy on prosecution of corporate crime); Harkness & Gabbay, supra note 13 (declaring Kaplan's decision to declare legal fees portion of Thompson Memorandum unconstitutional "may have done much more than pave the way for a handful of defendants to get their lawyers paid"). In fact, Stein may lead the way toward the "rewriting of the rules of corporate cooperation in government investigations." Id.

86. See Ellard, supra note 6, at 988 (expressing concern that Thompson Memorandum penalizes employees under investigation, and ultimately corporations that employ them, for invoking Fifth Amendment); cf. Sheppard Testimony, supra note 7 (arguing "authentic cooperation means "providing prosecutors with the privileged notes of interviews with corporate employees who may have criminal exposure, yet [who] have little or no choice to refuse any request to speak with corporate counsel" in which case "employees effectively give statements to the government without ever having had a chance to assert their Fifth Amendment right against self-incrimination"). But cf. Buchanan, supra note 6, at 602 (stating Fifth Amendment is not guarantee that employees who refuse to cooperate with government investigation will nonetheless get to keep their jobs, as "cooperation with the corporation is part of the individual's employment obligation").


88. See Ellard, supra note 6, at 991 (quoting LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 452 (1968)) (describing protection intended by framers).
cost of invoking constitutional rights, making the consequences to the Fifth Amendment specifically and the American legal system generally very significant.89

B. Stein Leaves Critics Hopeful That Waiver Provision in the Thompson Memorandum Will Be Modified or Struck Down

Though Stein dealt only with the legal fees provision of the Thompson Memorandum, it pushed the door open for future legal challenges to the most objectionable portion of the Memorandum: its heavy emphasis on pressuring corporations under investigation to waive their attorney-client and work product privileges.90 Corporations compelled to disclose privileged information do more than sacrifice their constitutionally guaranteed rights; they also run the risk that they will be deemed to have waived privilege altogether, thereby impacting other litigation against them.91 The selective waiver doctrine, recently dubbed the "litigation dilemma,"92 has emerged as a potential solution to this problem.93 In jurisdictions adopt-

89. See id. at 993-94 (stating Thompson Memorandum has greatly weakened constitutionally guaranteed protection of Fifth Amendment in criminal corporate investigation setting). "While [the Thompson Memorandum] does not transform federal prosecutors into inquisitors, it does move the investigative, charging, and plea processes toward an inquisitorial system by shifting power from courts and juries to the Department of Justice and the U.S. Attorneys who work for it." Id. at 992.

90. For a further discussion of the argument that Stein leaves the door open to challenge other aspects of Thompson Memorandum, see infra notes 91-102.

91. See Wray & Hur, supra note 1, at 1173 (discussing implications of waiver of privilege). Commentators have described the selective waiver doctrine as follows: A company may intend its waiver to apply only to the specific materials disclosed to government investigators, but opponents could later argue—and courts could later agree—that the company’s disclosure constituted a waiver with respect to all communications or work product that relate to the same subject matter.

In addition, the current state of law means that a company’s waiver of privilege vis-à-vis the government will likely result in waiver in inevitable follow-on private or other civil litigation, even where the company seeks to avoid that result by negotiating a confidentiality agreement of a limited-waiver agreement stating that the waiver does not extend to third parties. Id.; see also Buchanan, supra note 6, at 606 (discussing implication of selective waiver doctrine on privileged disclosures to government); Harris & Stemmer, supra note 6 ("Without a doubt, zealous plaintiffs’ attorneys will request production of all privileged material turned over to the government based on principles of waiver."). Releasing a corporation’s proprietary information can cause “a great deal of harm to a corporation’s ongoing and prospective business dealings.” Id. More specifically, the information may be in and of itself "sufficient to establish plaintiffs’ claims.” Id.

92. See Wray & Hur, supra note 1, at 1173 (categorizing selective waiver doctrine as “litigation dilemma”).

ing the selective waiver doctrine, a company seeking to obtain cooperation credit from the government may disclose privileged information that would otherwise be protected by the attorney-client privilege or the work product privilege but will retain those protections against other parties such as third party plaintiffs. Today, though, most jurisdictions do not recognize the selective waiver doctrine, and therefore corporations that disclose privileged information to the government leave themselves vulnerable to mandatory disclosure of that same information in later litigation against the company.

waiver doctrine). At the June 2006 meeting of the Federal Judicial Conference’s Advisory Committee on Evidence Rules, a new Federal Rule of Evidence was approved to be published for comment in August. See id. at 1-2 (detailing Advisory Committee’s findings). The proposed version of Federal Rule of Evidence 502(c) provides in the proposed subsection (c):

Selective waiver—In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection—when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority—does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by state law. Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other governmental agencies or as otherwise authorized or required by law.

Id. at 5. Additionally, although the Committee acknowledged that the majority of courts have rejected the selective waiver doctrine, the note explains: “A rule protecting selective waiver in these circumstances furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations.” See id. at 12 (citing In re Columbia/HCA Healthcare Corp., 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J., dissenting)) (providing proposed Advisory Committee note to Rule 502(c)).

94. For a further discussion about the selective waiver doctrine, see supra note 93 and accompanying text and infra note 101.

95. See Elkan Abramowitz & Barry A. Bohrer, Waiver of Corporate Attorney-Client and Work Product Protection, N.Y. L.J., Nov. 1, 2005, at 3 (declaring unsettled case law regarding selective waiver has resulted in lack of protection and uncertainty surrounding issue). Corporations cannot anticipate whether they will be forced to waive protections and the result will depend entirely “on the jurisdiction in which the proceedings are held.” See id.; Harris & Stemmer, supra note 6 (“Most courts find that disclosing privileged information to the government or anyone else results in a waiver of the privilege as to any other third party.”). Courts that do not acknowledge the doctrine of selective waiver “require the production of all such material to the plaintiffs.” Id. Harris and Stemmer have said:

Although a minority of courts have decided that the production of privileged material to the government only results in a “selective waiver” and deny disclosure as to private third parties, the majority of courts recognize no such exception. Thus attorneys advising corporate clients to waive the privilege must also warn their clients of the substantial risk that private plaintiffs are bound to obtain copies of the material that was produced to the government.

Id. (citation omitted). In most cases, the cost of disclosure means that “once the privilege is waived, third party private plaintiffs’ lawyers can gain access to attorney-client conversations and use them to sue the company or obtain massive settle-
Recently, in *In re Qwest Communications International*, 96 the Tenth Circuit rejected the selective waiver doctrine on the grounds that the company was not unduly pressured by the government to reveal privileged information. 97 Instead, the court determined Qwest made that decision voluntarily. 98 *Stein,* however, directly contradicts the determination in *Qwest,* even though Kaplan issued his ruling just one week later. 99 *Stein* held that companies suspected of wrongdoing are faced with enormous pressure to cooperate with government investigations. 100 The reality is that, from the perspective of corporations under investigation, there is


The Tenth Circuit thus became the latest to join eight other circuits (the U.S. Court of Appeals for the First, Second, Third, Fourth, Sixth, Eighth, District of Columbia and Federal circuits [sic]) in rejecting this doctrine in certain circumstances, and declined to follow the Fourth and Eighth circuits, the only circuits to adopt selective waiver, at least in part, in similar circumstances (and even those two circuits are internally split in their application of the doctrine).

*Id.* Compare *In re Steinhardt Partners,* 9 F.3d 230, 235 (2d Cir. 1993) (denying selective waiver), and Westinghouse Elec. Corp. v. Philippines, 951 F.2d 1414, 1431 (3d Cir. 1991) (requiring corporation to provide third party with information previously disclosed to government), with Diversified Indus. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (holding disclosure of material to government did not result in waiver of privilege with respect to other litigation).

96. 450 F.3d 1179 (10th Cir. 2006).
97. See id. at 1192 (rejecting selective waiver doctrine); Hammel & Malionek, supra note 95 (describing facts and holding of *Qwest*).
98. See *Qwest,* 450 F.3d at 1192 (rejecting selective waiver doctrine in part on grounds that Qwest voluntarily turned over documents to government); see also Hammel & Malionek, supra note 95 (stating Tenth Circuit determined *Qwest* made disclosures of privileged information to government willingly). Two commentators noted:

The *Qwest* decision would appear, at first blush, to strike a blow against companies, like Qwest, struggling to balance their desire to cooperate (and gain credit from the government for cooperating) against the fear of a waiver of privilege and a resulting broader disclosure of otherwise-protected information to private litigants.

*Id.*

99. See Hammel & Malionek, supra note 95 (stating *Stein* dispelled notion that corporations make privileged disclosures to government voluntarily). "Exactly one week after *Qwest* was decided, any lingering doubt about the pressure felt by businesses to cooperate with government investigations (or risk crippling consequences, such as indictment) was dispelled [by *Stein*]." *Id.*

100. See United States v. Stein, 435 F. Supp. 2d 350, 347 (S.D.N.Y. 2006) (stating KPMG's behavior was entirely compelled to prevent government from indicting). For a further discussion about the pressures facing corporations to cooperate, see supra notes 19-28 and accompanying text.
sentially no choice but to cooperate fully. Stein leaves critics hopeful that the waiver provision of the Thompson Memorandum, like the legal fees provision, will be held unconstitutional based on a similar analysis of Fifth and Sixth Amendment principles, or that it will at the very least be the target of legislative action.

C. Critics Get Traction in Asserting That Thompson Memorandum Sacrifices Employees' Rights and Sidesteps Constitution

Given the recent willingness of corporations to throw their employees under the bus to save the company, commentators have argued that the Thompson Memorandum has created a "culture of cooperation." The Thompson Memorandum essentially instructs prosecutors to exploit a corporation's fear of indictment by basing favorable charging decisions on corporate cooperation. It thereby forces corporations to provide access to the product of internal investigations that would otherwise be privileged and "beyond law enforcement's reach."

101. For a further discussion of the pressure on a corporation to cooperate fully, see supra note 20 (describing current Justice Department practice, under which corporation is usually indicted if it fails to cooperate, which is price that most corporations are unwilling to pay in order to assert their constitutional and privilege rights). Once a corporation has agreed to cooperate, it must deal with the threat of the "litigation dilemma." See Hammel & Malionek, supra note 95 (discussing agonizing decision corporations face when deciding whether to share privileged information with government). Hammel and Malionek state: The decision to assert or waive the privilege against the government is a difficult one for businesses, as they seek to maximize their cooperation yet manage the threat of increasing their exposure in private litigation if they waive the privilege over potentially harmful documents. The recognition by the court in Stein that this decision is rarely one made 'freely' by businesses [is] in direct contradiction to the underpinning of Qwest . . . .

Id. (italics added).

102. See MacLean, supra note 5 ("Eventually, waiver of attorney-client privilege will fail under the same rationale that formed the basis of Kaplan's ruling on coerced denial of attorney fees."); cf. Hammel & Malionek, supra note 95 ("[T]he evidence laid out in meticulous detail in Stein of government pressure on businesses to show their cooperation with the government by, for example, waiving their attorney-client protections may provide the first 'brick' towards reversing the trend in the case law to reject selective waiver outright.").

103. See, e.g., MacLean, supra note 5 (stating corporations that waive privilege before any determination of guilt has been made are sacrificing employees' rights); Pickholz & Pickholz, supra note 6 (stating changes in law enforcement's behavior resulting from Thompson Memorandum have "opened a Pandora's box . . . for employees").


105. See id. at 35 (stating corporations attempting to cooperate "must rely on their counsel, who have in essence become deputized by the federal government").
Detractors of the Thompson Memorandum say it minimizes the involvement of defense lawyers in assisting employees and pressures corporations under investigation to limit or eliminate the advancement of legal fees and to threaten to terminate those employees who decline to cooperate or are indicted. Critics are therefore encouraged that Stein so clearly calls into question the coercive nature of the Thompson Memorandum and recognizes that its policies sacrifice the rights of employees.

Another common criticism of the Thompson Memorandum is that it makes the jobs of prosecutors easier at the cost of circumventing constitutional protections. Rather than sticking to traditional methods of prosecution, prosecutors essentially use a corporation's own counsel to conduct the investigation de facto for the government. By pressuring

106. See William M. Sullivan, Jr. & Kevin M. King, Striking Down the Thompson Memo: New York Court Properly Finds Problems with Government Tactics, L. TIMES, Aug. 21, 2006, at 36 (stating Thompson Memorandum mandates of "cooperation" result in minimizing involvement of defense attorneys and eliminating payment of legal fees to employees who refuse to cooperate and thereby sacrifice employees' rights).

107. For a further discussion about the concern that the Thompson Memorandum sacrifices employees' rights and the reasons critics find Stein encouraging, see supra notes 103-06 and accompanying text.

108. See Meese Testimony, supra note 20 (stating government may not use third party to do indirectly what it could not do directly). Meese stated that "the Constitution would not have allowed the prosecutors in Stein to "subject the KPMG defendants' bank accounts to forfeiture with the sole justification and for the sole purpose of depriving them of the money they needed to retain competent legal counsel" or to "threaten the KPMG defendants with the loss of employment if they refused to proffer testimony during the investigation or invoked their Fifth Amendment rights." See id.; Kirchgaessner, supra note 5 (pointing out while prosecutors say Thompson Memorandum makes it easier to convict individuals, fundamental constitutional rights are being violated in process). But cf. McNulty Testimony, supra note 6 (stating Justice Department "see[s] nothing wrong in asking a corporation to disclose . . . the results of their internal investigation to assist [the government] in investigating a corporation's claim of innocence"). McNulty defended the Thompson Memorandum as a means to "conserve[ ] public and private resources" and a method to speed up time-consuming investigations. See id. (describing purpose of Thompson Memorandum).


When corporate wrongdoing comes to light, companies typically engage outside counsel, who conduct interviews, review documents, and prepare extensive work product, such as interview memoranda, reports, chronologies and other summaries. Under the Thompson Memo, prosecutors could take into account a company's decision to disclose such privileged materials to the government in assessing "the completeness of its disclosure" of any wrongdoing.

In practice, many prosecutors requested disclosure of the results of internal investigations as a matter of course. Companies, although loath to risk a waiver that would permit other governmental agencies and plaintiffs in related civil litigation to obtain the work product of their counsel
corporations to condition continued employment on cooperation with an internal investigation—the product of which will ultimately be turned over to the government—the government is essentially using the threat of termination to coerce the corporation's employees to waive their Fifth Amendment right to remain silent in the face of a criminal investigation.\footnote{Id.}

In response to such allegations, defenders of the Thompson Memorandum argue its policies are in place because corporate fraud victimizes the average, unsophisticated investor.\footnote{Id. See Garrity v. New Jersey, 385 U.S. 493, 500 (1967) (holding Fifth Amendment rights of police officers who were threatened with termination if they did not cooperate with government investigation were violated); \textit{see also} Wray \& Hur, \textit{supra} note 1, at 1172 (stating Thompson Memorandum's heightened emphasis on cooperation "erode[s] the attorney-client privilege by creating a de facto requirement that companies waive the privilege to avoid criminal charges"); Janis, \textit{supra} note 104, at 35 (noting that by compelling disclosure of counsels' reports, government is essentially killing corporation from inside out); cf. Andrew Grainger \& Martin Newhouse, \textit{Misusing Courts Against Companies}, \textit{Boston Globe}, May 10, 2005, at A15 ("Prosecutors should do the work required by law to prove their cases instead of threatening corporate suspects with extinction if they seek a trial.").} They argue that the prosecutorial tactics in question attempt to lessen these casualties by making it easier for the government to identify corporate wrongdoing, to assess quickly whether a criminal investigation is required and to act swiftly to take ameliorative action.\footnote{Id. See, e.g., Buchanan, \textit{supra} note 6, at 587 ("These crimes cause[ ] tremendous losses to investors, lenders, employees, consumers and many others, as well as adversely impact[ ] financial markets."); Christie \& Hanna, \textit{supra} note 5, at 1048 (noting corporate crime victimizes average citizens). Discussing the real-life impact fraud in corporate America has on innocent people, Christie and Hanna state: Securities fraud is, to say the least, a serious offense carrying with it a grave risk of harm to the public. In a world that has seen corporate debacles at Enron, WorldCom, Adelphia, Cendant and others, no one should need reminding that millions of people depend on American corporations—and their financial disclosures—for their personal financial well-being. Jobs, investments, retirement funds and indeed, the health of our economy depend on publicly traded companies doing what Congress mandated in the 1930s: disclosing all material facts so that financial risk can be assessed and financial decisions can be made with eyes wide open. Id.} Although critics acknowledge that the Thompson

\footnote{110. See Christopher A. Wray, Assistant Att’y Gen., Criminal Div., U.S. Dep’t of Justice, Remarks to the American College of Trial Lawyers 4-5 (Mar. 6, 2004), \textit{available at} http://www.usdoj.gov/criminal/press_room/speeches/2004_2985_rmrk03 0604ACTLPhoenixinter.pdf (stating that overriding concerns of public are achieved using Thompson Memorandum since "real-time response to allegations of fraud is critical to maintaining confidence in the markets and the economy as a whole").}
Memorandum creates a uniform policy throughout widespread jurisdictions, they nonetheless assert that whatever small benefit uniformity brings is dwarfed when compared to the sidestepping of constitutional liberties that occurs under the current policy. Stein’s criticism that the Thompson Memorandum makes the government’s job easier by allowing prosecutors to skirt constitutional roadblocks has therefore validated the existing objections of the defense bar.

Perhaps one of the most disturbing aspects of the Thompson Memorandum to critics is that it was not the product of any legislative action and has not—until now—been subject to judicial scrutiny, and yet it is the law. The Justice Department did attempt to clarify its position on waiver in the 2005 “McCallum Memorandum,” which instructed all United States attorneys to obtain permission from their supervising prosecutors before seeking waivers. Critics contend, however, that the latest revision does nothing to address their complaints regarding the waiver provision and consequently is not a sufficient modification.

113. See, e.g., Christie & Hanna, supra note 5, at 1046 (defending Thompson Memorandum on basis that guidelines help huge army of federal prosecutors who are separated by distance and jurisdiction by providing them with sense of unity and underlying principles).

114. For a further discussion of the argument that the Thompson Memorandum skirts the Constitution, see supra notes 108-14 and accompanying text.

115. See, e.g., Donohue Testimony, supra note 95 (lamenting that Thompson Memorandum was implemented “without the involvement of Congress or the judiciary”); Harkness & Gabbay, supra note 15 (“Congress did not legislate these rules, nor were they the product of an administrative rule making.”); Kirchgaessner, supra note 5 (noting Thompson Memorandum “was developed without any kind of congressional or judicial involvement”); cf. Danforth, supra note 6 (“[T]oo much power lies in relatively inexperienced people in the field, unchecked by Congress or courts.”).


117. See Donohue Testimony, supra note 95 (stating McCallum Memorandum is ineffective and does nothing “to change [the] internal policy that penalizes companies for preserving their attorney-client privilege”); The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) [hereinafter Mathis Testimony] (statement of Karen J. Mathis, President of Am. Bar Ass’n), available at http://judiciary.senate.gov/testimony.cfm?id=2054&wit_id=5742 (stating McCallum Memorandum “does not establish any minimum standards for, or require national uniformity regarding, privilege waiver demands by prosecutors”). Mathis insisted that despite the Justice Department’s claims that it has revised the guidelines, it still “has not yet taken steps to reexamine and remedy its role in the growing problem of government-coerced waiver.” Id. at 5; accord Meese Testimony, supra note 20 (deriding Justice Department claim that McCallum Memorandum is “significant reform” and complaining it does nothing to address major criticisms of Thompson Memorandum). But cf. McNulty Testimony, supra note 6 (defending McCallum Memorandum as “a strong and fair response to corporate counsel’s complaints that
therefore hopeful that *Stein* will force the Justice Department to realistically assess its policy and implement meaningful change.\(^{118}\)

V. **Judge Kaplan Keeps Hammering Away: Subsequent *Stein* Rulings Do Not Bode Well for Justice Department Policy**

Many aspects of the Thompson Memorandum remain intact after *Stein*, but critics consider Judge Kaplan's holding the “most promising development thus far, despite its attack on the fee provisions rather than privilege waiver.”\(^{119}\) Moreover, there have been major setbacks to the government's case against KPMG. That, coupled with the increased drumbeat for change, suggests that future revisions of Justice Department policy may be on the horizon.\(^{120}\)

Judge Kaplan recently issued two additional important decisions in the KPMG case.\(^{121}\) In his second KPMG opinion, issued just a month after *Stein*, Kaplan suppressed certain employee statements made during the course of the government’s investigation.\(^{122}\) Kaplan held that, because of individual [Assistant United States Attorneys] had too much autonomy in making waiver requests during an investigation”.

118. See, e.g., MacLean, *supra* note 5 (stating *Stein* has encouraged “defense lawyers to push back against the government’s pressure by . . . calling on Congress to get involved”); Sullivan & King, *supra* note 106 (declaring *Stein* is “significant setback for the Department of Justice” and will “encourage challenges to the department’s often-problematic policies and their strong-arm application by frontline prosecutors”).

119. Lynnley Browning, *Judge Blasts Prosecutor Fee Pressure: Ruling on Controversial “Thompson Memo” May Open Doors in Attorney-Client Privilege Battles*, ABA J. E-REPORT, July 7, 2006, http://www.abanet.org/journal/ereport/jy7memo.html (describing legal community’s enthusiasm over *Stein* and noting that despite its assault only on fee provision, many think *Stein* is first step to overcoming waiver provision); see also Hamblett, *supra* note 83 (noting *Stein* is in line with perception by defense groups that Justice Department policy is overzealous and tramples on fundamental rights); cf. Peck, *supra* note 12 (“Although the Stein decision is only a District Court opinion, the decision should carry weight outside the Southern District of New York and affect prosecutorial policy nationwide.”). *Stein* is taking place in the Southern District of New York, where “[a] significant number of white-collar criminal cases are tried, . . . and [the Southern District’s] opinions tend to be influential” in this area. *Id.*; see also Sullivan & King, *supra* note 106 (noting that while currently *Stein* only applies to Southern District of New York, “Kaplan’s sharply critical opinions mark a significant defeat for the Department of Justice and, in particular, the Thompson memo”). Sullivan and King further observed that “[Kaplan’s] court is an important venue for corporate and white-collar prosecutions, and its pronouncements always have been highly influential.” *Id.*

120. See *Taxes and Justice*, WALL. ST. J., Sept. 20, 2006, at A26 (stating Judge Kaplan is displeased with behavior of prosecutors in KPMG case because they have been slow to produce documents requested by defendants’ lawyers).


122. See *Stein II*, 440 F. Supp. 2d at 337 (stating employees would not have proffered evidence absent economic coercion); see also Bar, *supra* note 20 (discussing holding in *Stein II*, in which Judge Kaplan suppressed proffers made by two
the government's pressure, KPMG threatened to cut off legal fees and to fire uncooperative employees, which in turn compelled two defendants to make statements to investigators that they would not have made absent the economic coercion.\textsuperscript{123}

Since then, Kaplan has refused to dismiss a civil lawsuit brought by the KPMG defendants demanding that KPMG pay their defense costs in the criminal case.\textsuperscript{124} Kaplan also denied KPMG's request for a jury trial to determine whether the corporation must advance defense costs to the KPMG defendants because their claim was for specific performance of a contract and hence equitable in nature.\textsuperscript{125} Although KPMG is appealing

former KPMG officials to prosecutors during government's investigation on grounds statements were taken in violation of defendants' Fifth Amendment rights). Bar, a frequent commentator on the KPMG case, summed up \textit{Stein II} as follows:

At a suppression hearing, two movants—former KPMG employees—testified that KPMG told them they would be fired unless they cooperated with the government's probe. The court suppressed the movants' statements as coerced in violation of the Fifth Amendment right against self-incrimination. The movants presented evidence of a subjective belief of no real choice but to speak and also that a reasonable person would have felt the same way.

\textit{Id.}

\textsuperscript{123} See \textit{Stein II}, 440 F. Supp. 2d at 337 (suppressing pre-trial proffer statements made by two KPMG defendants on grounds that statements were made only because of government's threats that employees had to talk). The court based its analysis on the reasoning in \textit{Garrett v. New Jersey}, 385 U.S. 493 (1967), in which police officers were subjected to threats of termination if they did not answer questions that would have exposed them to criminal prosecution. See \textit{Stein II}, 440 F. Supp. 2d at 328 (describing statements as "coerced"). The \textit{Garrett} Court held that such economic coercion to secure a waiver of the privilege against self-incrimination violates the Fifth Amendment. See \textit{id.} at 329 (noting that officers likely spoke "because their jobs were on the line").

\textsuperscript{124} See David Reilly, \textit{KPMG Case Ordered to Trial on Legal Bills to Ex-Officials}, \textit{Wall St. J.}, Sept. 7, 2006, at C4 (noting Kaplan has denied request by KPMG to dismiss civil lawsuit brought by KPMG defendants who allege corporation must pay for their defense in criminal case). The civil case will determine whether the former employees had an implied contract that required KPMG to pay legal fees. See \textit{id.} If there was a contract, "the firm could have to pay millions of dollars for their defense." \textit{Id.}

\textsuperscript{125} See \textit{Stein III}, 452 F. Supp. 2d at 280-81 (rejecting KPMG's request for jury trial); see also Beth Bar, \textit{Kaplan Denies KPMG Request for Jury Trial on Defense Fees}, \textit{N.Y. L.J.}, Sept. 20, 2006, at 1 (stating Kaplan has denied KPMG's request for jury trial in criminal case against KPMG defendants). KPMG filed its answer to the civil complaint filed by its former employees on the same day Kaplan rendered his decision on the jury issue. See \textit{id.} KPMG argued that its former employees are barred from suing it for legal fees, in whole or in part, because they "have unclean hands and are at fault in bringing about any loss and harm they might suffer." \textit{Id.} The corporation also asserted that forcing it to pay a sum that could be in the millions of dollars range "would amount to an unconstitutional taking in violation of its due process rights." \textit{Id.}
the ruling, Judge Kaplan has denied its request to stay the proceedings until the firm can challenge the ruling. If the Second Circuit Court of Appeals upholds Stein and the unconstitutionality of the legal fees portion of the Thompson Memorandum is affirmed, an assault on the attorney-client and work product privilege waivers will certainly not be far behind. But even if the Second Circuit ultimately disagrees with Judge Kaplan’s analysis, Stein has, nonetheless, had the kind of immediate impact on prosecutorial behavior for which most defense lawyers have been hoping. Kaplan is well regarded, and the Stein decision has engendered national praise and widespread attention. Already, at least one other district court judge has expressed similar dismay at Justice Department tactics. Moreover, the Stein decision

126. See KPMG Will Appeal a Legal-Fees Case, WALL ST. J., Sept. 19, 2006, at C6 (stating KPMG will appeal Kaplan’s ruling allowing KPMG defendants to sue firm for legal fees in connection with criminal case). KPMG also asked Judge Kaplan to delay issuing any further rulings related to the lawsuit until an appeal can be heard by the U.S. Second Circuit Court of Appeals, a request which he has since refused. See id. (detailing KPMG request). Separate from that request, KPMG also filed counterclaims against five of the former executives, arguing that they breached their fiduciary duty to their firm in regard to their “supervision of the tax-shelter sales,” or in the alternative, that they “embezzled from the firm or defrauded it by entering into side agreements related to them.” Id.

127. Cf Sullivan & King, supra note 106 (stating if Second Circuit upholds Stein, decision will be influential and impact Justice Department policy).

128. See, e.g., MacLean, supra note 5 (noting Stein has already impacted behind-the-scenes behavior of prosecutors during negotiations with corporations under investigation). MacLean quotes various white-collar defense attorneys, who have said “[Stein] has had a definite, immediate effect on the way [prosecutors] treat companies and that prosecutors are being “far less aggressive in trying to drive a wedge between corporate counsel and lawyers for individuals.” Id.; see also, Kirchgessner, supra note 5 (observing that “anecdotal evidence suggests prosecutors are already taking a more cautious approach in discussions with companies,” at least with respect to cutting off attorneys’ fees to individuals under investigation).

129. See, e.g., Coffee, supra note 12 (acknowledging analysis in Stein is well-respected and deserving of praise). According to Coffee, Stein “has attracted national attention, and was a clear winner, because it has allowed defense counsel all over the country to sleep more soundly, knowing that their fees are safe.” Id.; see also Paul Davies, KPMG Case Sets Up Key Ruling on Legal Fees, WALL ST. J., June 5, 2006, at C2 (noting Kaplan is respected and has strong reputation in white-collar crime.) Kaplan’s decision will likely set precedent and garner a lot of attention given his distinguished reputation among judges and scholars alike familiar with white-collar criminal issues. See id. (describing Kaplan’s track record in white-collar litigation as “well-regarded”); Segal, supra note 83 (stating Stein “has attracted national attention” in part because of Kaplan’s outspoken opinions).

130. See Segal, supra note 83 (noting legal issues in Stein bear strong similarity to pending federal criminal prosecution in New Hampshire). Segal described the situation in New Hampshire as follows:

In New Hampshire, officers and employees of Enterasys Networks (ETS) … were indicted in federal court for “cooking” the company’s books, i.e., issuing false and misleading financial statements, overstating the company’s earning and understating its losses. Under the corporation’s Delaware bylaws, ETS was required to advance legal fees and costs to the
appears to have emboldened certain other corporations to refuse to waive privileges. The government recently indicted Milberg Weiss Bershad & Schulman LLP, a class action law firm, and it is widely speculated that this is because the firm refused to waive its attorney-client privilege. Kaplan’s watershed ruling undoubtedly influenced Milberg Weiss’s decision to fight the government’s tactics, and therefore is likely to impact the waiver provision of the Thompson Memorandum.

officers and indemnify them. (In both the KPMG and ETS cases, the defendants were acting in their roles as employees executing policies on behalf of and for the benefit of their corporate employer.) Once ETS learned that the DOJ was considering indicting the corporation, ETS agreed to cooperate. Relying on the Thompson memo, the DOJ “strongly advised” ETS to stop paying indicted officers’ legal fees. Implicit in the government’s “suggestion” was that the canceling of defense reimbursement to its executives was critical to the determination of cooperation. ETS complied, fearful of being indicted and not being viewed as “cooperative.” Defense counsel for the indicted ETS officials filed motions challenging this action as a violation of their clients’ Sixth Amendment rights. In March 2006, New Hampshire U.S. District Judge Paul Barbadoro expressed serious concerns about the government’s overreaching. Based on the judge’s stated concerns, ETS reversed itself and agreed to continue paying the legal fees.

Id. Segal asserts that these cases “graphically illustrate how the DOJ is overstepping, even compromising, the Sixth Amendment right to counsel.” Id.; see also, David M. Laigaie & Richard S. Kraut, Courts Push Back Against Governmental Overreaching, LEGAL INTELLIGENCER, July 26, 2006, at 7 (discussing recent cases in which judges have criticized Justice Department policies). Laigaie and Kraut characterize these decisions as a prime example that “the pendulum of corporate criminal enforcement may have swung too far.” Id.; cf. Peck, supra note 12 (suggesting another possible impact of Stein will be to heighten skepticism of other courts when they are forced to review aspects of Thompson Memorandum).

131. For a further discussion of Milberg Weiss, see infra notes 132-33 and accompanying text.

132. See Leahy Testimony, supra note 5 (stating Justice Department indicted Milberg Weiss “after that law firm refused to sign a deferred prosecution agreement that would have required the firm to waive the attorney-client privilege”); MacLean, supra note 5 (noting many critics believe Milberg Weiss was indicted because it refused to cooperate by waiving its privileges); Milberg Weiss Bershad & Schulman LLP, Our Statements (July 17, 2006), http://milbergweissjustice.com/ourstatements.php (announcing Milberg Weiss entered “not guilty” plea to government charges and called indictment unprecedented and unfair).

133. See Milberg Weiss, Bershad & Schulman LLP, Our Statements, (June 28, 2006), http://milbergweissjustice.com/ourstatements.php (applauding Stein as ruling that affirms “every defendant’s right to the due process guaranteed by the U.S. Constitution and a refutation of the government’s insistence that to avoid indictment, companies must refuse to advance the legal fees of their employees”). The statement calls the waiver of privileges, like witholding legal fees, an “unreasonable concession for the government to require in the name of cooperation” and says Milberg Weiss is hopeful “that courts will continue to hold the Justice Department accountable for such overreaching use of the Thompson Memorandum.” Id.; see also Browning, supra note 119 (discussing implication of Stein and suggesting it will impact waiver provision of Thompson Memorandum). Because most of Kaplan’s legal analysis focuses on why prosecutors cannot “manipulate criminal procedure to make the process unfair” it seems likely “to apply to other areas of the Thompson [Memorandum],” including waiver of attorney-client privi-
VI. POSTSCRIPT: STEIN'S IMPACT ON REVISIONING THE THOMPSON MEMORANDUM

A. Justice Department Summoned Before Congress to Answer Questions About Thompson Memorandum

After Stein, the prospect of the Justice Department adhering to its policy without modification to the Thompson Memorandum’s cooperation guidelines was never strong. Even before Stein, the legal community had already put forth many of the criticisms embraced by Judge Kaplan. In March 2006, for example, a subcommittee hearing of the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security elicited bipartisan criticism of the Thompson Memorandum. Then, in April, a

le. Id. (quoting Stephanie Martz, Director of National Association of Criminal Defense Lawyers’ White Collar Crime Project); see also Lynley Browning, KPMG Judge Issues Rebuke To Prosecutors, INT’L HERALD TRIB., June 29, 2006, at 13 (citing scholars who call Kaplan’s opinion “a well-reasoned attack” on Thompson Memorandum and state decision will likely be “a death blow” to at least legal fees provision of guidelines). The Department of Justice may be forced to reevaluate its policy on corporate prosecution if it is apparent that courts are resisting the application of the Thompson Memorandum in an attempt to frustrate the policies contained therein. See id.

134. See Pickholz & Pickholz, supra note 6 (asserting Thompson Memorandum needs serious modification and without real changes that address employees’ rights, judicial intervention is likely).

135. See, e.g., Browning, supra note 119 (noting Kaplan’s scathing assault of Thompson Memorandum in Stein echoes sentiments already expressed by other groups). Browning said:

This knock against the Thompson memo comes on the heels of a series of recent complaints about the provision encouraging waiver of attorney-client privilege. Last August, the [American Bar Association] House of Delegates joined the debate, passing a resolution opposing “policies, practices and procedures of governmental bodies that have the effect of eroding the attorney-client privilege and work product privilege.”

Id.

136. See White Collar Enforcement: Attorney-Client Privilege and Corporate Waivers: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 109th Cong. 1 (2006) [hereinafter House Hearings] (statement of Howard Coble, Member, H. Comm. on Judiciary) (“But the possible benefits of cooperation cannot be used to support a prosecutor’s laundry list of demands for a cooperating corporation.”). Congressman Coble stated:

Prosecutors must be zealous and vigorous in their efforts to bring corporate actors to justice. However, zeal does not in my opinion equate with coercion in fair enforcement of these laws. To me, the important question is whether prosecutors seeking to investigate corporate crimes can gain access to the information without requiring a waiver of the attorney-client privilege. There is no excuse for prosecutors to require privilege waivers as a routine matter, it seems to me.

Id.; see also Mathis Testimony, supra note 117 (noting Subcommittee members from both sides of political spectrum advocated need to preserve attorney-client privilege and expressed serious concerns about language of Thompson Memorandum regarding waivers); House Hearings, supra, at 5 (statement of Robert C. Scott, Ranking Member, Subcomm. on Crime, Terrorism and Homeland Security) (“It is one thing for officials of a corporation to break the attorney-client privilege in their own self-interest by their own volition. It is another thing for the Department
U.S. Sentencing Commission committee organized to update the Sentencing Guidelines declined to include an amendment to the provisions that encouraged prosecutors to seek waivers, indicating that at least some governmental entities are rethinking their original support for the Thompson Memorandum’s position.\footnote{See, e.g., Lynnley Browning, Ex-Officials of Justice Department Oppose Prosecutors’ Tactic in Corporate Criminal Cases, N.Y. TIMES, Sept. 7, 2006, at C4 (discussing developments that indicate U.S. Sentencing Commission is rethinking its position discouraging legal fees payments and insisting on waivers); see also Wray & Hur, supra note 1, at 1118 (summarizing 2004 commentary to amendment that made it clear that “full cooperation [would] include—indeed, in some circumstances [would] require waiver of attorney-client privilege and work-product protections”). The commentary stated that “[w]aiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score . . . unless such a waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.” Id. (quoting U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 cmt. n.12 (2004)). But on April 5, 2006, the U.S. Sentencing Commission voted unanimously to rescind the amendment to the Commentary that encouraged prosecutors to require corporations to waive the attorney-client privilege and work product protections in exchange for “cooperation” credit. See Horowitz & Oliver, supra note 5, at 1039 (discussing Commission’s decision to repeal commentary in amended guidelines); Harris & Stemmer, supra note 6 (stating Commission “agreed to revise the commentary and eliminate any reference to the waiver of privilege” because of “adverse comments submitted by various bar associations and other organizations”); cf. Mathis Testimony, supra note 117, at 4 (stating Commission’s vote to remove privilege waiver language from Guidelines is “positive and encouraging”).}

Since \textit{Stein}, too, criticism of the Thompson Memorandum has mounted.\footnote{For a further discussion of the increasingly heated commentary since \textit{Stein}, see infra notes 134-44.} In early September 2006, ex-Justice Department officials sent a letter to Attorney General Alberto Gonzales asking the government to amend the Thompson Memorandum by curtailing prosecutorial tactics that encourage companies to waive privileges and to cut off legal fees to non-cooperative employees.\footnote{See Mathis Testimony, supra note 117 (stating three former Attorneys General, three former Deputy Attorneys General and four former Solicitors General signed letter, which expresses “opposition to the privilege waiver provisions of the Thompson Memorandum”). Mathis called the letter remarkable because its authors were mostly former Justice Department administrators. See id. (recognizing authors, and stating letter “demonstrates just how widespread concerns over the Department’s privilege waiver have become”); Browning, supra note 133 (discussing letter written by ex-officials of Justice Department that calls for elimination of waiver and legal fees provisions of Thompson Memorandum). Employees are discouraged from openly talking to in-house counsel, who are then impeded in their ability to effectively “counsel compliance with the law.” See Mathis Testimony, supra note 117 (explaining that this harms companies and investing public).}

That same month, a Senate Judiciary Committee hearing evaluated the Justice Department’s policy of requiring corporations that wish to be regarded as cooperating to waive their attorney-
client and work product privileges. At the hearing, a top-ranking official of the Justice Department indicated the government would consider, albeit reluctantly, making changes to the Thompson Memorandum.

To really quell criticism, though, the Justice Department would have to jettison the most objectionable portions of the Thompson Memorandum: the legal fees and privilege waiver provisions. Edwin Meese III, a former attorney general under President Reagan, made that very suggestion during his testimony before the Senate Committee. Indeed, other prominent members of the legal and business communities, including a former director of the Enron task force and the president of the American Bar Association, all urged the Justice Department to strike both the waiver and termination of legal fees guidelines from the Thompson Memorandum.

B. Thompson Gets Replaced; Will the McNulty Memorandum Bring Real Change or More of the Same?

In December 2006, the Department of Justice finally responded to criticism of the Thompson Memorandum by restricting the circumstances under which prosecutors may seek waivers of confidential information. The “McNulty Memorandum,” issued by Deputy Attorney General Paul McNulty, revises the controversial waiver provisions of the Thompson Memorandum.

140. See John Hasnas, Do Nothing, WALL ST. J., Sept. 16, 2006, at A9 (discussing Senate Judiciary Committee hearings and noting “questions have been raised about [the Justice Department’s] policy of charging individuals with obstruction of justice for lying to or concealing information from corporate counsel during internal investigations”).

141. See McNulty Testimony, supra note 6 (pledging that Justice Department is open minded and “welcome[s] constructive criticism”). McNulty acknowledged that the “time may come when revisions are needed to this policy” but said modifications would be made when the Justice Department was convinced they were “necessary and in the public interest.” Id.; see also Lynneley Browning, Justice Department Is Reviewing Corporate Prosecution Guidelines, N.Y. TIMES, Sept. 13, 2006, at C3 (noting Justice Department defended its policies at Senate Judiciary Hearing but also might be willing to consider revising guidelines).

142. For a further discussion of what critics of the Thompson Memorandum suggested at the Senate Judiciary Committee hearing, see infra notes 143-44 and accompanying text.

143. See Meese Testimony, supra note 20 (calling for reforms to Thompson Memorandum that eliminate any consideration of corporation’s waivers of payment of employees’ legal fees when making indictment decision); Browning, supra note 141 (describing former attorney general’s testimony).

144. For a discussion of the legal community’s opposition to the waiver and legal fees guidelines of the Thompson Memorandum, see supra note 6 and accompanying text.

Memorandum.146 Previously, the Justice Department had responded to criticism of the so-called waiver requirement of the Thompson Memorandum in several ways.147 First, the government contended the Thompson Memorandum contained the same language regarding waiver as did its predecessor, the "Holder Memorandum."148 Second, although most investigations necessitate certain waivers, the government does not seek disclosure of all privileged materials.149 Third, the government argued that it willingly enters into confidentiality agreements with companies so that privileged information cannot be used in other litigation against those companies.150 Finally, the government alleged that it had not seen any empirical evidence to support the criticism that waiver-related concerns have inhibited companies from freely reporting misconduct or turning over the results of internal investigations.151

Nonetheless, critics argued that the burdens associated with corporate cooperation in a government investigation, namely waiver of privileges, is simply too high a price to pay.152 Immediately following the Stein decision, the Justice Department issued a press release stating the government

146. See McNulty Memorandum, supra note 145; see also Marcia Coyle, The McNulty Memo: Real Change or Retreat?, N.J. L.J., Dec. 25, 2006, at 17 (stating McNulty Memorandum replaces Thompson Memorandum).

147. For a further discussion of arguments defending the Thompson Memorandum, see infra notes 148-51 and accompanying text.

148. See Wray & Hur, supra note 1, at 1175 (pointing out that waiver policy was in place before and changed very little by Thompson Memorandum). Compare Thompson Memorandum, supra note 2, at pt. II, ¶ 4 (noting that prosecutors will consider "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work-product protection"), with Holder Memo, supra note 2, at pt. II, ¶ 4 (containing identical language).

149. See Wray & Hur, supra note 1, at 1176 (noting government does not seek waiver of all privileged materials but rather wants "roadmap" of sorts to uncover criminal wrongdoing); see also, e.g., Privilege in Peril? Debate Heats Up at Federalist Society Event, Corp. Crime Rep., Jan. 12, 2006, at 4, available at http://www.corporatecrimereporter.com/privilege011206.htm (declaring government only requires corporation to provide enough material so that government may do its job efficiently).

150. See Wray & Hur, supra note 1, at 1176 (discussing government's use of confidentiality agreements to assuage fears of corporations cooperating with government investigations that are worried about being forced to disclose that same information in other litigation); see also The Justice Department's Rational Approach to Deterring Corporate Crime, Metropolitan Corp. Couns., July 2005, at 53 (outlining government's use of confidentiality agreements as means to protect corporations that choose to cooperate with government investigations from waiver issue in third party litigation).

151. See Wray & Hur, supra note 1, at 1176 (recounting government's defense of Thompson Memorandum); see also Interview with United States Attorney James B. Comey Regarding Department of Justice's Policy on Requesting Corporations Under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection, U.S. Att'y's Bull., Nov. 2003, at 1, 3 (stating government has seen no proof that waiver provision is deterring corporations from cooperating fully).

152. For a further discussion of the argument that the Thompson Memorandum mandates waiver of privilege, see supra note 6.
ment remained committed to the policies of the Thompson Memorandum, and defended its hardball tactics as necessary in an era of corporate scandal and greed. Ultimately, though, it could not withstand the virulent opposition to its policies embodied in the Stein decision.

The latest revision to Justice Department policy makes several changes to the Thompson Memorandum; whether those changes are significant remains uncertain. For prosecutors requesting privileged materials, the McNulty Memorandum creates a two-tiered approach based on the type of information involved. Regardless of the sort of information involved, waivers may only be sought in “rare circumstances[,]” and federal prosecutors will be required to establish a “legitimate need” for privileged information. More importantly, prosecutors will need to obtain written approval from the Deputy Attorney General before asking for waivers from companies under investigation. Additionally, and most significantly with respect to Stein, a company’s decision to advance attorney fees will only be taken into account under the most extraordinary of circumstances.


154. See Gina Passarella, White Collar Bar Wants More from Department of Justice, L. INTELLIGENCER, Dec. 14, 2006, at 1 (“After pressure from judges, Congress and the corporate world, the Justice Department announced this week a series of policy changes that aim to stop prosecutors from using a corporation’s refusal to share certain information as a check against the company when it comes time to decide whether to prosecute.”).

155. For a further discussion of the impact the changes, if any, the McNulty Memorandum will bring to the policies of the Justice Department, see infra notes 156-65 and accompanying text.

156. See McNulty Memorandum, supra note 145, at pt. VII, § B, ¶ 2 (outlining two-tiered approach for disclosure of privileged materials); see also Coyle, supra note 146 (noting there are two different categories of privileged materials at issue under McNulty Memorandum). For Category 1 materials, or factual information such as “key documents, witness statements or purely factual interview memorandum,” the prosecutor will have to ask approval from the U.S. attorney who in turn will consult with the assistant attorney general of the Justice Department’s Criminal Division before any waiver approval can be sought. See McNulty Memorandum, supra note 145, at pt. VII, § B, ¶ 2 (discussing differing approaches to waiver depending on type of information sought). For Category 2 materials, such as attorney-client communications, legal advice or non-fact attorney work product the U.S. attorney will be required to obtain written permission from the Deputy Attorney General before seeking any waiver. See id. (same).

157. See McNulty Memorandum, supra note 145, at pt. VII, § B, ¶ 2 (responding to criticism of Thompson Memorandum and creating more rigorous system for prosecutors to go through in order to obtain privileged information).

158. See id. (instituting high level approval requirement in order to obtain waivers).

159. See id. at pt. VII, § B, ¶ 3 (eliminating legal fees from prosecutors’ arsenal in charging analysis); see also Coyle, supra note 146 (“[T]he memo changes the
These latest revisions have elicited mixed reviews. While some remain cautiously optimistic, neither the American Bar Association nor the Association of Corporate Counsel appear impressed with the Justice Department’s latest revisions, saying the new policy “falls far short” and comes “a day late and a dollar short.” Perhaps the largest complaint is that under these new guidelines, “[t]he pressure to waive privilege still remains unabated.” While the “culture of waiver” that existed under the Thompson Memorandum may “dissipate to a degree,” corporations will still have a powerful incentive to appear as cooperative as possible by voluntarily waiving attorney-client and work product privileges. Although a policy overhaul was thought to be long overdue, many wonder whether these latest changes will have any real impact.

C. Critics Still Fear Justice Department Will Plow Ahead with Its Waiver Policy Absent Congressional Intervention

Critics remain apprehensive that, unless the Justice Department is forced to modify its policy more vigorously, the issues surrounding waivers of privilege will go unaddressed. Some have called for Congress to step department’s practice to conform with U.S. District Judge Lewis Kaplan’s ruling on legal fees in the government’s litigation against KPMG.

160. See Steve Lash, Critics Assail Latest Waiver Policy, CHI. DAILY L. BULL., Dec. 19, 2006, at 3 (discussing concerns that despite new limitations of McNulty Memorandum, prosecutors will remain able to consider waiver of privilege inappropriately when making charging decisions).

161. See id. (stating new policy does not do enough to prevent prosecutorial interference with attorney-client privilege).

162. See Jason McLure, DOJ Revises Corporate Fraud Procedures, N.J. L.J., Dec. 18, 2006, at 31 (claiming Justice Department tinkering on latest policy revisions does not go far enough).

163. See Coyle, supra note 146 (highlighting most significant criticism of latest revisions to Justice Department policy and stating “although they prohibit prosecutors making charging decisions from considering a corporation’s refusal to provide ‘the most sensitive’ attorney-client information, they do allow favorable consideration when a company agrees”).


165. See Passarella, supra note 154 (questioning whether McNulty Memorandum will play any real role in easing critics’ concerns).

166. See Donohue Testimony, supra note 95 (asking Senate Judiciary Committee to “invalidate the provisions of DOJ’s Thompson Memorandum and similar policies at other federal agencies that prevent executives and employees from freely, candidly and confidentially consulting with their attorneys . . . either through oversight of the Department of Justice or by enacting legislation”); Mathis Testimony, supra note 117 (recommending that Committee urge Justice Department “to modify the Thompson Memorandum to prohibit prosecutors from demanding, requesting, or encouraging . . . that companies [take any] . . . type of punitive action against employees or other corporate agents as a condition for receiving cooperation credit”); The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) [hereinafter Weissman Testimony] (statement of Andrew Weissman).
in legislatively and implement a form of the selective waiver doctrine to limit third parties' ability to use information the government has obtained from corporations through waivers of privileges. Congress action to protect limited disclosures to law enforcement may go a long way to ameliorate concerns about and criticisms of the Thompson Memorandum. At the peak of Congressional disgust with the Thompson Memorandum and just five days before the McNulty Memorandum was announced, Senator Arlen Specter introduced legislation called The Attorney-Client Protection Act of 2006, which would have overturned portions of the Thompson Memorandum and its policies. Despite the recent changes, there is wide speculation that Specter will reintroduce his legislation in the new session of Congress if he feels the revisions fall short of addressing the waiver issues of the Justice Department's policy. Some critics have also suggested reforming corporate criminal liability law so that the government would stop prosecuting corporations and instead simply charge employees who committed the crimes.

See, e.g., Meese Testimony, supra note 20 (suggesting legislation addressing waiver provision might ease current malaise of Thompson Memorandum).

See Donohue Testimony, supra note 95 (asking Congressional committee either to institute oversight of Justice Department or invalidate waiver and fees payment provisions of Thompson Memorandum, which prevent corporate employees from confiding in corporation's attorneys).


See Ralph Lindeman & Robert Wilhelm, DOJ Limits Consideration of Privilege Waivers in Criminal Matters, 38 Sec. Reg. & L. Rep. (BNA) No. 49, at 2087 (Dec. 18, 2006) ("Specter told reporters Dec. 7 that he intends to reintroduce his bill in the next Congress if the Justice Department does not respond satisfactorily to his concerns. A committee aide told BNA Dec. 12 that Specter is reviewing the revised policy and had no immediate public comment.").

See Weissman Testimony, supra note 166 (stating issues critics have with Thompson Memorandum "are symptoms of a larger problem with the current state of the law of criminal corporate liability" and that "[a] rethinking of criminal corporate liability is in order"); Hasnas, supra note 140 (asserting current policy of prosecuting corporations for behavior of specific employees is misguided). Hasnas comments:

When should corporations be subject to criminal punishment? Perhaps never. These entities cannot be imprisoned, only fined; and the fines are paid by the corporations' shareholders. The defining characteristic of the modern publicly traded corporation is the separation of ownership and control: Shareholders do not control the actions of corporate employees. Thus, imposing criminal punishment on a corporation, rather than on the employees who committed the offense, punishes shareholders who are innocent of wrongdoing.
It remains to be seen whether the McNulty Memorandum will bring any real change, and change may depend more on the extent to which the Justice Department implements the McNulty Memorandum’s policies than on the content of the substantive changes themselves. As Senator Patrick Leahy has stated, "the proof of the Department’s commitment to honoring the legal and constitutional rights of defendants will be in the pudding."172

D. Conclusion

Overzealous investigative tactics used by prosecutors incited criticism of the Thompson Memorandum largely because they all but require blanket waivers of attorney-client and work product privileges.173 More fundamentally, the institutionalization of the Thompson Memorandum by the Justice Department has resulted in the erosion of basic legal rights.174 While Stein only narrowly assailed the Thompson Memorandum, it is nonetheless a severe blow to questionable prosecutorial tactics employed in recent years aimed at combating corporate fraud.175 Stein will

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Id. Hasnas suggests that corporations should not be held criminally liable if they have done everything possible to prevent their employees from acting illegally. See id. (noting impossibility for corporations to "guarantee that there will be no intentional violations of law by rogue employees" or even "inadvertent[ ] violat[ions of] the law" by ordinarily law-abiding employees). Hasnas describes the current climate of corporate “cooperation” in the following way:

Under current law, whenever an employee comes under suspicion of criminal wrongdoing, the corporation must choose between betting the company’s future that its employee will be exonerated, and doing whatever DOJ demands to avoid indictment. Faced with these alternatives, it is hardly surprising that most corporations waive their privileges, cut off their employees’ legal fees and refuse to enter into joint defense agreements with them, and fire them if they refuse to cooperate with the government.

Id. Finally, the author suggests that one way to modify the current problem inherent in the Thompson Memorandum is to refrain from prosecuting corporations unless there has been corporate misconduct, as opposed to individual employee criminal wrongdoing within the larger framework of a corporation, stating:

Adopting a standard for corporate criminal liability that requires wrongful corporate action for corporate conviction would, by restoring the balance of power between the prosecution and the corporate defendant to one more appropriate to an adversarial system of justice, remove the source of DOJ’s coercive power.

Id.


173. For a further discussion of the argument that the Thompson Memorandum mandates waivers, see supra note 6.

174. For a further discussion of the criticism that the Thompson Memorandum is striking at heart of adversarial system of justice and trampling on constitutional rights, see supra note 7 and notes 88-118 and accompanying text.

175. For a further discussion of how people in the legal community are encouraged by Stein, see supra notes 127-33 and accompanying text.
have a wide-ranging impact on criminal investigations and corporate responses to such investigations. The decision is merely the prelude to further attack on other objectionable aspects of the Thompson Memorandum. Stein has already influenced what the government can and cannot use to measure the cooperation of corporations attempting to avoid indictment. Already it has all but eliminated the objectionable legal fees aspect of Justice Department policy in criminal corporate prosecutions. Furthermore, it has jumpstarted legislation addressing the selective waiver doctrine. Despite these latest revisions, the Justice Department's policy governing prosecution of corporations is still increasingly under attack.

The continued outcry against the Thompson Memorandum and the enthusiasm with which Stein has been met makes it likely that the decision will retrospectively be seen as the catalyst for modifying the waiver provision of the Justice Department's policy. Despite recent revisions, more extensive ones are necessary to clearly safeguard corporations' attorney-client and work product privileges, not only to protect them from

176. For a further discussion of how the Stein decision has had an immediate impact on prosecutorial behavior and has reassured critics of the Thompson Memorandum, see supra notes 127-33.

177. See Hammel & Malionek, supra note 95 (declaring Stein decision leaves Thompson Memorandum susceptible to further attack). Commenting on the implications of the Stein decision, Hammel and Malionek state:

In concluding that the Thompson Memorandum violates the Due Process Clause because of its legal fee advancement provision, the court went out of its way to mention that another factor to be considered under a government's cooperation framework—though not at issue in Stein—is whether a company fails to waive attorney-client protections. Accordingly, the government's conduct in Stein provides a window into the zeal with which it seeks cooperation from companies under investigation and measures that cooperation against the factors set forth in the Thompson Memorandum—including whether the privilege has been waived.

Id.

178. See McLure, supra note 162 (noting it was Kaplan's criticism articulated in Stein decision, along with Congressional pressure and lobbying campaign conducted by business and legal groups that led to Justice Department's modifications to Thompson Memorandum). Referring to the Stein decision, one former federal prosecutor stated the Department of Justice was essentially "'compelled to make these changes in the face of judicial and Congressional scrutiny.'" Id.

179. For a further discussion of how the McNulty Memorandum revised the Thompson Memorandum with respect to legal fees, see supra note 159 and accompanying text.

180. See Hammel & Malionek, supra note 95 (stating Stein will impact future of selective waiver doctrine). For a discussion of the selective waiver doctrine, see supra notes 93-95 and accompanying text and note 101.

181. See, e.g., Hasnas, supra note 140 (noting Thompson Memorandum has come under intense scrutiny and discussing possible modifications to guidelines as result).

182. For a further discussion of the argument that Stein leaves the door open to challenge other aspects of Thompson Memorandum, see supra notes 83-133 and accompanying text.
prosecutorial badgering, but also—and more importantly—to safeguard the fundamental constitutional rights that underlie those privileges.\(^{183}\)

Lauren E. Taigue

\(^{183}\) For a further discussion of the outcry for modifications to the Thompson Memorandum, see *supra* notes 138-54, 160 and 163 and accompanying text.