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Prosecuting Corporations: The KPMG Case and the Rise and Fall of the Justice Department's 10-year War on Corporate Fraud

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> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[1]

* * *

> The imposition of economic punishment by prosecutors before anyone has been found guilty of anything, is not a legitimate governmental interest -- it is an abuse of power.[2]

Introduction

On December 12, 2006, the United States Department of Justice ("DOJ") announced a major revision of its principles governing the prosecution of corporations. DOJ's prior approaches were set forth in two successive policy memoranda by Deputy Attorneys General Eric Holder (in 1999)[3] and Larry Thompson (in 2003).[4] These policy statements identified corporate cooperation as a critical factor in determining whether or not to prosecute. Two components that weighed heavily in the analysis of corporate cooperation were: (1) whether or not a company was willing to waive the attorney-client privilege; and (2) whether the company intended to pay attorneys' fees for individuals. The Thompson Memorandum suggested that a corporation should not be given credit for cooperation if it refused to waive its attorney-client privilege or if it advanced legal fees to employees facing investigation, even if the corporation's policies or charter would normally call for the advancement of legal fees.[5]

Prosecutors used the broad language of the Thompson Memorandum to strong-arm corporations and Boards of Directors into waiving what many consider to be the two basic foundations of the lawyer-client relationship. Corporations were left with limited choices. They could fight the government and run the risk of ending up like Arthur Anderson or Enron - extinct with thousands of employees out of jobs – or give in to the aggressive prosecutorial demands. Facing these options, many major corporations chose the latter. The results of this approach quickly became clear: while virtually no indictments were filed against corporations, DOJ was able to step up its successful prosecution of executives, officers, board members and employees - utilizing the assistance and resources of the corporation itself.

This practice of leaning on corporations to waive privilege and cut off attorneys' fees was roundly criticized. The Association of Corporate Counsel conducted a survey in 2005 after their members and their members' clients sensed the mounting attack on their right to counsel.[6] Forty percent of in-house and outside corporate counsel respondents reported that they had experienced an erosion of privilege since the Enron scandals.

While the objections to these tactics grew throughout 2004 and 2005, the boiling point came in June 2006. Judge Lewis A. Kaplan of the United States District Court for the Southern District of New York issued his landmark decision in the KPMG tax prosecution declaring that DOJ's policies violated the Fifth, Sixth and Fourteenth Amendment rights of former KPMG employees.[7] Specifically, Judge Kaplan agreed with cries of foul from former employees and partners of accounting giant KPMG when, during the course of its tax fraud investigation into KPMG, the government arguably forced KPMG to cut off payment of the individuals' legal fees.

Judge Kaplan's opinion was applauded by defense lawyers, corporations and their officers, directors and employees, and constitutional scholars; his decision was criticized by prosecutors and law enforcement agencies. Bar associations, legal scholars and commentators, and legislators also weighed in on this debate. On December 12, 2006, Deputy Attorney General Paul McNulty issued his revisions to the Thompson Memorandum, both to respond to the cacophony of criticisms and to revise and clarify DOJ policy.[8]

This article first analyzes the Holder and Thompson Memoranda, exploring the history of DOJ's policies regarding corporate prosecution and its practical applications by federal prosecutors. Second, this piece scrutinizes the *Stein* case and Judge Kaplan's opinion declaring certain government practices to be unconstitutional. Third, this article discusses the several responses to the government's overreaching, focusing on the proposed Senate legislation and the December 12, 2006 McNulty Memorandum. Finally, it examines the future of corporate prosecutions, and the effect - if any - of DOJ's policy revisions engendered by the McNulty Memorandum.

Holder, Thompson, and the History of Corporate Prosecution Guidelines

Corporate prosecutions are nothing new to this country. As early as 1834, courts in the United States were imposing corporate criminal liability in cases involving nonfeasance of quasi-public corporations that resulted in public nuisances.[9] Later, in the early 18th century, courts held commercial corporations liable for public nuisances.[10] Eventually, commercial corporations began to be held liable for crimes that did not require an element of criminal intent.[11] Finally, by the early 1900s, corporations were being held criminally liable for crimes of intent under agency theories.[12] The 1980s witnessed a slew of insider trading scandals[13] and the 1990s saw the boiler room and pump-and-dump schemes that rocked the stock markets.[14]

The late 1990s ushered in a new front on the Justice Department's war on corporate fraud—full-scale attacks on corporate entities. These prosecutions varied widely from jurisdiction to jurisdiction. To the general public, as well as corporations and white collar lawyers, there was little guidance from "Main Justice" on what was and was not fair game. The result was a series of policy statements issued by the Department of Justice.

The 1999 Holder Memorandum

In 1999, as a result of the mounting criticism from corporate entities and defense attorneys regarding the lack of uniformity in the exercise of prosecutorial discretion, DOJ announced its first corporate charging policy. Then-Deputy Attorney General Eric Holder, Jr. issued a memorandum to all federal prosecutors entitled "Federal Prosecution of Corporations," more commonly known as the "Holder Memorandum."[15] The Holder Memorandum listed factors that a prosecutor should consider in deciding whether to charge a corporation. The factors to be considered were:

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 pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management;
3. The corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work-product privileges;
5. The existence and adequacy of the corporation's compliance program;
6. The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
7. Collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable; and
8. The adequacy of non-criminal remedies, such as civil or regulatory enforcement actions.[16]

The Holder Memorandum stressed that "[c]orporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment."[17] In setting out these factors for prosecutors to consider when making corporate charging decisions, the Holder Memorandum clearly linked corporate cooperation to a corporation's willingness to waive its attorney-client and work product privileges.

The Holder Memorandum's foray into providing guidance and creating uniformity was met with mixed results. The factors laid out in the Memorandum were merely hortatory, not binding, and the Memorandum did not address how these factors were to be weighed. The result of this lack of clarity was a general consensus among prosecutors that they were being given carte blanche to request waivers, a conclusion met by skepticism from many including corporate officials and the white collar defense bar.[18] White collar practitioners and corporate counsel immediately recognized the threat posed by the pressure tactics that often resulted in the waiver of the attorney-client privilege.

In May 2000, for example, the Association of Corporate Counsel ("ACC") complained to DOJ that the ACC's "members indicate that it is the regular practice of U.S. Attorneys to require corporations to waive their attorney-client privileges and divulge confidential conversations and documents in order to prove cooperation with a prosecutor's investigation."[19]

At its inception, the KPMG investigation was, from the government's standpoint, a relatively simple one: it was about KPMG's use and marketing of certain suspect tax shelter devices . . . the KPMG case now stands at the center of the debate on the use and abuse of prosecutorial powers in the war on corporate crime.

Between 1999 and 2003, this country experienced one of the most explosive eras of corporate prosecutions. Federal prosecutors across the country investigated and prosecuted corporations, partnerships, boards of directors, executives and employees of some of the world's largest and most successful companies. Names once known to only those in the business community – like Enron, Tyco and Worldcom - became known nationwide. At the same time, there was a sharp increase in the number of health care fraud prosecutions. For example, after several years and several separate investigations, Tenet Healthcare agreed to pay the Federal Government $900 million for billing violations[20] and at least another $395 million to patients themselves for unnecessary medical procedures.[21] Similarly, in 2001, Taketa-Abbott Pharmaceutical Products Inc. paid nearly $600 million under the False Claims Act.[22] Then, in 2003, HCA Inc. settled government investigations for a record combined total of $1.7 billion in criminal and civil claims for a range of conduct including cost report fraud and payment of kickback to physicians.[23]

What was common to many of these prosecutions was DOJ's use of the Holder Memorandum to force corporate cooperation. Investigators and prosecutors had little guidance outside of the Holder Memorandum. The result was a hodgepodge of approaches by prosecutors, leading to a wide array of outcomes ranging from restitution to victims, criminal fines, civil penalties, "corporate integrity agreements" and, in the case of Enron, Tyco, and Worldcom, real prison time.[24]

The 2003 Thompson Memorandum

In January 2003, the Justice Department made a concerted effort to further refine and elaborate on the corporate prosecution guidelines. In the wake of the investigations and prosecutions of Enron, Worldcom, Anderson Consulting, Tyco, HealthSouth, other companies and their executives, officers and employees, there was a widespread consensus that the Holder Memorandum needed amending. Then-Deputy Attorney General Larry D. Thompson issued his own memorandum entitled "Principals of Federal Prosecution of Business Organizations," better known as "The Thompson Memorandum."[25] It changed the Holder principles in two primary ways. First, DOJ's guiding principles were no longer supposed to be merely advisory; the Thompson Memorandum made these principles binding on all federal prosecutors in every case where a company might be criminally liable. Second, the Thompson Memorandum elevated the importance of corporate cooperation and corporate compliance programs. The Thompson Memorandum emphasized that "[t]oo often business organizations, while purporting to cooperate with a DOJ investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation."[26] The Thompson Memorandum expressly stated that "the main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation."[27] The Thompson Memorandum is clear in its comments:

> One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including . . . a waiver of the attorney-client and work product protections [as well as] whether the corporation appears to be protecting its culpable employees and agents . . . through the advancing of attorney's fees.[28]

These definitions of cooperation were significant shifts in the manner in which prosecutors previously had judged a corporation's good faith in responding to investigations. Never before had a prosecutor been able to take into account a corporation's willingness to advance or pay attorney's fees for individuals. Indeed, to the contrary, it was the norm for corporations to pay such fees, especially where the corporation had entered into a contractual agreement to do so.[29] Moreover, this policy shift seemed to turn the "innocent until proven guilty" maxim on its head. The presumption now seemed to be that individuals, whether they be mere witnesses, subjects or even targets, should not get the benefit of corporate assistance in paying legal fees. These restrictions were not linked to guilt or innocence; rather, they attached at the moment the prosecutors took an interest in the individual.

One thing was certain: the Thompson Memorandum's goal was not a subtle one. In the rubble of the corporate fraud investigations and prosecutions of the prior four years, the Memorandum was seen as a tool to allow prosecutors to force companies to cooperate fully with DOJ investigators, to root out the wrongdoing of individuals, and to implement comprehensive (and expensive) compliance programs. For corporations, the possibility that the government would agree not to prosecute (or to defer prosecution for a specified time period, after which charges would be dismissed) was the only potential upside.

Corporate America and the white collar bar did not take these changes lightly.[30] In the stroke of a pen, DOJ had redefined the ways corporations under law enforcement scrutiny would do business. Expensive, detailed, and labor intensive compliance programs were now practically required. Moreover, a corporation now had additional tangible benchmarks by which their "cooperation" would be judged: (1) Did the corporation waive privilege?; and (2) Did the corporation pay for the attorneys' fees of former and current executive officers and employees? The chorus of criticism was not limited to the corporate boardroom (and their counsel). For example, a coalition of former DOJ officials, including three former Attorneys General and three former Deputy Attorneys General, sharply criticized the waiver policy.[31]

Understandably, critics focused their attacks on the Memorandum's directives regarding corporate cooperation and its necessity towards avoiding prosecution. The Thompson Memorandum highlighted powerful tools for prosecutors and, importantly, encouraged their use: (a) the forced waivers of the attorney-client privilege; and (b) the refusal to pay for individuals' attorneys' fees. Coupled with the pressures on corporations not to enter into joint defense arrangements with alleged individual wrongdoers and to make documents and witnesses readily available, the Thompson Memorandum gave prosecutors a virtually unfettered ability to mandate full cooperation.

The United States Sentencing Guidelines

The powerful tools prosecutors had to insist upon cooperation did not end with the Thompson Memorandum. The United States Sentencing Commission also provided federal prosecutors with yet another means to enforce this cooperation. In May 2004, the United States Sentencing Commission followed suit with the Thompson Memorandum and approved amendments to the U.S. Sentencing Guidelines. The Guidelines Amendments provided that "the two factors that mitigate the ultimate punishment of an organization are (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility."[32] According to the 2004 Amendments, waiver 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."[33] Criticisms of these Guidelines changes paralleled those levied against the Thompson Memorandum.[34]

It did not take long for a single case to highlight the Thompson Memorandum's coercive and potentially unconstitutional power when in the hands of certain prosecutors. The fight over the extent to which federal prosecutors could lean on corporations, demand cooperation, insist on privilege waivers, and interfere with traditional fee arrangements reached its zenith in the tax and fraud investigation of KPMG and the ultimate prosecution of a number of its executives and employees. This matter shined a searing spotlight on the aggressive tactics used by prosecutors in the wave of corporate fraud prosecutions and on the constitutional and ethical infirmities in those approaches. Examining and analyzing the KPMG case is instructive.

The KPMG Case

United States v. Stein[35] is one of the largest, most well-known and controversial criminal tax cases in our nation's history. What began as a somewhat routine Internal Revenue Service ("IRS") investigation of KPMG in 2003 morphed into one of the most constitutionally intriguing criminal law decisions of the past half-century. The practical consequences of the *Stein* decision on corporate prosecutions will be felt for years to come.

At its inception the KPMG investigation was, from the government's standpoint, a relatively simple one: it was about KPMG's use and marketing of certain suspect tax shelter devices. Since then, it has come to stand for much more. Due to certain aggressive actions taken by DOJ, the KPMG case now stands at the center of the debate on the use and abuse of prosecutorial powers in the war on corporate crime. Dissecting this KPMG case and Judge Kaplan's landmark opinion is essential for understanding the future of corporate prosecutions.

The *Stein* case began as an IRS investigation into KPMG, its leadership and the use of certain tax shelter devices.[36] As a result of the IRS investigation, Jeffery Stein, the former KPMG deputy chairman, and several other senior partners were asked to resign their positions at the firm.[37] In Mr. Stein's case, his severance package included an agreement that "Mr. Stein would be represented at KPMG's expense, in any suits brought against KPMG or its personnel and himself, by counsel acceptable to both him and the firm."[38]

The Government's Efforts to Enforce Cooperation

On February 5, 2004, the IRS made a criminal referral to DOJ, specifically the U.S. Attorney's Office for the Southern District of New York.[39] Shortly thereafter, the government notified over thirty KPMG employees and partners that they were "subjects" of the federal grand jury investigation of the suspect tax shelters.[40] Around the same time, KPMG terminated several partners in an effort to potentially stave off corporate prosecution.

This decision came on the heels of the tough questioning of several partners during their testimony before the U.S. Senate Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations. Over two days, the subcommittee hearings focused on "the role of professional organizations like accounting firms, law firms, and financial institutions in developing, marketing, and implementing tax shelters."[41] Six partners and executives from KPMG, as well as representatives from other accounting firms, law firms, and a panel of government regulators testified before the Senate Subcommittee.[42] As Judge Kaplan noted, the "firm's reception at the hearing was not favorable."[43]

The Assistant U.S. Attorneys ("AUSAs") handling the case wasted no time in putting pressure on KPMG to fully cooperate with the criminal probe. On February 25, 2004, the AUSAs met with KPMG's attorneys.[44] During this meeting the AUSAs put intense pressure on KPMG to refuse to pay or advance attorneys' fees to those employees who refused to cooperate, who invoked Fifth Amendment rights or who were indicted.[45] The prosecutors repeatedly invoked the Thompson Memorandum (and the Sentencing Guidelines) in their efforts to strong-arm KPMG.[46]

Understandably, KPMG found itself in a nearly impossible position. The importance of the firm (as opposed to the individual partners) avoiding indictment cannot be overstated. It was not too long ago that the "Big Four" accounting firms were the "Big Five." This was before Arthur Andersen was prosecuted and convicted for obstruction of justice relating to the Enron scandal.[47] Arthur Andersen LLP was a giant accounting firm who provided internal audit and consulting services to Enron. The firm was investigated in connection with the Enron scandal and eventually indicted with one count of obstructing an official proceeding of the S.E.C.[48] After a fight over jury instructions regarding the level of culpability required for a guilty verdict, the jury eventually deadlocked.[49] After the judge recited the *Allen* charge,[50] the jury deliberated for three more days and returned a guilty verdict. The Court of Appeals for the Fifth Circuit affirmed, holding that the jury did not need to find any consciousness of wrongdoing and that no reversible error had occurred. The Supreme Court granted certiorari and reversed, holding that the jury instructions were infirm for several reasons.[51] Although the conviction was eventually overturned, this relief came too late to save the firm and the jobs of thousands of Arthur Andersen employees.[52]

There is little doubt that KPMG weighed the demise of Arthur Andersen when making its decision to cooperate with the government in an attempt to avoid indictment. In fact, one of the amicus briefs filed in the *Stein* litigation highlights this reality: "In the 212-year history of the U.S. financial markets, no major financial-services firm has ever survived a criminal indictment."[53] KPMG, eager to avoid this corporate death penalty, initially attempted to continue its longstanding practice of advancing payment to partners to defend against allegations of violations committed in the performance of their duties and obligations at KPMG.[54] But federal prosecutors doggedly hounded KPMG on the issue, making what KPMG regarded as implicit threats that any payment of attorneys' fees would be viewed negatively.

Faced with this "proverbial gun to the head,"[55] KPMG changed its longstanding policy and notified its former partners and employees (as well as the government) that it would not pay attorneys' fees if they did not cooperate. Moreover, KPMG imposed a $400,000 cap on all fees for any single individual and announced that it would cease paying all fees if the individual was indicted.[56] KPMG went even further: acting in accordance with a government request, KPMG notified its employees that they could proceed without counsel, notwithstanding the incredibly high stakes.[57]

KPMG, during the government's investigation, continued to pressure the individual partners and employees. When KPMG learned - almost always from the government - that an individual subject had not fully cooperated, had refused to be interviewed by the government, or had withheld documents, KPMG promptly informed the individual that he had ten days to fully cooperate or else KPMG would immediately cut off the legal fees.[58]

These individuals suffered oppressive consequences. They were faced with a difficult choice: either submit to a government interview and potentially make incriminating statements or remain silent and potentially lose the ability to retain, and afford, their attorney of choice.

The Consequences of KPMG Cooperation

KPMG's decision to fully cooperate with DOJ ultimately paid off, at least from the perspective of the corporate entity and some of its workforce. In August 2005, the U.S.

Attorney's Office for the Southern District of New York reached a settlement agreement known as a "deferred prosecution" with KPMG. Among other things, KPMG agreed to pay the government approximately $45 million and to open its books and operations to independent scrutiny. In exchange for compliance with the stated obligations, the government agreed to seek dismissal of criminal charges. This extraordinary cooperation with the government helped KPMG avoid the ruinous indictment it feared.

The individual partners and employees did not fare as well. In August 2005, six former partners and the former deputy chairman were indicted for criminal tax fraud conspiracy. Two months later, in October, another ten individuals were indicted on criminal conspiracy and tax evasion.[59] If convicted, these individuals faced up to five years in prison on the conspiracy charges and five years on the tax evasion charge.[60]

Despite having their fees completely cut off, the individual defendants did not rollover. In some cases, they kept the same counsel; in other cases, they retained new counsel, sometimes more affordable. These defendants felt stung not only by KPMG's decision to cut off fees, but also by the government's significant role in KPMG's decision, a fact that perhaps weighed more heavily than KPMG's somewhat justified decision. Indeed, the defendants strongly believed that the government had forced KPMG to act as it did.[61]

The defendants challenged what they perceived to be unconstitutional coercion by the prosecutors. Specifically, the defendants moved to dismiss the indictment (or for other relief) on the ground that the government had interfered improperly with the advancement of attorneys' fees by KPMG in violation of their constitutional rights.[62] The defendants alleged, among other things, that the prosecution's wrongful interference with advancement of defendants' legal fees violated their constitutional rights to counsel and a fair trial.[63] They maintained that the government had "substantially interfer[ed]" with KPMG and its partners' freedom to contract and had induced KPMG to stop advancing their costs of defense.[64] The defendants further asserted that the government had "tortuously interfered with the business relationship between KPMG and its employee-partners" and infringed on the defendants' constitutional rights to counsel and a fair trial.[65]

Judge Kaplan's Decision

Judge Kaplan agreed with the defendants. Judge Kaplan took the government to the woodshed for its role in KPMG's decision to cut off the defendants' attorneys' fees, sharply criticizing DOJ policy as well as the specific actions of prosecutors in this case. Judge Kaplan, widely regarded as a middle-of-the-road jurist, not siding with any unusual frequency either the government or defendants, blistered the government for its conduct. In a sharply worded eighty-three-page opinion, Judge Kaplan concluded that the Department of Justice had violated the former KPMG partners' and employees' substantive due process rights and their rights to counsel and a fair trial.[66] As detailed below, his comprehensive and landmark opinion held that DOJ's application of the Thompson Memorandum in the KPMG investigation violated the Fifth, Sixth and Fourteenth Amendment rights of the former partners and employees.[67] Specifically, the court found that the implementation of the Thompson Memorandum had violated the Fifth Amendment Due Process Clause because it denied the defendants the fundamental right to defend themselves with legally available resources, without DOJ interference.[68] Judge Kaplan also held that the government's actions violated the Sixth Amendment right to counsel, in that the AUSAs interfered with the defendants' right to representation by counsel of their choice.[69]

Substantive Due Process

With regard to the substantive due process claim, Judge Kaplan concluded that the government overstepped permissive prosecutorial limits when it intensely pressured KPMG to withhold legal fees. Judge Kaplan reasoned that the numerous and calculated references to the Thompson Memorandum (and Sentencing Guidelines) coupled with the powerful impact of the Memorandum itself, violated the defendants' substantive due process right to fundamental fairness in criminal proceedings. Judge Kaplan found that the prosecutor's conduct violated the defendants' constitutional "right to obtain and use in order to prepare a defense resources lawfully available to him or her, free of knowing or reckless government interference."[70]

Judge Kaplan examined the constitutional implications of the government's actions in light of the practical realities of complex, high-stakes criminal investigations and prosecutions. His opinion expressly recognized that complex white collar cases invariably mean gigantic legal fees, due to massive document productions and reviews, extensive pretrial maneuvering and briefing, the frequent use of expert financial, accounting and tax experts, and the multi-month length of many trials.[71] In turn, Judge Kaplan reasoned that the government directly interfered with the defendants' ability to mount a defense because the government had, for all intents and purposes, precluded the defendants from receiving money to pay their legal bills.[72]

Judge Kaplan utilized traditional due process analysis in reaching this conclusion. Specifically, he applied strict scrutiny to the government's actions. In doing so, he concluded that the government did not have any legitimate interest in precluding the payment of legal fees and in treating such payments as shielding and protecting culpable individuals.[73] Judge Kaplan stated, "[t]he imposition of economic punishment by prosecutors, before anyone had been found guilty of anything, is not a legitimate governmental interest – it is an abuse of power."[74] Judge Kaplan did not undermine the government's legitimate interest in evaluating corporate cooperation while making charging decisions. Rather, he found that the Thompson Memorandum and the prosecutor's use of it were not narrowly tailored to serve this interest. He concluded that the Thompson Memorandum did not sufficiently address the governmental concern, including the payment of fees as a means to impede, obstruct or interfere with an ongoing investigation or prosecution. Judge Kaplan expressly noted, "[t]here is no necessary inconsistency between an entity cooperating with the government and, at the same time, paying defense costs of individual employees and former employees."[75] Continuing, Judge Kaplan stated that "the Thompson Memorandum does not say that payment of legal fees may cut in favor of indictment *only if* it is used as a means to obstruct an investigation."[76] Thus, the Memorandum and its procedures were not, in Judge Kaplan's view, narrowly tailored to achieve a compelling and legitimate objective. Instead, it "discourages and, as a practical matter, often prevents companies from providing employees and former employees with the financial means to exercise their constitutional rights to defend themselves."[77]

Right to Counsel

Judge Kaplan's decision does not rest solely on due process grounds. He also concluded that the government's conduct violated the Sixth Amendment right to counsel. As a preliminary matter, Judge Kaplan addressed the well-established principle that the Sixth Amendment right to counsel does not attach until after a defendant is indicted. Judge Kaplan rejected the notion that pre-indictment events cannot serve as the basis for a constitutional violation, concluding "[t]he fact that events were set in motion prior to indictment with the object of having, or with knowledge that they were likely to have, an unconstitutional effect upon indictment cannot save the government. This conduct, unless justified, violates the Sixth Amendment."[78] He emphasized that "[t]he government here acted with the purpose of minimizing these defendants' access to resources necessary to mount their defenses or, at least, in reckless disregard that this would be the likely result of its actions."[79]

The government also argued that interference with obtaining third-party payment for attorneys' fees does not constitute a Sixth Amendment violation. Judge Kaplan brushed this argument aside. He found that the individual defendants had a legitimate expectation that KPMG would continue its longstanding policy of paying attorneys' fees. He found this expectation rooted in both tort and contract law, concluding that "[t]he right [of an employee to have an employer pay legal expenses] is as much a part of the bargain between employer and employee as salary or wages."[80]

Throughout his opinion, Judge Kaplan stressed the harmful effects that the Thompson Memorandum, and the government's abuse of it, had on the adversarial process in general. Judge Kaplan viewed these efforts not as fair blows, as demanded by *Berger*, but as prejudicial interference with the system's fair workings.[81] He concluded that the Thompson Memorandum "undermines the proper functioning of the adversary process that the Constitution adopted as the mode of determining guilt or innocence in criminal cases," and that "[t]he actions of prosecutors who implement it can make matters even worse, as occurred here."[82]

Needless to say, the government disagreed with Judge Kaplan's analysis and conclusions. On July 27, 2006, Michael Garcia, the U.S. Attorney for the Southern District of New York, issued a statement defending the line prosecutors' actions. He stated, "The actions of the government were entirely consistent with appropriate Department of Justice policy, and we believe that the prosecutors acted ethically and properly throughout the case."[83]

While Judge Kaplan's constitutional analysis was both novel and interesting, the practical effect of his decision - both in the *Stein* case and in future cases - is less certain. The individual defendants in *Stein* sought the complete dismissal of the indictment as well as the suppression of certain pre-indictment statements, allegedly made in part because of fee-related pressures. The defendants also sought monetary sanctions against the prosecutors. Judge Kaplan denied the motion to dismiss the indictment and rejected the defendants' efforts to obtain financial sanctions against the prosecutors. Instead, Judge Kaplan elected to provide the defendants with an opportunity to obtain funds for their defense. He initiated ancillary proceedings in the criminal case aimed at making a determination regarding the defendants' claims against KPMG for fees.

Since this landmark opinion, the trial has been continued to ensure that the defendants have a fair opportunity to prepare for trial "notwithstanding the government's improper interference with the payment of legal fees and failure to comply with the discovery deadline."[84] Based on Judge Kaplan's findings, the KPMG defendants have sued KPMG for attorneys fees in the Southern District of New York.[85] The defendants allege that KPMG would have advanced the attorneys' fees "but for the unconstitutional interference with KPMG's practice and policy of advancing such expenses" by the U.S. Attorney for the Southern District.[86] KPMG has fought back, refusing to pay the fees notwithstanding Judge Kaplan's opinion, The civil suit could take months, even years to come to a resolution and Judge Kaplan has made it clear that the criminal case will not proceed until the issue of the attorneys' fees is settled. Recently, Judge Kaplan granted a second continuance, this time postponing the trial indefinitely.[87]

On January 3, 2007, United States District Court Judge Loretta A. Preska dismissed the criminal/conspiracy charge against KPMG, concurring with federal prosecutors who concluded that KPMG had fully complied with the 2005 deferred prosecution agreement that allowed KPMG to avoid a fate similar to that met by Arthur Andersen three years earlier. While KPMG must still submit to special oversight until at least September 2008,[88] this development allowed KPMG to focus on the future and put the past behind it.

While KPMG executives and leaders applauded the decision and vowed model compliance and ethics programs, former KPMG executives - still fighting the criminal case - strongly objected. These individuals' lawyers say that they followed laws then on the books and asserted that they were the victims of intense government pressure, an argument that Judge Kaplan has supported.[89]

Legislative and Executive Responses to the *Stein* Opinion

Legislative Response to the KPMG Case

Senator Arlen Specter, the then lame-duck Chair of the Senate Judiciary Committee,[90] responded relatively swiftly to the growing clamor regarding abusive practices in corporate prosecutions. On December 7, 2006, he proposed legislation -- the Attorney-Client Protection Act of 2006 ("ACPPA") -- that set its sights not only on the abusive prosecutorial practices but also on the Thompson Memorandum itself.[91] The ACPPA proposed that federal prosecutors be prohibited from using a company's waiver of attorney-client privilege, as well as other factors, to determine the company's level of cooperation. Section 3014 (b) stated:

> In any Federal investigation or criminal or civil enforcement matter, an agent or attorney of the United

States shall not - (1) demand, request, or condition treatment on the disclosure by an organization, or person affiliated with that organization, of any communication protected by the attorney-client privilege or any attorney work product; (2) condition a civil or criminal charging decision relating to a organization, or person affiliated with that organization, on, or use as a factor in determining whether an organization, or person affiliated with that organization, is cooperating with the Government. - (A) any valid assertion of the attorney-client privilege or privilege for attorney work product; (B) the provision of counsel to, or contribution to the legal defense fees or expenses of, an employee of that organization…[92]

Further, in an obvious attempt to force DOJ to revise its corporate charging policies as outlined in the Thompson Memorandum, Senator Specter noted, "Cases should be prosecuted on their merits, not based on how well an organization works with the prosecutor."[93] Most notably, the ACPPA sought lasting and deep protections of the attorney-client privilege, even those stretching beyond the corporation context. Specifically, the ACPPA sought to protect "any communication"[94] covered by the attorney-client privilege and not just those of a corporation. Similarly, and again in direct response to the constitutional issues raised in *Stein*, the ACPPA also extended to prohibiting consideration of a company's decision to: (a) pay the attorneys fees of an employee under investigation; (b) enter into a joint defense agreement with employees; and (c) refuse to terminate a person's employment if the employee does not cooperate in an investigation.[95] Notably, this approach would have extended to so-called parallel proceedings and civil enforcement actions by agencies including the Securities and Exchange Commission, the Office of Inspector General and the Federal Election Commission.

The ACPPA arguably raised more questions than it answered. The legislation failed to set forth the standards governing inquiries regarding the government's conduct. Fundamental legal and procedural questions seem to have been left wide open: Who bears the burden of proof on any hearing? Will there be a full mini-trial on these issues? Will the rules of evidence apply? What will the standard of review be at the appellate levels? Who has standing to allege a violation of the statute - the corporation, the individual, a shareholder? If a challenge is brought pre-indictment, how is Federal Rule of Criminal Procedure 6, governing grand jury secrecy, implicated? Will matters be addressed under seal?

Additionally, the statute failed to provide any guidance on the appropriate remedy if and when a violation occurs. More questions remained: Will the indictment be dismissed? Can a court step in and halt an investigation? Will the court appoint a special prosecutor or a monitor to oversee the investigation? Certainly such intervention will give rise to separation of power issues. Moreover, it is well established that courts are generally loath to interfere with matters traditionally within the reasonable range of prosecutorial discretion. The Supreme Court has placed significant restrictions on the supervisory power of the courts to attempt to remedy prosecutorial misconduct by dismissing indictments, and it is virtually unheard of for a court to interfere with an ongoing grand jury investigation.[96]

McNulty Memorandum

It came as no surprise to anyone following the issue that DOJ did not just sit back and let the Senate resolve these sticky constitutional, prosecutorial and ethical issues affecting the day-to-day dealings of thousands of prosecutors. On December 12, 2006, Deputy Attorney General Paul McNulty formally announced a revision of DOJ policy regarding the federal prosecution of business organizations. Just as Larry Thompson expressly superseded Eric Holder's once-controlling Memorandum in an effort to revise and clarify certain guidelines regarding corporate prosecutions, Deputy Attorney General McNulty did the same with the Thompson Memorandum.[97]

Predictably, in large part in response to the furor created by the aggressive approaches of prosecutors in a string of cases and the stinging rebuke of Judge Kaplan in *Stein*, the "McNulty Memorandum" attempted to take action in two principle areas: (1) requests for waiver of attorney-client privilege and work product protections from companies seeking leniency from the government; and (2) the advancement of fees to company employees in criminal investigations and prosecutions.[98]

Attorney-Client Privilege Issues After McNulty

The McNulty Memorandum is in many ways a retreat from previous DOJ policy with regards to attorney-client privilege issues. As a preliminary matter, the McNulty Memorandum lays out the same set of relevant charging factors previously identified in the Thompson Memorandum. After setting forth these criteria, the McNulty revisions—at least on their face—limit the authority of prosecutors in the privilege waiver and attorneys' fees areas. Under the McNulty Memorandum, "[w]aiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation."[99] Indeed, even requests for waiver are now only authorized if "there is a legitimate need for the privileged information" in order for the government to fulfill its law enforcement obligations.[100] Such need may be demonstrated by the following factors:

(a) the likelihood and degree to which the privileged information will benefit the government's investigation;
(b) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;
(c) the completeness of the voluntary disclosure already provided; and
(d) the collateral consequences to a corporation of a waiver.[101]

These factors, however, are not defined in the McNulty Memorandum. Furthermore, even in situations where prosecutors determine that the application of the factors establishes an acceptable need for waiver, prosecutors still have an additional hurdle - compliance with strict consultation and approval requirements that did not exist under the Holder or Thompson frameworks.

The McNulty Memorandum identifies two broad categories of information likely to be sought by prosecutors: (1) Category I information which is purely factual and which may or may not be privileged but which is related to the underlying misconduct; and (2) Category II information consisting of attorney-client communications or non-factual attorney work product, including legal advice given to the corporation.[102] Before requesting a waiver of even Category I information privilege, line prosecutors must obtain the written approval of a United States Attorney, who in turn must furnish a copy to and consult with the Assistant Attorney General of the Criminal Division. Significantly, however, a company's response to the government's request for a waiver of privilege for Category I information "may be considered in determining whether a corporation has cooperated in the government's investigation."[103] Typical items falling within Category I would be memoranda of factual interviews with witnesses in an internal investigation.

Even more restricted, a request for Category II information must be approved in writing by the Deputy Attorney General, and may only be sought in "rare circumstances."[104] A company's compliance with a Category II request may be favorably considered in determining whether the company has cooperated with the government's investigation; prosecutors, however, are explicitly prohibited from considering a refusal to comply with a Category II request in their “cooperation” calculus.[105]

Legal Fee Issues After McNulty

With respect to fees, the McNulty Memorandum states that "[p]rosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment."[106] However, in a footnote, the McNulty Memorandum states that in "extremely rare cases" the advancement of attorneys' fees "may be taken into account when the totality of the circumstances show that it was intended to impede a criminal investigation."[107] Any request to consider such a circumstance in a charging decision must be approved by the Deputy Attorney General.

Considerations for the Future

It took the legal community four years to understand the true import of the Holder Memorandum and an additional four years to comprehend the ways in which the application of the Thompson Memorandum affected corporate prosecutions. Accordingly, it will likely be some time before the full practical impact of the McNulty Memorandum is understood. In the end, the eventual impact of the McNulty Memorandum is likely to depend more on DOJ’s incorporation of the Memorandum into their efforts to combat corporate fraud than the actual words on the page.

In some ways, the McNulty Memorandum takes away with one hand what it gave with the other. The policy was enacted ostensibly to reduce the pressure on companies to refuse to pay fees and to waive privilege in order to be considered to have fully cooperated with an ongoing investigation. The new Memorandum recognizes the importance of giving companies certain latitude on the fees issue and on the vitality of the attorney-client protections. Yet despite the mollifying language of the McNulty Memorandum, DOJ has explicitly retained the ability to punish corporations that refuse to waive privilege and continues to permit prosecutors to take into account the advancement of attorneys’ fees in "rare circumstances" - a term undefined in the Memorandum and therefore left open to interpretation by DOJ prosecutors.

To reach some useful conclusions about the effects of this Memorandum and the future of corporate prosecutions, it is helpful to examine the consequences from the vantage point of the three truly interested parties: (1) the prosecutors; (2) the corporation; and (3) employees and officers. *First*, the McNulty Memorandum aims to give prosecutors even more guidance on the proper (and constitutional) handling of corporate fraud investigations and charging decisions. The clarifications set forth in McNulty will most likely curb egregious abuses by overly aggressive prosecutors. Prosecutors will not seek attorney-client privilege waivers as a default in every case and instead will seek to comply more rigorously with the McNulty guidelines. Similarly, prosecutors will be somewhat more restrained in exerting pressure on the attorneys’ fees issue. That being said, the McNulty Memorandum certainly will not eliminate the use of the pressure tactics excoriated by Judge Kaplan in *Stein*. Charging decisions will remain almost exclusively in the domain of DOJ, with virtually no legislative or judicial oversight. Prosecutors will continue to pressure corporations to fully cooperate. Occasionally, that will mean the waiver of certain privileges and the refusal to pay an employee’s attorneys’ fees. What we may see is the more *subtle* use of pressure by prosecutors. Rather than following in the footsteps of the KPMG prosecutors and making overt statements, prosecutors may take greater steps to cloak their efforts at forcing cooperation.

Second, examining the policy change from the vantage point of the corporation leads to a similar conclusion: corporate behavior most likely will not change and corporations will be faced with the same pressure from prosecutions. Corporations (acting through leadership decisions) are no less likely to engage in fraudulent and criminal conduct. Such conduct, when it does take place, is driven by economic, financial and marketplace-motivated considerations; rarely is the threat of prosecution (or the use of certain investigative prosecutorial tools) a determinative factor. That being said, to the extent corporate officers and executives do take into consideration potential law enforcement action, the continued possibility that prosecutors will bear down on a corporation, request a privilege waiver and demand the cutting off of attorneys’ fees, even if somewhat more remote than prior to December 2006, may still be enough to strike fear in their hearts and affect conduct.

Of course, perhaps the group most affected by the revised policy will be the corporation’s white collar criminal defense lawyers. These attorneys will have a new revitalized spring in their steps when dealing with investigations of corporate clients. The psychological impact of the developments over the past year and the resulting DOJ policy change will be significant. Undoubtedly, defense attorneys will push back harder when their corporate client is threatened - explicitly or implicitly - by prosecutors. They will challenge most requests to waive the attorney-client or work product privileges and will balk at efforts to chill the payment of attorneys’ fees. Emboldened by the *Stein* decision, the legislative response and the McNulty Memorandum, these defense attorneys will alsomore aggressively “appeal” the actions and decisions of line prosecutors to supervisors, U.S. Attorneys and Main Justice.

Third, the McNulty Memorandum will affect corporate officers and employees for better and for worse. On one hand, officers, executives and employees of corporations stand to benefit from these changes. As noted above, prosecutors will be more reluctant to lean on corporations to cut off fees; at the same time, corporations and white collar defense attorneys will push back harder on any suggestion to that effect. The net result will be that individual officers will be more likely to receive the paid counsel of their choice, to the extent authorized by their indemnification and other contractual agreements. On the other hand, the McNulty Memorandum further entrenches DOJ's practice of refraining from charging corporations and instead focusing on the culpable individuals. As has been the case since *Andersen*, corporations most likely will still receive offers to enter into deferred prosecution and non-prosecution agreements. Indeed, since the issuance of the Thompson Memorandum, DOJ has entered into at least thirty deferred and non-prosecution agreements, as compared to one-third that number in the previous decade. Corporations will continue to cooperate, in one form or another, meaning individuals will continue to be charged for alleged criminal activity.

All of this leads to the ultimate question: how will the public be affected by these developments? Corporate crime has been around for hundreds of years. It is reasonable to conclude that it will continue and that prosecutors will have an array of tools to fight corporate fraud. The McNulty Memorandum will not significantly restrict the ability of prosecutors to identify wrongdoing and address it either at the company or individual level. Prosecutors can still demand cooperation and retain the option of charging the corporation where justified. In this way, shareholders, investors and the financial markets will be protected.

Perhaps of equal importance, however, there is the real potential that justice will be better served. Following these developments, prosecutors now have available clearer guidelines to assist them in distinguishing between "fair" blows and "foul" blows, to borrow from the *Berger* parlance. Properly, subjects and targets of white collar crime investigations will have their constitutional due process and right to counsel protected. Ultimately, the adversarial process, upon which our entire system is premised, hopefully will function more effectively and efficiently.

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[1] Berger v. United States, 295 U.S. 78, 88 (1935).

[2] United States v. Stein, 435 F. Supp. 2d 330, 363 (S.D.N.Y. 2006).

[3] Memorandum from Deputy Attorney General Eric Holder, Jr. to All Component Heads and United States Attorneys (June 16, 1999), [hereinafter Holder Memorandum], (*available at* http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html).

[4] Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components and United States Attorneys (Jan. 20, 2003), [hereinafter Thompson Memorandum] ,(*available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm).

[5] *Id*. at §VI.

[6] The Association of Corporate Counsel issued a survey, the results of which indicate that nearly 75 percent of both inside and outside counsel agree that a "culture of waiver" has evolved in which government agencies expect a company under investigation to waive legal privileges. *Available at* http://www.acca.com/Surveys/attyclient2.pdf. (last visited Jan. 17, 2007); Peter J. Henning, *Overcriminalization: The Politics of Crime: Targeting Legal Advice*: 53 Am. U.L. Rev. 669, 675 (2005) (stating that DOJ's approach to legal advice as indicated by the Thompson Memorandum reflects a broader mistrust of the legal profession).

[7] *Stein*, 435 F. Supp. 2d at 356.

[8] Memorandum from Deputy Attorney General Paul J. McNulty to Heads of Department Components United States Attorneys (Dec. 12, 1006), [hereinafter McNulty Memorandum], (*available at* http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf).

[9] V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 Harv. L. Rev. 1477, 1480 (1996) (citing People v. Corporation of Albany, 11 Wend. 539, 539 (N.Y. Sup. Ct. 1834)).

[10] *See* Susquehannah & Bath Tpk. Rd. Co. v. People, 15 Wend. 267, 268 (N.Y. Sup. Ct. 1836); McKim v. Odom, 12 Me. 94 (Me. 1835).

[11] Khanna, *supra* note 9, at 1481.

[12] *See* John C. Coffee, Jr., *Corporate Criminal Responsibility*, in 1 Encyclopedia of Crime and Justice 253, 254 (Sanford H. Kadish ed., 1983).

[13] Editorial, *Stunning Justice in the Milken Case*, N.Y. Times, Nov. 22, 1990, at A26 (Michael Milken was sentenced to a ten year prison sentence after he pleaded guilty to violating Federal securities laws and committing other crimes. The sentence was the longest received by any executive caught up in the Wall Street scandals that began to unfold in 1986); James Sterngold, *Boesky Sentenced to 3 Years in Jail in Insider Scandal*, N.Y. Times, Dec. 19, 1987, § 1, at 1 (stating that Ivan F Boesky's three-year jail sentence is the third longest to have been imposed in a case related to insider trading).

[14] Cases in which the defendants allegedly inflated a security's market price so that they could then sell the shares before the price of the stock fell. *See, e.g.*, 2 Thom as Lee Hazen, Treatise on the Law of Securities § 9.6, 14.18, at 292 (4th ed. 2002) (describing pump and dump schemes); 3 Jerry W. Markham, A Financial History of the United States: From the Age of Derivatives into the New Millenium (1970-2001), at 53 (2002).

[15] Holder Memorandum, *supra* note 5.

[16] *Id*. at § II(A).
[17] *Id*. at § I(A).
[18] Lawrence D. Finder; *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. Tex. L. Rev. 111, 114-15 (2005); *see also* David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 Am. Crim. L. Rev. 147, 147-48 (2000).
[19] Letter from Maud Mater, Executive Vice President General Counsel and Secretary, American Corporate Counsel Association to Eric Holder, Deputy Att'y Gen., U.S. Dept. of Justice, (May 12. 2000) (*available at* http://www.acca.com/public/accapolicy/holder.html).
[20] *See* The False Claims Act Legal Center: Taxpayers Against Fraud Top 20 Cases, http://www.taf.org/top20.htm (last visited Jan. 17, 2007).
[21] *See* Judith A. Thorn, *Tenet Announces $395 Million Payment For Unnecessary Surgery on 769 Patients*, 9 Health Care Fraud Reports 30, Jan. 5, 2005.
[22] *See supra* note 23.
[23] Press Release, Department of Justice, Largest Health Care Fraud Case in U.S. History Settled HCA Investigation Net Record Total of $1.7 Billion (June 26, 2003) (*available at* http://www.usdoj.gov/opa/pr/2003/June/03_civ_386.htm).
[24] Carolyn Said, *The Enron Verdict: From White Collars to Prison Blues, Among the Tales of Success and Corporate Excess, the Actions of Enron Leaders -- and Others -- Speak Volumes*, San Francisco Chronicle, May 26, 2006, *available at* http://www.sfgate.com/cgi-bin/article. Cgi?f=/c/a/2006/05/26/BUGL3J2D3B33.DTL.
[25] Thompson Memorandum, *supra* note 6.
[26] *Id*.
[27] *Id*.
[28] *Id*. at § VI(B).
[29] *See, e.g*., Def.'s Mem. Supp. Motion to Remedy the Violation of Defendant's Constitutional Rights to Counsel and a Fair Trial Resulting From the Prosecutors' Wrongful Interference With Defendants' Ability to Obtain Advancement of Legal Fees From KPMG, U.S. v. Stein et al. (05 Cr. 888 (LAK)(ALL)) at 4 (citing *Active Asset Recovery, Inc. v. Real Estate Asset Recovery Servs., Inc*., C.A. No. 15478, 1999 Del. Ch. LEXIS 179, at *15, *50 (Del. Ch. 1999) (discussing the Del. evised Unif. Ltd. P'ship Act and Delaware's strong policy of supporting advancement as well as indemnification of legal fees and expenses needed for defense litigation) (*available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/kpmg_attorneys_fees_memo.pdf).
[30] *See, e.g*., Reni Gertner, *ABA Launches Task Force To Address Threats To Attorney Client Privilege*, Daily Journal of Commerce, (Portland, OR) January 28, 2005 (ABA President Robert Grey creates Presidential Task-Force on Attorney-Client Privilege opposing government policies that erode the privilege and doctrine while supporting policies, practices, and procedures that recognize their values); *Report of the American Bar Association's Task Force on the Attorney-Client Privilege*; Business Lawyer, May 2005 (discussing the importance of preserving attorney-client privilege and work-product protection laws in the face of government requests for waivers of these privileges).
[31] *See The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations*, by Edwin Meese III, Ronald Reagan Distinguished Fellow in Public Policy and Chairman, Center for Legal and Judiciary Studies, The Heritage Foundation: Testimony before the United States Senate Committee, September 12, 2006; *see also The Future of the Attorney-Client Relationship in White-Collar Prosecutions*, Heritage Foundation event, November 30, 2006; Letter to Hon. Alberto R. Gonzales (Sept 5, 2006), *available at* http://www.acca.com/public/attyclientpriv/agsept52006.pdf.
[32] Amendments to the Sentencing Guidelines May 2004, *available at* http://www.ussc.gov/2004guid/RFMay04.pdf (last viewed Dec. 16, 2006).
[33] *Id*.
[34] It is worth noting that similar to other actors in the Justice System, the Sentencing Commission recently announced that it was removing the privilege waiver and work-product protection language from the Sentencing Guidelines. This change became effective November 1, 2006. *See* Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective Nov. 1, 2006, 71 Fed. Reg. 28063-01, 28073 (proposed May 15, 2006); *see* McNulty Memorandum, *supra* note 10, at § VII (2) n.2 (stating that "the Sentencing Guidelines reward voluntary disclosure and cooperation with a reduction in the corporation's offense level.); *see also* USSG §8C2.5(g) (showing that the reference to consideration of a corporation's waiver of attorney-client and work product protections in reducing a corporation's culpability score in Application Note 12, was deleted effective November 1, 2006).
[35] 435 F. Supp. 2d 330.
[36] *Id.* at 338.
[37] *Id*. at 339.
[38] *Id*.
[39] *Id.*
[40] In federal criminal law parlance "subjects" usually refer to persons in whom the government has an interest but who are not, at the time of the designation, "targets" who the government intends to prosecute.
[41] U.S. Senate Committee on Homeland Security and Governmental Affairs: Permanent Subcommittee on Homeland Security and Governmental Affairs, *available at* http://hsgac.senate.ogv/index.cfm??Fuseaction=Hearings.Detail&HearingID=133.
[42] *Id*.
[43] *Stein*, 435 F. Supp. 2d at 338-39 ("Senator Coleman, the subcommittee chair, for example, opened the hearing by saying that 'the ethical standards of the legal and accounting profession have been pushed, prodded, bent and, in some cases, broken for enormous monetary gain.' At another point, Senator Levin, the ranking minority member, in obvious exasperation at a KPMG witness, suggested that the witness 'try an honest answer.'") (quoting U.S. Tax Shelter Industry: The Role of Accountants, Lawyers, and Financial Professionals, Hearings Before the Permanent Subcomm. on Investigation of the S. Comm. on Governmental Affairs, 108th Cong. 2 (2003)).
[44] *Id*. at 341.
[45] *Id.* at 341-42.
[46] *Id*. at 341.
[47] United States v. Arthur Andersen, LLP, 374 F.3d 281 (5th Cir. 2004) (reversed and remanded by Arthur Andersen v. United States, 544 U.S. 696 (2005)).

48 *Andersen*, 374 F.3d at 284.
49 *Andersen*, 544 U.S. at 702.
50 Allen v. United States, 164 U.S. 492 (1896) (court must instruct jurors of the importance of reaching a verdict and ask that they continue their deliberations).
51 *Andersen*, 543 U.S. at 707.
52 Tom Fowler & Todd Ackerman, *The Andersen verdict; Andersen guilty; Outcome viewed as fatal blow to firm*, HOUST. CHRON., June 16, 2002, at A1; Charles Lane, J*ustices Overturn Andersen Conviction; Advice to Enron Jury on Accountants' Intent Is Faulted*, WASH. POST, June 1, 2005, at A01.
53 Brief for The Securities Industry Association et al. as Amici Curiae Supporting Defendant at 6, United States v. Stein, 435 F. Supp. 2d 330 (D.N.Y. 2006), (quoting 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).
54 *Stein*, 435 F. Supp. 2d at 340.
55 *Id*. at 336.
56 *Id*. at 346.
57 *Id*.
58 *Id*. at 347.
59 Press Release, Department of Justice Superseding Indictment of 19 Individuals Filed in KPMG Criminal Tax Fraud Case, (Oct. 17, 2005), *available at* www.usdoj.gov/tax/txdv05547.htm. Nineteen individuals total (sixteen former KPMG partners or executives) were charged with conspiracy to defraud the IRS, tax evasion, and obstruction of the Internal Revenue Laws).
60 26 U.S.C. §7212 (1954); 18 U.S.C. §2 (1948).
61 Memorandum of Law, *supra* note 32, at 14.
62 *Stein* at 350; *see also* Press Release, *supra* note 61.
63 Memorandum of Law, *supra* note 32, at 15.
64 *Id.*
65 *Id*.
66 *Stein*, 435 F. Supp. 2d at 360-63.
67 *Id*. at 334, 356, 382.
68 *Id.* at 362.
69 *Id.* at 369.
70 *Id.* at 361.
71 *Id*. at 362 (internal citations omitted) (n. 163 "If one were to assume a six-month trial of 117 days and that a defendant were represented by a single lawyer who devoted eight hours a day for each trial day, the cost at $400 per hour simply to attend the trial would be almost $375,000, without taking into account such other expenses as transcripts, copying, travel expenses, and the like.").
72 *Id*.
73 *Id.* at 363.
74 *Id*.
75 *Id*. at 364.
76 *Id.* at 363.
77 *Id*. at 368.
78 *Id*. at 366.
79 *Id*. at 366-67.
80 *Id.*
81 *Id.* at 366. Judge Kaplan was critical of the prosecutors throughout and listed them by name, going so far as to state, "[t]he government was economical with the truth in its early response to this motion. It is difficult to defend even the literal truth of the position it took in its first memorandum of law." *Id*. at 381. Judge Kaplan's opinion was so critical of the prosecutors that it prompted a letter from the United States Attorney requesting that the court withdraw from its opinion the statements regarding the U.S. Attorney's office (quote mentioned above) and the named references to the prosecutors involved appearing throughout the opinion. This request was denied.
82 *Id*. at 368-69.
83 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.
84 Memorandum and Order entered by Judge Kaplan, 07/19/06.
85 *Complaint at 4*, Stein et.al. v. KPMG, 452 F.Supp.2d 230 (S.D.N.Y. 2006) (C.A. No. 1:06-CV-5007-LAK).
86 *Id*.
87 *See* Memorandum and Order, Stein et.al. v. KPMG, 461 F. Supp. 2d 201, 204 (2006) (stating that "[i]t is impossible now to predict with confidence when the charges in the indictment might be tried").
88 Carrie Johnson, *Charge Against KPMG Dropped. Firm Cooperated Over Tax Shelters, Prosecutors say*, WASH. POST, January 4, 2007, at D01.
89 *Id*.
90 November 2006 brought a change in the leadership of the Senate. As a result, Senator Specter is no longer the Chair of the Senate Judiciary Committee. As this bill was introduced at the end of the 109th Congress, it would have to be re-introduced in the 110th Congress that began in January 2007 for it to have any effect. At the time this article went to press, this had not occurred.
91 Attorney-Client Privilege Protection Act of 2006 [hereinafter ACPPA], 109th Cong. (2006), *available at* http://www.ballardspahr.com/files/tbl_s29GeneralContent/PDFfile1222/36/AttorneyClientPrivilegeProtectionAct2006.pdf.
92 *Id*.
93 Media Notice, Specter Press Conference on Attorney-Client Privilege (Dec. 7, 2006).
94 *Id.* at 5.
95 *Id*. at 5-6.
96 *See* U.S. v. Williams, 504 U.S. 36, 46 (1992) (stating that "supervisory power can be used to dismiss an indictment because of misconduct before the grand jury, at least where that misconduct amounts to a violation of one of those "few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions").
97 *See supra* note 10.
98 In response to the backlash from the KPMG case, the United States Sentencing Commission recently announced that it has removed the privilege-waiver and work-product protection. This change took effect November 1, 2006.
99 McNulty Memorandum, *supra* note 10, at §VII (2).
100 *Id.*
101 *Id.*
102 *Id.*
103 *Id.*
104 *Id*.
105 *Id*.
106 *Id.* at § VII(3).
107 *Id*. at n.3.