THE THOMPSON MEMO: ITS PREDECESSORS, ITS SUCCESSOR, AND ITS EFFECT ON CORPORATE ATTORNEY-CLIENT PRIVILEGE

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"Confidentiality is like toothpaste, once it is out of the tube it is out for good." [1]

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I. THE RISE OF CORPORATE MISCONDUCT AND THE RESPONSE BY THE DEPARTMENT OF JUSTICE

For over a decade, the misconduct of corporate America has captivated ordinary Americans. The Department of Justice (hereinafter the "Department") has also taken note. In 1993, then-United States Attorney General Richard Thornburgh described the government's position toward white-collar crime as "constantly pushing the edge of the envelope out to see if you can get an edge for the prosecution."[2] Specifically, the government was trying to get every edge "on those people who are devising increasingly more intricate schemes to rip off the public, hiring the best lawyers, providing the best defenses . . . ." [3] Until rather recently, however, the Department had not maintained a consistent position on the prosecution of corporate misconduct.

A. The Department Releases the Holder Memo

In June 1999, then-Deputy Attorney General Eric H. Holder issued a memorandum entitled "Federal Prosecution of Corporations."[4] In recognizing that "[c]orporations are 'legal persons,' capable of suing and being sued, and capable of committing crimes,"[5] the Holder Memo urged federal prosecutors to consider a list of eight factors when determining whether to file criminal charges against a corporation.[6] The Holder Memo advised federal prosecutors that the eight factors were not "outcome-determinative," but rather, were "only guidelines."[7] Furthermore, the Holder Memo did not require a federal prosecutor to reference these factors in the charging decision or to document the importance assigned to any one factor.[8]

One of the most controversial of these eight factors suggested that a federal prosecutor's charging decision could be positively influenced by a corporation's "timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation . . . ."[9] Specifically, the Department's policy allowed a federal prosecutor to forego the

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[1] Pamela A. MacLean, *No Comfort From DoJ Waiver Rule 'McNulty Memo' on Attorney-Client Privilege Blasted by Critics*, THE NAT'L L. J., Jan. 22, 2007, at 2 (statement of Steven K. Hazen, an advisor to the ABA task force on Rule 502 and the State Bar of California Business Law Section).
[2] 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), *citing* Jim McGee, *War on Crime Expands U.S. Prosecutors' Powers; Aggressive Tactics Put Fairness at Issue*, Wash. Post., Jan. 10, 1993, at A1 (quoting Mr. Thornburgh).
[3] *Id.*
[4] Memorandum from Deputy Attorney Gen. Eric H. Holder, Jr. to All Component Heads and U.S. Attorneys (June 16, 1999), *available at* http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html [hereinafter the Holder Memo].
[5] *Id.*, Part. I, Charging Corporations: General.
[6] *Id.*, Introduction.
[7] *Id.*
[8] *Id.*
[9] *Id.*, Part VI (A), Charging the Corporation: Cooperation and Voluntary Disclosure.

prosecution of a corporation "in exchange for cooperation when a corporation's 'timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective.'"[10]

The Holder Memo recommended that a federal prosecutor consider two questions in determining the level of a corporation's cooperation. The first question asked "whether the corporation appears to be protecting its culpable employees and agents."[11] The Memo warned prosecutors to be wary of "attempts to shield corporate officers and employees from liability by a willingness of the corporation to plead guilty."[12] The second question explored "the adequacy of a corporation's cooperation in the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections . . . ."[13] Such a waiver might apply to both "its internal investigation and . . . communications between specific officers, directors, and employees and counsel."[14]

The ability of a federal prosecutor to seek the waiver of these privileges was not without constraint. The Holder Memo stated that a waiver should be "limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue."[15] The Memo also prohibited a federal prosecutor from seeking a corporate waiver for information related to the government's on-going criminal investigation of the corporation The Holder Memo further explained that the Department did not consider the "waiver of a corporation's privileges an absolute requirement."[16]

B. The Department Issues the Thompson Memo

As the corporate misconduct of companies like Arthur Anderson, Tyco International, HealthSouth Corporation, Enron, Adelphia, and WorldCom continued to affect ordinary American lives, the federal government took stronger action. In July 2002, President George W. Bush introduced the Corporate Fraud Initiative, which included the enactment of the Sarbanes-Oxley Act of 2002[17] and the formation of the President's Corporate Fraud Task Force.[18] The Department also completed an internal review of the Holder Memo, and on

[10] *Id.*, Part VI (B).
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*

[15] *Id.; see id.* at Part VI (B) n.2.
[16] *Id.*, Part VI (B).
[17] Sarbanes-Oxley Act of 2002, 15 U.S.C. §_7201 (2002). The Sarbanes-Oxley Act provided new regulatory and remedial powers to the Securities Exchange Commission. For example, the statute authorizes the SEC to seek forfeiture of certain bonuses and profits (15 U.S.C. § 7243 (2000 & Supp. 2005)), officer and director bars and penalties (15 U.S.C. §§ 78(u)(d)(2), 77(t)(e)), temporary asset freezes (15 U.S.C. § 78u-3), and the barring of individuals from the securities industry based on state regulatory proceedings (15 U.S.C. § 78o). The SEC also has the authority to establish victim restitution funds in administrative proceedings and civil actions seeking the payment of disgorgement and civil penalties (15 U.S.C. § 7246).
[18] *See* Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002) (establishing Corporate Fraud Task Force), *available at* www.usdoj.gov/dag/cftf/execorder.htm. The Corporate Fraud Task Force is chaired by the Deputy Attorney General and includes senior Justice Department officials, the heads of the Departments of Treasury and Labor, and the heads of the Securities and Exchange Commission, Commodity Futures Trading Commission, Federal Energy Regulatory Commission, Federal Communications Commission, Office of Federal Housing Enterprise Oversight, and United States Postal Inspection Service. *Id.*

January 20, 2003, Deputy Attorney General Larry Thompson released the newly drafted "Principles of Federal Prosecution of Business Organizations."[19] Thompson described the new memo as "draw[ing] heavily on the combined efforts of the Corporate Fraud Task Force and the Attorney General's Advisory Committee to put the results of more than three years of experience with the principles into practice."[20]

Commentators have described the Thompson Memo as the "most comprehensive statement by the federal government to date concerning the exercise of prosecutorial discretion when weighing the indictment of a corporation."[21] Then-Deputy Attorney General Thompson explained 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."[22] Because "more and more often, federal prosecutors are faced with criminal conduct committed by or on behalf of corporations,"[23] the Thompson Memo toughened the standards established by its predecessor, the Holder Memo.[24] The Thompson Memo substantially reviewed four major areas of the Holder Memo,[25] including "the authenticity of a corporation's cooperation," upon which increased emphasis and scrutiny were placed.[26]

The Thompson Memo encouraged a federal prosecutor to examine various factors in assessing the level of a corporation's cooperation. These factors include whether the corporation made the necessary waivers of attorney-client privilege and work-product protection, and whether the corporation appeared to be protecting culpable employees and agents.[27] Again, the Department emphasized that the "waiver of a corporation's attorney-client and work product protection" was not "an absolute requirement."[28]

The Thompson Memo also added a third factor for consideration. A federal prosecutor should consider "whether the corporation, while purporting to cooperate, has engaged in conduct that impedes the investigation (whether or not rising to the level of criminal obstruction)."[29] Because federal prosecutors "are generally seeking the facts: what happened,

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[19] Memorandum from Deputy Attorney Gen. Larry D. Thompson to Heads of Dep't Components and U.S. Attorneys (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm [hereinafter, the Thompson Memo].

[20] *Id.*

[21] Dan K. Webb, Robert W. Tarun & Steven F. Molo, *Understanding the Factors Motivating the Prosecutor*, WL CORPII § 16.04 (2006).

[22] Thompson Memo, *supra* note 19.

[23] Holder Memo, *supra* note 4, Introduction.

[24] *See* Jason McLure, *Specter Bill Seeks to Alter DoJ Corporate Fraud Investigations*' LEGAL TIMES, Dec. 8, 2006, at 2, *available at* http://www.law.com/jsp/newswire_article.jsp?id=1165501515476 (noting that since the original Thompson Memo was released, federal prosecutors have won more than 1,100 corporate-fraud convictions since 2002).

[25] *See* Webb, Tarun & Molo, *supra* note 21. Notwithstanding these four major revisions, the bulk of the Holder Memo was unaffected.

[26] Thompson Memo, *supra* note 19. The other three substantive revisions were (1) charging the employee responsible for the misconduct, (2) alternatives to criminal proceedings, (3) corporate compliance programs. *Id.*

[27] *Id.*, Part VI (B).

[28] *Id.*

[29] *Id.* The Memo explains that examples of such impeding conduct include "overly broad assertions of corporate representation of employees or former employees; inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed; making presentations or submissions that contain misleading assertions or omissions;

who did, how they did it," a corporation "must help the Government catch the crooks" in order to receive any credit for its cooperation.[30] Then-Assistant Attorney General for the Criminal Division Christopher Wray summarized the Department's position.

> The message we're sending to Corporate America on this point is two-fold: Number one, you'll get a lot of credit if you cooperate and that credit will sometimes make the difference between life and death for a corporation. Number two, if you want to ensure that credit, your cooperation needs to be authentic: you have to get all the way on board and do your best to assist the Government.[31]

Cooperation did not ensure absolution. A corporation's offer of cooperation alone "does not automatically entitle it to immunity from prosecution . . . . [because it] is merely one relevant factor, that needs to be considered in conjunction with the other factors . . . ."[32]

C. The United States Sentencing Commission Takes Action

The United States Sentencing Commission (Sentencing Commission) had not previously addressed the corporate waiver of either privilege. But, on April 30, 2004, the Sentencing Commission bolstered the Department's position when it submitted to Congress several proposed amendments to the section of the Federal Sentencing Guidelines pertaining to "organizations."[33] Following the Commission's recommendations, Congress subsequently amended the Commentary of Section 8C2.5 of the Guidelines to read that the corporate wavier of the attorney-client privilege "is not a prerequisite . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."[34] Following the enactment of the amendment on November 1, 2004, [35] a corporation's waiver of the attorney-client privilege and the work-product protection served to reduce the corporation's culpability score, thereby securing a more lenient sentence.[36]

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incomplete or delayed production of records; and failure to promptly disclose illegal conduct known to the corporation." *Id*.

[30] *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*, 51 U.S. ATT'YS' BULL. 1, 1 (2003) [hereinafter the Comey Interview].

[31] Christopher A. Wray, Assistant Attorney Gen., Dep't of Justice, Criminal Div., Remarks to the Assoc. of Certified Fraud Exam'rs Mid-South Chapter, (Sept. 2, 2002), *available at* http://www.usdoj.gov/criminal/pr/speeches/2004/09/2004_2954_rmks2CFC_TN090204.pdf.

[32] Thompson Memo, *supra* note 19, Part VI (B).

[33] *Proposed Amendment of Commentary in Section 8C2.5 of the Federal Sentencing Guidelines Regarding Waiver of Attorney-Client Privilege and Work Product Doctrine: Hearing Before the United States Sentencing Commission*, 109th Cong. (2005) (statement of Donald C. Klawiter, Chair of the ABA Antitrust Law Section) [hereinafter the Klawiter Testimony]. "Organizations" is a broad term encompassing corporations, partnerships, unions, non-profit organizations, governments, and other entities. *Id*. at 2.

[34] U.S. SENTENCING GUIDELINES MANUAL §8C2.5 at 124 (2004), *available at* http://www.ussc.gov/2004 guid/RFMay04_Corp.pdf.

[35] Klawiter Testimony, *supra* note 33.

[36] *Id.*

II. CONCERN OVER THE DEPARTMENT'S POLICIES INCREASES

The following statements are representative of the criticisms directed at the Department and its policies.

"The [corporate] attorney-client privilege is under attack as never before."[37]

"Privileged information used to belong to the client; now it apparently belongs to the government."[38]

"The sound you hear coming from the corridors of the Department of Justice is a requiem marking the death of privilege in corporate criminal investigations."[39]

A. General Concerns Regarding the Department's Policies

While opponents most often criticize the Department's policies for forcing a corporation into a "completely untenable position,"[40] many critics believe the Department intends to "go[] after corporate America – and its lawyers – with everything it has got."[41] The white-collar corporate defense bar reacted to this tactic "with a great degree of consternation."[42] Others have described the Department's current position as poor policy because the "the government, with its vast array of powers…coerce[s] its corporate adversary to surrender the means (attorney client and work product privileges) by which it exercises all its constitutional and other rights."[43]

Other critics characterize the Department's policies as "seriously flawed, providing no standards, no real guidance and no meaningful oversight. In short, [the Department] will accomplish little, if anything, with respect to improving the controversial practice that serves to coerce waivers of both privileges."[44] A variety of sources informed the ABA that the number of waiver requests expressly or implicitly accompanied by a threat of harsh treatment

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[37] Ronald C. Minkoff, *A Leak in the Dike: Expanding the Doctrine of Waiver of Attorney-Client Privilege* (2006-2007 Update), *reprinted in* WL 163 PLI/NY 181, 184 (2006).

[38] Joseph P. Savage, Jr. & Melissa M. Longer, '*Waive' Goodbye to Attorney-Client Privilege*, 7 NO. 9 Bus. Crimes Bull., at 4 (2000).

[39] Zornow & Krakaur, *supra* note 2, at 147-48.

[40] 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, 1225 (2006); *see also* Breckinridge L. Willcox, *Attorney/Client Privilege Waiver: Wrongheaded Practice?*, 6 BUS. CRIMES BULL. 12, at 1 (2000) (concluding that it "all but required" waiver to qualify for cooperation credit from prosecutors).

[41] Tamara Loomis, *Justice Encourages Waiving Attorney-Client Privilege*, N.Y. L. J. (Feb. 21, 2003), *available at* http://www.law.com/jsp/article.jsp?id=1045754121051.

[42] Richard Ben-Veniste & Lee H. Rubin, *DoJ Reaffirms and Expands Aggressive Corporate Cooperation Guidelines*, 18 LEGAL BACKGROUNDER, April 4, 2003, at 1. The Thompson Memo is most strongly criticized for the emphasis it places on the cooperation of the corporation including the "[prosecutor's] dramatic power over companies under investigation."

[43] Silbert & Joannou, *supra* note 40, at 1229; *see* John S. Baker, *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 329 (2004) ("[G]iven the increase in corporate criminal investigations since the Enron collapse, it is difficult to imagine that federal prosecutors have become more restrained.").

[44] Stephen W. Grafman & Jeffrey L. Bornstein, *New Memo Won't Help*, NAT'L. L.J., Nov. 14, 2005, at 1, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1131640455767.

for refusing to cooperate had risen. Consequently, it its May 2005 Report, the ABA concluded that the Department had "not developed detailed safeguards to regulate when and how prosecutors may legitimately seek attorney-client privileged information and attorneys' litigation work product . . . ."[45]

In testimony before the Senate Committee on the Judiciary, former federal prosecutor Andrew Weissmann complained that the Thompson Memo "gives federal prosecutors a green light to seek waivers of the attorney-client privilege [but] offers no guidance…about when it is appropriate to do so . . . ."[46] According to Weissmann, the Thompson Memo recognized the impropriety of a waiver request for communications regarding a corporation's ongoing defense in a criminal investigation,[47] but the Memo's general lack of guidance created a "wide area in the middle where the practices of federal prosecutors vary considerably."[48]

A federal prosecutor's use of the Thompson Memo as a means to "seek a blanket waiver of all attorney-client communications" particularly troubled Weissmann.[49] Because the Department could replicate much of the disclosed information "by rolling up its sleeves and interviewing the witnesses," Weissman argued that waivers are "simply a shortcut where the government can obtain the information directly."[50] Members of the defense bar echoed Weissmann's testimony and complained that "laz[y] prosecutors" unnecessarily rely on these waivers.[51]

Stephen W. Grafman and Jeffrey L. Bornstein share this sentiment. The two men opined that many federal prosecutors use the Thompson Memo's cooperation factor as "justification to seek, and in many cases virtually demand, that a corporation . . . turn over the fruits of [an internal] investigation to the government . . . [because] a corporation that does not waive these valuable privilege rights effectively is considered a noncooperator."[52] Hence, the Department strong-arms a corporation under investigation into "turn[ing] over protected materials to the government almost reflexively…."[53]

Historically, the Department's policies regarding the waiver of privileges raised two major concerns. First, a corporate waiver may create disincentives for corporate counsel to memorialize thoughts and impressions in writing, which may impede the free flow of information between corporate employees and counsel. Second, courts have generally held

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[45] ABA Presidential Task Force on the Attorney-Client Privilege, May 2005 Report, *reprinted in* 60 BUS. LAW. 1029, 1046 (2005), *available at* http://www.abanet.org/buslaw/attorneyclient/materials/hod/report.pdf [hereinafter ABA May 2005 Report].

[46] *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Andrew Weissmann, Partner, Jenner & Block), *available at* http://judiciary.senate.gov/testimony.cfm?id=2054&wit_id=5743. Andrew Weissmann previously served for 15 years as an Assistant United States Attorney in the Eastern District of New York. He also represented the United States as the Director of the Department of Justice's Enron Task Force and Special Counsel to the Director of the FBI. *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] John Gibeaut, *Junior G-Men*, 89-JUN A.B.A. J. 46 (2003).

[52] Grafman & Bornstein, *supra* note 44.

[53] Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and in Practice*, 43 AM. CRIM. L. REV. 1095, 1172 (2006); *see also* Stephen W. Grafman & Jeffrey L. Bornstein, *supra* note 44.

that a corporation's waiver of privileged information pursuant to a government investigation also extends to any subsequent civil litigation. Herein lays the corporate dilemma. On the one hand, a corporation's full cooperation during a government investigation may help the corporation to avoid a federal indictment. On the other hand, a corporation that waives its privileges does so with the "sober recognition that [it] also may be handing over [its] internal documents to both the plaintiffs' bar and relevant federal and state regulatory authorities."[54]

B. The Danger to the Flow of Information

Critics complain that the Department's policy of seeking corporate waivers of privileged information fractures the relationship between the employer and its employees. As Silbert and Joannou explained, "deputiz[ing] corporations to help 'catch the crooks' . . . is pitting corporations against their employees and their counsel, for when privileges are waived, employees cannot help but feel threatened and counsel can no longer provide trusted and confidential advice."[55] Because the attorney-client privilege belongs to the client rather than the attorney,[56] one author warns that "[e]mployees should not have false expectations concerning the confidentiality of their communications with corporate counsel…."[57] At any time, a corporation may waive the protected confidentiality of those communications, and may do so over an employee's objection.[58]

Empirical studies suggested that these complaints may be warranted. The Association of Corporate Counsel recently completed a survey, collecting responses from over 363 in-house lawyers and 365 outside attorneys. Ninety-five percent of the respondents agreed that if "privilege did not offer protections . . . there [would] be a 'chill' in the flow or candor of information from clients."[59] Similarly, in a study conducted by the National Association of Criminal Defense Lawyers, over 95% of respondents answered "Yes" when asked "Do you believe that there would be a 'chill' in the flow or candor of information provided to you as counsel for the company if the privilege did not offer protection to client communications or your attorney work-product?"[60]

The timing of a corporation's decision to waive its privileges may also impair the quality of the legal advice that the corporation obtains from its counsel. Consequently, many practitioners advise a guarded approach to "planning and structuring an investigation . . . to avoid a landslide that could be potentially fatal to the company."[61] Some practitioners do not prepare written reports relating to an internal investigation because it is likely that a waiver

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[54] Ben-Veniste & Rubin, *supra* note 42, at 2.
[55] Silbert & Joannou, *supra* note 40, at 1240.
[56] *See In re* Grand Jury Proceedings, 73 F.R.D. 647, 652 (M.D. Fla. 1977) (citing Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 556 (2d Cir. 1967)).
[57] Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 599 (2004).
[58] *Id.*
[59] Association of Corporate Counsel, *Executive Summary – Association of Corporate Counsel Survey: Is the Attorney-Client Privilege Under Attack?*, at 2, April 6, 2005, *available at* http://www.abanet.org/buslaw/attorneyclient/publichearing20050421/testimony/hackett1.pdf
[60] National Association of Criminal Defense Lawyers, *Executive Summary – National Association of Criminal Defense Lawyers Survey: The Attorney-Client Privilege is Under Attack*, at 3, April 2005, *available at* http://www.acc.com/Surveys/attyclient_nacdl.pdf.
[61] Julie M. O'Daniel & Kerry K. Vatzakas, *Strategic Considerations in Internal Investigations--An Overview*, WL 27 SECLITFRMS § 1:8 (2006).

will be required as part of the cooperation agreement with the government.[62] Critics note that the Department's "culture of waiver" may encourage a "different kind of investigation;" meaning one that does not "investigate too thoroughly or probe too deeply."[63] The "government can hardly accuse a company of not cooperating for failure to provide a report if one has not been prepared."[64] Such an investigation "is to provide company counsel with incentives not to ferret out the facts, and to provide employees with incentives not to reveal them."[65]

C. The Collateral Risks of Disclosure to the Government

A review of the case law indicates that in *most* jurisdictions, a corporation's waiver of the attorney-client privilege and the work-product protection pursuant to a government investigation also constitutes a waiver of these privileges in subsequent civil litigations. For example, in *Permian Corp. v. United States*,[66] the court determined that the defendant corporation's production to the Securities and Exchange Commission (SEC) of privileged documents also applied to subsequent civil suits. Likewise, *In re Martin Marietta Corp.*,[67] the corporation's submission to federal prosecutors of a position paper constituted a waiver of attorney-client privilege regarding both the document and the underlying witness statements from which the document was prepared. Furthermore, *In re Steinhardt Partners, L.P.*,[68] the court held that the corporation waived its work-product protection when, during the course of the federal investigation, the corporation submitted to the SEC several protected items. These decisions force many corporate attorneys to conclude that "in most jurisdictions, privileged documents produced to the government, even pursuant to a confidentiality agreement, will be discoverable by private litigants."[69] Such a policy "invite[s] civil lawsuits in which . . . the company's lawyers already will have conducted the plaintiffs' investigation for them."[70] However, as illustrated in the next section by the *McKesson* cases, the law in this area is far from settled.

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[62] *See* David Hechler, *Scandals Help Erode Privilege*, NAT'L. L.J., Dec. 23-30, 2002, at A22, A31.
[63] Shirah Neiman, Hallmarks of an Effective Corporate Compliance Program and Waiver of the Privilege Under the principles of the Federal Prosecution of Business Organizations, Address at the 2003 White Collar Crime National Institute.
[64] O'Daniel & Vatzakas, *supra* note 63.
[65] Jed Rakoff, *Coerced Waiver of Corporate Privilege*, N.Y. L.J., July 13, 1995, at 33.
[66] Permian Corp. v. United States, 665 F.2d 1214, 1220-21 (D.C. Cir. 1981).
[67] *In re* Martin Marietta Corp., 856 F.2d 619, 623-24 (4th Cir. 1988).
[68] *In re* Steinhardt Partners, L.P., 9 F.3d 230, 236 (2d Cir. 1993).
[69] O'Daniel & Vatzakas, *supra* note 61. If the privileged documents are not discoverable, private citizens may also attempt to obtain documents through a Freedom of Information Act (FOIA) request. 5 U.S.C. § 552 (1994). While a cooperating corporation can ask the government not to release its disclosed material pursuant to an FOIA request, the corporation's request does not bind the agency. 17 C.F.R. § 200.83; *see* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977) (holding that the conveyance of privileged material to the SEC pursuant to a subpoena did not constitute a universal waiver of privilege because "[t]o hold others may have the effect of thwarting the developing procedures of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.").
[70] Alec Koch, *Internal Corporate Investigations: The Wavier of Attorney-Client Privilege and Work-Product Protection Through Voluntary Disclosures to the Government*, 34 AM. CRIM. L. REV. 347, 355 (1997).

D. The Tangled Web of McKesson

> A string of decisions arising from the same set of facts, although they are somewhat conflicting, are instructive. In the *McKesson* line of cases, McKesson HBOC, Inc. ("McKesson") made a public announcement on April 28, 1999 that its auditors had discovered accounting irregularities. The SEC investigation and inevitable private litigation were initiated immediately following the announcement. Soon thereafter, McKesson's board authorized its audit committee to review the circumstances and make recommendations regarding the company's accounting policies, procedures and controls. The audit committee retained Skadden, Arps, Slate, Meagher & Flom ("Skadden") to assist in the investigation. Skadden retained PricewaterhouseCoopers ("PWC"), which had not previously performed auditing services for McKesson, to assist in the investigation.[71]

Afterwards, "Skadden and PWC met with the SEC and agreed to provide a written report" of their internal investigation, which included any back-up materials.[72] McKesson did not want to waive either the attorney-client privilege or work-product protection, therefore, McKesson and the SEC entered into a "confidentiality agreement."[73] The confidentiality agreement stated that McKesson and the SEC shared a "common interest . . . in obtaining information contained in the Report and Back-up Materials if it is able to do so without losing protection from further disclosure."[74] The SEC agreed to maintain the confidentiality of the information "except to the extent the [SEC] determines that disclosure is otherwise required by federal law."[75] Skadden later "entered into a separate confidentiality agreement with the United States Attorney's Office ("USAO") on behalf of the company, and agreed to provide the same documents on the same conditions, except that the USAO could use the documents in any criminal proceedings."[76]

In *McKesson HBOC, Inc. v. Adler*,[77] the trial court ordered McKesson to deliver to the plaintiffs the materials that McKesson had previously provided to the government. According to the trial court, McKesson waived the attorney-client privilege by giving to the SEC the requested materials.[78] On appeal, the Georgia Court of Appeals affirmed in part, and reversed and remanded in part.[79] The appellate court agreed with the lower court, also concluding that McKesson waived its attorney-client privilege.[80] However, the appellate court remanded to the trial court for a determination of whether McKesson had also waived its work-product protection.[81]

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[71] O'Daniel & Vatzakas, *supra* note 61.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] McKesson HBOC, Inc. v. Adler, 254 Ga.App. 500, 501 (Ga. App. Ct. 2002).
[78] *Id.*
[79] *Id.* at 504
[80] *Id.*
[81] *Id.*

In *Saito v. McKesson HBOC, Inc.*,[82] plaintiffs moved to intervene in the criminal prosecution of its former executives. The former McKesson executives, now defendants, asserted "a work product privilege as to all these documents and attorney-client privilege as to four of them."[83] In light of the confidentiality agreement between the SEC and McKesson, the court determined that McKesson did not waive its privilege, and therefore, the work-product doctrine protected the documents that McKesson previously gave to the SEC.[84] The court reasoned that McKesson maintained a reasonable expectation of privacy in its work-product during the government's investigation, and that the signed confidentiality agreement confirmed this expectation.[85]

The next year, in *United States v. Bergonzi*, the district court ruled that because the communications between Skadden and McKesson "was made with the intent to relay the communication to the Government,"[86] McKesson had waived all privileges.[87] According to the court, the disclosure of privileged information to a third-party waived the corporate work-product protection.[88] The court regarded the "common interest" language of the confidentiality agreement as unpersuasive, and concluded that McKesson and the government "did not have a true common goal, as it could not have been the Company's goal to impose liability onto itself . . . . "[89]

Later, in *McKesson HBOC, Inc. v. Superior Court*,[90] the plaintiffs moved to compel McKesson to produce the audit committee report and the interview memoranda prepared by Skadden. As in *Bergonzi*, the "common interest" language of the confidentiality agreements did not persuade the appellate court.[91] The court noted that "the SEC and United States Attorney agreed to keep the documents confidential if they did not need to disclose the document's contents to perform their duties. The agreements did not bind the government to maintain confidentiality under all circumstances."[92] The court concluded that McKesson waived the work-product protection.[93]

In *McKesson Corp. v. Green*, the Georgia Court of Appeals characterized the SEC and McKesson as adversaries.[94] Consequently, McKesson waived its work-product protection when it voluntarily shared with the SEC the audit documents.[95] McKesson argued that even if it had turned over its work-product to an "adversary," then its confidentiality agreement between the SEC and the United States Attorney's Office should prevent any additional waiver of the privilege.[96] Since the confidentiality agreement allowed the government to convey to other entities the materials "as it 'deems appropriate,'"[97] the court rejected

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[82] Saito v. McKesson HBOC, Inc., 2002 WL 31657622, at *1 (Del. Ch. 2002), *aff'd*, 870 A.2d 1192 (Del. 2005)
[83] *Id.* at *2.
[84] *Id.* at *12.
[85] *Id.* at *6-*7
[86] United States v. Bergonzi, 216 F.R.D. 487, 494 (N.D. Cal. 2003).
[87] *Id.*
[88] *Id.* at 497-98.
[89] *Id.* at 496.
[90] McKesson HBOC, Inc. v. Superior Court, 9 Cal. Rptr. 3d 812, 816 (Cal. Ct. App. 2004).
[91] *Id.* at 819-20.
[92] *Id.* at 820.
[93] *Id.* at 821.
[94] McKesson Corp. v. Green, 266 Ga. App. 157, 163 (Ga. Ct. App. 2004), *aff'd*, 279 Ga. 95 (Ga. 2005).
[95] *Id.*
[96] *Id.*
[97] *Id.* at 164.

McKesson's argument. The court held that the confidentiality agreements were "illusory," and did not "ensure that the work-product would remain confidential."[98]

Lastly, in *Aronson v. McKesson HBOC, Inc.*,[99] the court concluded that "McKesson did not waive its work-product protection" when, according to the terms of a confidentiality agreement, McKesson provided to the government its written report. Acknowledging that other courts had differing opinions, the district court emphasized the general "benefit to the public of permitting disclosure of work product to the government," and held that McKesson's privilege remained intact.[100]

The *McKesson* cases illustrate the increasingly complex battle waged over the scope of a corporation's waiver of the attorney-client privilege and work-product protection.

> Companies have tried in a number of ways to avoid a finding that by providing the written report or other materials to the government the company waived the applicable privileges and thus must provide the often damaging materials to parties in civil and other litigation . . . . (Rule 5.3(a)(vi)) [m]ost of those companies have nevertheless been ordered by courts across the country to fork over the written road map of the company's wrongdoing to civil class action plaintiffs or litigants in other cases involving the events in question.[101]

According to some, the Department's emphasis on a corporation's full disclosure is responsible for much of the confusion.

III. THE DEPARTMENT DEFENDS THE THOMPSON MEMO

Those Department officials involved in drafting the original Thompson Memo believe that the Memo's principles are sound.[102] These officials note that the same 2002 memo was also instrumental in helping "prosecutors win more than 1,100 corporate-fraud convictions since 2002."[103] Despite an occasionally zealous federal prosecutor, supporters of the Thompson Memo argue that the "guidelines are an accurate way to assess whether a company is truly cooperating with a criminal fraud investigation."[104] William Mateja, one of the former Department officials involved in drafting the Thompson Memo, thinks that "a lot of prosecutors are doing the right thing . . . . [f]irst and foremost, they're trying to get to the truth, and if they can get to it without asking companies to waive, they do."[105]

In a late 2003 interview, United States Attorney James B. Comey stated that "[t]he *Principles* do not *require* waiver, and do not even require cooperation. Rather, all relevant

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[98] *Id.*
[99] Aronson v. McKesson HBOC, Inc., 2005 WL 934331, at *10 (N.D. Cal. 2005).
[100] *Id.* The district court in *In re* Natural Gas Commodity Litigation, 2005 WL 1457666 at *8-*9 (S.D.N.Y. 2005), *motion denied*, 232 F.R.D. 208 (S.D.N.Y. 2005), reached the same conclusion on the same basis, pointing out that the Second Circuit had not adopted a "per se waiver" approach as other judicial circuits had.
[101] O'Daniel & Vatzakas, *supra* note 61.
[102] McLure, *supra* note 24.
[103] *Id.*
[104] *Id.*
[105] *Id.*

factors need to be assessed in making a charging decision."[106] Furthermore, Comey stressed that if a corporation wants to cooperate and can do so without waiving any privileges, then a federal prosecutor "should give them the opportunity to do that."[107] Comey emphasized that the decision to charge a corporation is based on a variety of factors, and that "cooperation will not guarantee non-prosecution . . . ."[108] He continued, "all the cooperation and waivers in the world may not obviate the need to charge a corporation that has engaged in very serious misconduct, involving high level management, over a long period of time."[109]

Comey also defended the Department's practice of "piggybacking" a federal investigation onto a corporation's internal investigation.[110] "This is about the public's interest in uncovering corporate crime in a timely fashion . . . [and] to minimize additional losses and maximize restitution."[111] Comey noted that "internal investigations [may] cost millions of dollars and [require counsel to] analyze hundreds of thousands of documents . . . . [f]ederal prosecutors . . . would be unable to replicate that work."[112] A federal prosecutor "can, however, work with a report of such an internal effort in order to conduct a thorough and complete Government investigation."[113] Regardless of whether the government piggybacks a federal investigation onto an internal corporate investigation, Comey stressed that the core issue remains whether the corporation cooperates in helping the government "catch the wrongdoers."[114]

Similarly, in his recent testimony before the Senate Judiciary Committee, Deputy Attorney General Paul McNulty recognized that "the attorney-client privilege is an extremely important component of our constitutional order and great legal tradition. The Justice Department may not and will not do harm to this principle of basic fairness."[115] Furthermore, McNulty noted there are many ways for a federal prosecutor to obtain relevant information, but that "[s]ome ways are faster and more productive than others. . . . [and] disclosing the results of the company's internal investigation is one of the best ways."[116] He commented:

> [M]ost corporations . . . are anxious to cooperate with Government investigations. Whether it is the Holder memo, the Thompson memo, a McNulty memo, or no memo, corporations will continue to cooperate in order to bring criminal investigations to an end, to bring them out from under that dark cloud of potential prosecution.[117]

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[106] Comey Interview, *supra* note 30, at 2. Although the Thompson Memo's language regarding the wavier of attorney-client privilege does not vary from that of its predecessor, the Holder Memo, criticism of the Thompson Memo has been more pronounced.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *See id.* at 3-4.
[111] Comey Interview, *supra* note 30, at 3-4.
[112] *Id.* at 4.
[113] *Id.*
[114] *Id.*
[115] *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Paul J. McNulty, Deputy Attorney General, Dep't of Justice) [hereinafter the McNulty Statement].
[116] *Id.*
[117] *Id.*

Promising to continue the dialogue regarding the Thompson Memo, McNulty remarked: "waiving of the attorney-client privilege is just one part of one factor . . . . [but it] can make a big difference for the hopes and dreams of shareholders . . . ."[118]

IV. THE MCCALLUM MEMO INTRODUCES ADMINISTRATIVE OVERSIGHT

Acting Deputy Attorney General Robert D. McCallum, Jr. attempted to further refine the Department's policies. On October 21, 2005, McCallum issued a very brief memo entitled "Waiver of Corporate Attorney-Client and Work Product Protection."[119] According to the McCallum Memo, the Department continued to "place[] significant emphasis on the prosecution of corporate crimes."[120] Following the precedent independently set by some United States Attorneys, the McCallum Memo directed each of the 93 United States Attorneys to develop a written waiver review process.[121] This review process would delineate the circumstances in which that United States Attorney would approve a federal prosecutor's request for a corporate waiver.[122] This process would "ensure that federal prosecutors exercise appropriate prosecutorial discretion under the principles of the Thompson Memo . . . . "[123] Because each United States Attorney retained the prosecutorial discretion necessary "to seek timely, complete, and accurate information from business organizations,"[124] the McCallum Memo also acknowledged that the "waiver process might vary from district to district . . . ."[125]

V. THE AMERICAN BAR ASSOCIATION MOBILIZES

The American Bar Association (ABA) actively waged its battle against the Department's solicitation of corporate waivers on two fronts. First, "the ABA has worked closely with a broad coalition of legal and business groups in an effort to persuade the U.S. Sentencing Commission to amend" the previously amended language of Section 8C2.5 of the Sentencing Guidelines.[126] Second, the ABA engaged the Department in a public dialogue in an attempt to coax the Department into modifying the policies established by the Thompson Memo.[127]

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[118] *Id.*

[119] Memorandum from Acting Deputy Attorney General Robert D. McCallum, Jr. to Heads of Dep't Components and U.S. Attorneys, (Oct. 21, 2005), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/AttorneyClientWaiverMemo.pdf [hereinafter the McCallum Memo].

[120] *Id.*

[121] Michael S. Greco, *U.S. Should Rethink Attorney-Client Policy*, 31-MAY MONT. LAW. *24, *24 (2006).

[122] *Id.*

[123] McCallum Memo, *supra* note 119, at 1.

[124] *Id.*

[124] Because the McCallum Memo does not required consistency or predictability across the various offices, some practitioners believe that this issue is "particularly troublesome for corporations doing business in a global marketplace." William R. McLucas, Howard M. Shapiro, & Julie J. Song, *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. CRIM. L. & CRIMINOLOGY 621, 633 (2006).

[125] McCallum Memo, *supra* note 119, at 1.

[126] ABA Presidential Task Force on the Attorney-Client Privilege Report to House of Delegates, Dated August 2006; *reprinted in* WL 1571 PLI/Corp. 723, 728 (2006) [hereinafter the ABA August 2006 Report to HOD].

[127] *Id.*

In August 2004, the ABA House of Delegates adopted Recommendation 303, which "vigorously opposed the proposal that a corporation's waiver of the attorney-client privilege and work product protections in connection with government criminal investigations be considered as a ground for reduction in sentence."[128] "Recommendation 303 supported five specific changes to the then-proposed amendments" to the Sentencing Guidelines.[129] One of these suggestions included an amendment to the Commentary to Section 8C2.5 to read that waiver of attorney-client privilege "should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government."[130] The ABA argued that the recent amendment to Section 8C2.5 left public corporations "with little choice but to waive the attorney-client privilege if they hope to negotiate lenient pleas, or non-prosecution or deferred prosecution agreements."[131]

On October 6, 2004, the ABA also created the Presidential Task Force on Attorney-Client Privilege to study and address the policies and practices that have eroded attorney-client privilege and work product protections.[132] The Task Force reviewed scholarly articles, studied applicable law, conducted meetings, held public hearings, and recorded oral and written testimony from interested persons.[133] In its first report released in May 2005, the Task Force concluded that under the Department's policies, a corporation's ability to confide fully and truthfully with its attorneys "will be reduced because of the risk that government agencies, subject to scant internal standards, safeguards and guidelines, may later demand and obtain access to confidential communications with counsel, thereby in turn making those communications accessible to private litigants."[134]

On at least two occasions, March 3, 2005[135] and August 15, 2005,[136] the ABA joined an informal coalition of "numerous prominent business, legal and public policy organizations" to formally present to the Sentencing Commission its recommendations. On May 17, 2005, the ABA independently expressed to the Commission its concerns in a separate letter.[137] On November 15, 2005, in testimony before the Sentencing Commission, the ABA's representative, Donald C. Klawiter, vocalized the ABA's concerns:

> Now that the privilege waiver amendment to the Sentencing Guidelines has become effective, there may be no limit on the Justice Department's ability to put pressure on companies to waive their privileges in almost all cases. Our concern is that the Justice Department, as well as other enforcement agencies, will contend that this change in the Commentary to the Guidelines provides

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[128] Mark H. Alcott, *Promoting Needed Reform, Defending Core Values*, 78-OCT. N.Y. ST. B.J. 5, 5 (2006).
[129] ABA August 2006 Report to HOD, *supra* note 126, at 727 n.1.
[130] *Id.*
[131] McLucas, Shapiro, & Song, *supra* note 124, at 634.
[132] ABA May 2005 Report, *supra* note 45, at 1043.
[133] ABA August 2006 Report to HOD, *supra* note 126, at 728.
[134] ABA May 2005 Report, *supra* note 45, at 1049.
[135] Klawiter Testimony, *supra* note 33, at 7. The following organizations signed the March 3, 2005 letter: "the American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, Frontiers of Freedom, National Association of Manufacturers, U.S. Chamber of Commerce, and Washington Legal Foundation." *Id.* at 7 n.7.
[136] Klawiter Testimony, *supra* note 33, at 7 n.7. The same groups that signed the coalition's March 3, 2005 letter also signed the August 15, 2005. The Financial Services Roundtable, National Association of Criminal Defense Lawyers, National Defense Industrial Associationand Retail Industry Leaders Association also signed the August 15, 2005 letter, which is *available at* http://www.abanet.org/buslaw/attorneyclient/materials/047/047.pdf.
[137] *Id.*

> Commission and Congressional ratification of the Department's policy of routinely requiring privilege waivers.[138]

Klawiter described the privilege waiver amendment as "counterproductive," noting that it "undermines, rather than enhances, compliance with the law."[139] He urged the Sentencing Commission to "modify the applicable language in the Commentary to clarify that the waiver of attorney-client privilege and work-product protections should not be a factor in determining whether a sentencing reduction under the Guidelines is warranted for cooperation with the government."[140]

In August 2005, following the completion of its research, the Task Force submitted to the ABA House of Delegates Recommendation 111, which the House of Delegates later adopted with little revision. [141] Recommendation 111 "strongly support[ed] the preservation of the attorney-client privilege and work-product doctrine as essential to maintaining the confidential relationship between client and attorney."[142] In the accompanying report, the Task Force concluded that as "a practical matter, corporations rarely can resist prosecutorial requests for disclosure, because of the harsh consequences of having to defend against criminal charges, and because . . . corporations depend on the leniency in sentencing that results from providing assistance satisfactory to the prosecution."[143]

On January 31, 2006, ABA President Michael S. Greco issued to bar leaders a letter soliciting support for the preservation of the attorney-client privilege.[144] In the letter, Greco criticized the Justice Department for "adopt[ing] – and . . . now following – a dangerous policy that has led many of its prosecutors routinely to pressure companies and other organization[s] to waive their privileges as a condition of cooperation during investigations."[145] According to Greco, the Thompson Memo forced corporations into a Hobson's choice.

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[138] Klawiter Testimony, *supra* note 33, at 5.
[139] *Id.* at 8.
[140] *Id.*at 8.
[141] ABA August 2006 Report to HOD, *supra* note 126, at 727.
[142] *Id.* Recommendation 111, *available at* http://www.abanet.org/buslaw/attorneyclient, reads as follows.

> "RESOLVED, that the American Bar Association strongly supports the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice and (4) promote the proper and efficient functioning of the American adversary system of justice; and FURTHER RESOLVED, that the American Bar Association opposes policies, practices and procedures of governmental bodies that have the effect of eroding the attorney-client privilege and work product doctrine and favors policies, practices and procedures that recognize the value of those protections. FURTHER RESOLVED, that the American Bar Association opposes the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage."

[143] ABA August 2006 Report to HOD, *supra* note 126, at 731.
[144] Letter from Michael S. Greco, President, American Bar Assoc., to Bar Leaders (Jan. 31, 2006), *available at* http://www.abanet.org/buslaw/attorneyclient/materials/stateandlocalbar/20060228000000.pdf [hereinafter the Greco Letter].
[145] *Id.*

> The invidious "culture of waiver" created by these government policies also leaves corporate employees exposed on two fronts. If they cooperate with the corporate investigators, they may be forced to waive their Fifth Amendment Rights against self-incrimination and risk prosecution. If they attempt to exercise their constitutional rights, they risk loss of their jobs. It is fundamentally unfair . . . .[146]

Greco characterized the Thompson Memo as "misguided and an affront to the centuries-old principled embodied in the attorney-client privilege . . . ."[147]

The opposition to the 2004 amendment to Section 8C2.5 of the Sentencing Guidelines, which opposition included written statements and testimony from the ABA, the coalition, and numerous former senior Justice Department officials, was palpable. Consequently, on April 5, 2006, the Sentencing Commission voted unanimously to revoke the privilege waiver language.[148] Although "[t]his change by the Sentencing Commission is a fabulous breakthrough," the ABA believed that corporate America was "not out of the woods yet."[149]

Less than one month later, Greco urged Attorney General Alberto Gonzalez to "consider modifying the Justice Department's internal waiver policy to stop the increasingly common practice of federal prosecutors requiring organizations to waive their attorney-client and work-product protections as a condition for receiving cooperation credit during investigations."[150] The letter criticized the Department's latest attempt to refine its waiver policies. "Though well-intentioned, the McCallum Memorandum likely will result in numerous different waiver policies throughout the country, many of which may impose only token restraints on the ability of federal prosecutors to demand waiver."[151] Greco included a list of suggested revisions that "would remedy the problem of government-coerced waiver [and] would strike the proper balance between effective law enforcement and the preservation of essential attorney-client and work product protections . . . ."[152]

VI. THE KPMG DECISION CHALLENGES THE CONSTITUTIONALITY OF THE THOMPSON MEMO

The debate regarding the Thompson Memo also engulfed the judiciary. On June 26, 2006, Judge Lewis Kaplan declared unconstitutional two provisions of the Thompson Memo.[153] First, the court found the Thompson Memo unconstitutional to the extent that the Memo

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[146] Michael S. Greco, Commentary, *U.S. Should Rethink Attorney-Client Policy*, 31-MAY Mont. Law. 24, at 2 (2006).
[147] *Id.*
[148] Michael E. Horowitz & April Oliver, *The State of the Federal Prosecutor*, 43 AM. CRIM. L. REV. 1033, 1039 (2006). *See* ABA August 2006 Report to HOD, *supra* note 123, at 731.
[149] Terry Carter, *Privilege Waiver Policy Dumped*, 5 No. 15 A.B.A.J. E.REP 2, 2 (2006) (statement of Lawrence J. Fox, a member of the ABA Task Force).
[150] Letter from Michael S. Greco, President, American Bar Assoc., to Alberto Gonzalez, Attorney Gen. of the U.S. (May 2, 2006) *available at* http://www.abanet.org/buslaw/attorneyclient/materials/stateandlocalbar/20060502000001.pdf [hereinafter the Gonzalez Letter].
[151] *Id.* at 2.
[152] *Id.* at 2-3.
[153] United States v. Stein, 435 F. Supp.2d 330, 382 (S.D.N.Y. 2006).

required a federal prosecutor to consider in the charging decision whether a corporation would advance or previously advanced to its employees and agents attorneys' fees.[154] Second, the court ruled the conduct of the United States Attorneys Office unconstitutional to the extent that the federal prosecutors involved in the KPMG investigation had threatened to consider in the charging decision the advancement of attorneys' fees.[155]

In early 2004, the Internal Revenue Service (IRS) made a criminal referral to the Justice Department.[156] The referral related to the IRS' ongoing investigation of tax shelters created by KPMG. [157] At that time, KPMG was one of the world's largest accounting firms.[158] The Department assigned the case to United States Attorney's Office for the Southern District of New York, which then had to determine whether to indict KPMG.[159] Because KPMG was eager to avoid the same fate that befell rival accounting firm Arthur Anderson, the corporation expressed a willingness to "cooperate fully with the government's investigation . . . and . . . save KPMG ."[160] During subsequent conversations with KPMG attorneys, federal prosecutors repeatedly asked whether KPMG intended to pay the attorneys' fees of the former KPMG employees that were now under investigation.[161] On at least one occasion, prosecutors reminded KPMG that "payment of legal fees . . . beyond any that it might legally be obligated to pay, could well count against KPMG in the government's decision whether to indict the firm."[162]

KPMG headed the warnings of federal prosecutors and limited the amount of attorneys' fees that KPMG would advance to its former employees.[163] KPMG further conditioned the advancement of these legal fees upon the employee's "cooperat[ion] with the government,"[164] which cooperation required the former KPMG employee to "be prompt, complete, and truthful."[165] KPMG also warned that "payment of . . . legal fees and expenses will cease immediately if . . . [] [the former KPMG employee] is charged by the government with criminal wrongdoing."[166]

In August 2005, the government and KPMG entered into a Deferred Prosecution Agreement (DPA).[167] The DPA called for KPMG to waive indictment, admit wrongdoing, accept restrictions on its practice, pay a 456 million dollar fine, and continue to cooperate "fully and actively" with the government's investigation.[168] At nearly the same time, the government filed charges against the former KPMG employees.[169] As promised, KPMG

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[154] *Id*.
[155] *Id.*
[156] *Id.* at 339.
[157] *Id.*
[158] *Id.* at 336.
[159] *Id.*
[160] *Id.* at 341.
[161] *Id.* at 341-42.
[162] *Id.* at 344.
[163] *Id.* at 345.
[164] *Id.*.
[165] *Id.*
[166] *Id.*
[167] *Id.* at 349.
[168] *Id.* at 349-50. The Deferred Prosecution Agreement required this behavior from KPMG with little or no regard to cost or the difficulty in implementation.
[169] *Id.*

ceased the advancement of attorneys' fees.[170] On January 19, 2006, the indicted former KPMG employees (KPMG Defendants) moved to dismiss the indictment, averring that government had improperly interfered with KPMG's advancement of attorneys' fee in violation of the employees' constitutional and other rights.[171] Concerned over the "impact of the Thompson Memorandum on KPMG's decision with respect to the payment of legal fees," the court ordered an evidentiary hearing.[172]

Following the hearing, Judge Kaplan determined that "KPMG had an unbroken track record of paying the legal expenses of its partners and employees . . . [and] [a]ll of the KPMG Defendants therefore had, at a minimum, every reason to expect that KPMG would pay their legal expenses."[173] Judge Kaplan criticized the Department's tactics noting that the federal prosecutors understood that "the threat inherent in the Thompson Memorandum, coupled with their own reinforcement of that threat, was likely to produce exactly the results that occurred – KPMG's determination to cut off the payment of legal fees."[174] He concluded that "KPMG refused to pay because the government held the proverbial gun to its head."[175] Furthermore, the court determined that the Thompson Memo had "interfered with the rights of such employees to a fair trial and to the effective assistance of counsel and therefore violated the Fifth and Sixth Amendments to the Constitution."[176]

The court ordered the Department to adhere to its representation that the Department would not consider in determining whether KPMG complied with the DPA any payment KPMG advanced to the KPMG Defendants.[177] Because Judge Kaplan concluded that the district court had the power to exercise "ancillary jurisdiction to resolve the[] [KPMG Defendants'] right to the advancement of expenses by KPMG,"[178] the court ordered the clerk of the court to open a civil docket to accommodate the KPMG Defendants' claims against KPMG for advancement of the legal fees.[179]

Judge Kaplan's decision elicited a varied response. David Spears, an attorney for the lead defendant Jeffrey Stein, said he was "floating on air" and predicted that the decision "will change the way the government does business in the investigation and prosecution of entities."[180] Conversely, the response from Michael Garcia, the United States Attorney for that district was subdued.

> We are disappointed in Judge Kaplan's opinion today . . . which we respectfully believe is unsupported by the factual record and the applicable law. 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.[181]

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[170] *Id.* at 350.
[171] *Id.*
[172] *Id.* at 351.
[173] *Id.* at 355-56.
[174] *Id.* at 365.
[175] *Id.* at 336.
[176] *Id.* at 382.
[177] *Id.*
[178] *Id.* at 378.
[179] *Id.* at 378.
[180] Mark Hamblett, *Kaplan Blasts U.S. Pressure on KPMG Case Fees*, N.Y.L.J., June 28, 2006, *available at* www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1151399128962.
[181] *Id.*

Department spokeswomen Kathleen Blomquist said that the Department was "surprised and disappointed by Kaplan's novel conclusion, never before reached by any other court, that these guidelines are constitutionally suspect. The department remains committed to the principles and guidance set out in the Thompson memorandum.[182]

On June 30, 2006, just four days after Judge Kaplan issued his decision, Garcia forwarded to the court an eight-page letter.[183] Although Garcia did not challenge the substance of the court's ruling, he asked the court to withdraw from the opinion certain statements.[184] Garcia specifically requested that Judge Kaplan withdraw the comments regarding the United States Attorneys' Office, the characterization of a federal prosecutor's testimony in FN 51, and the references by name to the federal prosecutors involved with the KPMG investigation.[185] Garcia claimed the court's suggestion that federal prosecutors were not candid was of great concern to both the United States Attorney's Office and to himself personally.[186] "Even if . . . the Court remains convinced it is necessary to reprimand the Government," Garcia wrote, "we respectfully submit that the reprimand should be directed at the Office and not the individual AUSAs . . . [as] the fault should not be attributed to individual prosecutors."[187] Garcia ended the letter by imploring the court to remove the names of the individual prosecutors from the sections of the opinion criticizing the Government's conduct, "lest the inclusion of those names have repercussions for them personally that the Court did not intend."[188]

The court's response to Garcia's request was brief. Judge Kaplan acknowledged that Garcia's letter "correctly notes that Mr. Weedle's declaration . . . stated that he had raised the attorneys' fee issue in the first meeting with Skadden Arps."[189] Consequently, Judge Kaplan revised one paragraph of the opinion to reflect this fact.[190] The court noted that the Garcia's request for changes "rests on evidence that the government did not offer."[191] Although Judge Kaplan reiterated "the high regard in which [] [the court] long has held the United States Attorney's office for this district," the court declined to make any substantive changes to the opinion.[192] Judge Kaplan explained that the criticism was a manifestation of the "disappointment borne of the ordinarily exceptional performance of the office."[193] In his closing words, Judge Kaplan affirmed the initial holding: "[t]he Department of Justice policy

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[182] Terry Carter, *Judge Blasts Prosecutor Fee Pressure, Ruling on Controversial "Thompson Memo" May Open Doors in Attorney-Client Privilege Battles*, 5 NO. 27 A.B.A.J. E.REP. 1, 2 (2006).
[183] Letter from Michael Garcia, U.S. Attorney for the S. Dist. of New York, to Lewis A. Kaplan, Dist. Court Judge (June 30, 2006), *available at* http://online.wsj.com/public/resources/documents/kpmg.pdf [hereinafter the Garcia Letter].
[184] *Id.* at 1.
[185] *Id.* at 1, 7.
[186] *Id.* at 1.
[187] *Id.* at 7.
[188] *Id.* at 7-8.
[189] Letter from Lewis A. Kaplan, District Court Judge, to Michael Garcia, U.S. Attorney for the S. Dist. of New York (July 7, 2006), *available at* http://online.wsj.com/public/resources/documents/kpmg3.pdf [hereinafter the Kaplan Reply].
[190] *Id.* at 1.
[191] *Id.* at 1.
[192] *Id.* at 2.
[193] *Id*.

that the office dutifully carried out, on the other hand, is more than a disappointment – it is unconstitutional."[194]

KPMG then filed a motion to dismiss the civil complaint filed by the KPMG Defendants. When Kaplan denied the motion, KPMG turned to the Second Circuit Court of Appeals. KPMG argued that the district court lacked subject matter jurisdiction, and that the claims of the KPMG Defendants' should have been dismissed in favor of arbitration. Pursuant to Federal Rule of Appellate Procedure Rule 21(b)(4),[195] the Second Circuit extended an invitation to Kaplan to file a brief.[196]

In the brief, Judge Kaplan suggested that the appellate court treat KPMG's appeal as a motion for leave to file a petition for writ of mandamus, and urged the appellate court to deny KPMG's motion.[197] While acknowledging that sovereign immunity shielded the government from an order to pay attorney fees, Judge Kaplan expressed a willingness to exercise ancillary jurisdiction to handle the claims of the KPMG Defendants against KPMG.(Need FN-can't find in case?) Kaplan argued that under *Garcia v. Teitler*,[198] the district court had the authority to exercise ancillary jurisdiction over the KPMG Defendants' claims against KPMG.[199] "*Garcia*, in the district court's view, holds that a district court has ancillary jurisdiction to decide a dispute between a criminal defendant and a nonparty where the dispute has its genesis in the criminal case and the resolution of the dispute is important to the district court's ability to perform its function and to do justice."[200]

According to Judge Kaplan, a district court may assert ancillary jurisdiction "to enable [it] to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees."[201] Judge Kaplan argued that the instant case was "a stronger case for the exercise of ancillary jurisdiction than *Garcia*,"[202] particularly because the "ancillary proceeding [] had its genesis in and is intimately related to the criminal case."[203] Relying on the three-part test set forth by the Supreme Court in *Kokkonen v. Guardian Life Insurance Co.*,[204] Judge Kaplan concluded that because "the relationship between the criminal case and advancement-fee claim 'could not be closer,' the advancement-fee claim bears directly on whether the criminal charges can be decided on the merits, and the determination of the fee claim would not dominate over the criminal charges."[205]

On the arbitration issue, Judge Kaplan also argued that mandamus was inappropriate. If the appellate court should reach the merits of the case, then Judge Kaplan believed the appellate court should uphold the district court's decision refusing to send the matter to arbitration. Judge Kaplan noted the relevant provisions governing arbitration apply only to

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[194] *Id.*
[195] Geri L. Dreiling, *Neither Brief Nor Usual*, 6 No. 3 ABAJEREP 1, 1 (January 19, 2007).
[196] United States v. Stein, No. S1 05 Crim. 0888 (LAK), 2007 WL 91350, slip op. at 18 (S.D.N.Y. January 8, 2007).
[197] *Id.*
[198] Garcia v. Teitler, 443 F.3d 202 (2d Cir. 2006).
[199] Stein, 2007 WL 91350, at 2-3.
[200] *Id.* at 3.
[201] *Id.*
[202] *Id.*
[203] *Id.* at 16.
[204] Kokkonen v. Guardian Life Insur. Co., 511 U.S. 375 (1994).
[205] Dreiling, *supra* note 190, at 2, summarizing Kaplan's decision; *see* Kokkonen, 511 U.S. 375; Stein, 2007 WL 91350.

disputes between members, which are defined as firm partners and principals, and that KPMG and the KPMG Defendants were not members.[206] Kaplan further concluded that the arbitration provision violated public policy.[207]

Despite the appellate court's lawful invitation to Judge Kaplan, Professor Michael P. Allen finds the brief "uniquely troubling."[208] Allen commented, "For a federal judge to be championing his own power in this way is something we should step back and think about."[209] As outside counsel for KPMG, attorney Charles Stillman was also surprised. "I am unaware of any case where the district court made a filing of this nature."[210] Professor Peter J. Henning described the confusion created by Judge Kaplan's filing. "I'm not really sure it is an amicus brief. It is like an amicus brief, but the judge is not an uninterested party. But he also is not a party to the case."

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VII. HEEDING THE CALL FOR REFORM

Following Judge Kaplan's decision in *Stein* and the repeal of the waiver privilege language from Section 8C2.5 of the Federal Guidelines, the concerted effort to change the Department's policy had gathered significant momentum.

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[206] Stein, 2007 WL 91350, *2.
[207] *Id.*
[208] Professor Allen is an Associate Professor at the Stetson University College of Law in DeLand, FL. *Id*.
[209] Dreiling, *supra* note 195, at 1.
[210] *Id*. at 2.
[211] *Stein*, 2007 WL 91350, *2.
[212] *Id*.
[213] *Id*.
[214] *Id.*
[215] Dreiling *supra* note 195. Professor Allen is an Associate Professor at the Stetson University College of Law in DeLand, FL. *Id*.
[216] *Id*.
[217] *Id.*
[218] *Id*.

A. The Proposal of a New Rule of Evidence

One popular suggestion for remedying the problem presented by the *McKesson* line of case is the judicial or legislative adoption of "selective waiver."[219] A selective waiver would allow a corporation to cooperate with the government by turning over the requested privileged documents, but would prevent subsequent third-party access to the same privileged documents.[220] Although a few courts have expressed a willingness to recognize selective waiver,[221] most courts have rejected the concept. [222] As the *Permian Corp.* court explained, "[t]he client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit."[223] In a recent article, Kenneth S. Broun and Daniel J. Carpa provided an extensive review of relevant case law addressing "selective waiver."[224]

According to Deputy Attorney General Paul McNulty, the Department supports a limited waiver. Recognizing that a corporation's exposure of a corporation to third-party lawsuits and shareholders suits following a corporate waiver of privileged information "is a significant concern,"[225] McNulty explained that the Department is "supportive of the effort to create a limited waiver and to amend federal rules to allow it to occur."[226] McNulty continued, "We would like to see some way forward to make it possible for limited waiver . . . ."[227]

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[219] *E.g.*, Ashok M. Pinto, *Cooperation and Self-Interest are Strange Bedfellows: Limited Waiver of the Attorney-Client Privilege Through Production of Privileged Documents in a Government Investigation*, 106 W. VA. L. REV. 359, 388 (2004).

[220] *See, e.g.*, David M. Brodsky & Jeff G. Hammel, *What Price Cooperation? Reducing the Costs of Waiving Privilege During SEC Investigations*, 6 No. 7 WALL STREET LAWYER 1, 3-4 (Dec. 2002), *available at* http://www.lw.com/upload/pubContent/_pdf/pub465.pdf (recommending "legislatively limiting the scope of the waiver in connection with an SEC investigation so that the information obtained through the waiver may be used solely by the Enforcement Staff . . . not in civil contexts outside the investigation"). *See* Buchanan, *supra* note 57, at 606 (observing that "[s]ome critics have requested legislative enactment or judicial creation of a privilege to cover voluntary disclosures of attorney-client privileged and work product information to the government"); *see generally*, Pinto, *supra* note 219.

[221] *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977) (recognizing selective waiver outright because "[t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them"); In re Steinhardt Partners, L.P., 9 F.3d 230, 236 (2d Cir. 1993) (expressing willingness to recognize selective waiver when either a common interest is shared between the disclosing party and the government or the government and the disclosing party enter into an explicit confidentiality agreement); Teachers Ins. & Annuity Assoc. of Am. v. Shamrock Broad. Co., 521 F. Supp. 638, 644-45 (S.D.N.Y. 1981) (recognizing selective waiver when "the right to assert the [attorney-client] privilege in subsequent proceedings is specifically reserved at the time the disclosure is made").

[222] *See, e.g.*, Richard M. Strassberg & Sarah E. Walters, *Is Selective Waiver of Privilege Viable?*, 230 N.Y.L.J. 7 (July 7, 2003) ("observing that the prevailing view in most circuits is that there can never be 'selective waiver' of the attorney-client privilege"); *see also* Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 947-951 (2006).

[223] Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981).

[224] Kenneth S. Broun & Daniel J. Carpa, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for a Federal Rule of Evidence 502*, 58 S.C. L. REV. 211 (2006).

[225] Pamela A. MacLean, *No Comfort From DoJ Waiver Rule 'McNulty Memo' on Attorney-Client Privilege Blasted by Critics*, 29 THE NAT'L L.J. 20 (January 22, 2007).

[226] *Id.*

[227] *Id.*

On April 24, 2006, the Advisory Committee on the Federal Rules of Evidence held a mini-conference to discuss the proposal of a new rule concerning corporate waiver of the attorney-client privilege and work-product protection.[228] The Advisory Committee approved for publication the proposed Federal Rule of Evidence 502.[229] The Committee then forwarded to the Committee on Rules of Practice and Procedure its recommendation, which was subsequently published. The deadline for public comment was February 2007.[230] The Committee was "especially interested in any statistical or anecdotal evidence tending to show that limiting the scope of waiver will 1) promote cooperation with government regulators, and 2) decrease the cost of government investigations and prosecutions."[231]

In the discussion of a selective waiver, the Committee noted that "[c]ourts are in conflict over whether disclosure of privileged or protected information to a government agency conducting an investigation of the client constitutes a general waiver of the information disclosed."[232] Thus, to rectify this conflict, subsection (c) of proposed Federal Rule of Evidence 502 explains that the disclosure of privileged information to the government during its investigation does not constitute a waiver of attorney-client privilege or work-product protection with respect to "non-governmental persons or entities, whether in federal or state court."[233] According to the Committee, the adoption of a selective waiver would improve corporate cooperation with government agencies and would increase the effectiveness and efficiency of government investigations.[234]

The Advisory Committee on Evidence Rules received more than 70 public comments on proposed Rule 502, and held two public hearings at which more than 20 witnesses testified.[235] At the Advisory Committee's April 2007 meeting, the Committee removed from proposed Rule 502 all language pertaining to selective waiver. In its May 15, 2007 letter to the Standing Committee on Rules and Procedure, the Advisory Committee on Evidence Rules explained that the language regarding a selective waiver provision had been removed from proposed Rule 502.[236] "The Evidence Rules Committee approved a separate report to Congress on selective waiver, setting forth the arguments both in favor and against the doctrine, and explaining the Committee's decision to take no position on the merits of selective waiver."[237] The Committee also prepared language for a selective waiver statute because "while the Committee took no position on the merits, it determined that the language could be useful to Congress should it decide to proceed with a separate selective waiver

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[228] Proposed Rule 502 on Waiver of Attorney-Client Privilege and Work Product (May 15, 2006), *available at* http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf [hereinafter Proposed Rule 502].
[229] *Id*.
[230] *Id*.; *see also* K&L Gates, *Deadline for Comments on Proposed Evidence Rule 502 is February 15, 2007* (Sept. 7, 2006) *available at* http://www.ediscoverylaw.com/2006/09/articles/federal-rules-amendments/deadline-for-comments-on-proposed-evidence-rule-502-is-february-15-2007-public-hearings-to-take-place-in-january-2007-in-new-york-and-phoenix/index.html.
[231] Proposed Rule 502, *supra* note 228, at 7.
[232] *Id.* at 12.
[233] *Id.*
[234] *Id*.
[235] Letter from Jerry E. Smith, Chair, Advisory Committee on Evidence Rules, to David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure (May 15, 2007), *available at* http://www.uscourts.gov/rules/Reports/2007-05-Committee_Report-Evidence.pdf.
[236] *Id.*
[237] *Id*.

provision."[238] On September 26, 2007, the Committee on Rules of Practice and Procedure forwarded to the United States Senate proposed Rule of Evidence 502, noting that "[t]he selective waiver provision proved to be very controversial," and that the proposed rule no longer contained language regarding a selective waiver. [239]

B. Senator Specter Introduces the Attorney-Client Privilege Protection Act of 2006

On December 7, 2006, Senator Arlen Specter formally introduced into the Senate the Attorney-Client Privilege Protection Act of 2006 (the ACPPA). Senator Specter's bill aimed to prevent federal prosecutors from forcing companies to waive the attorney-client privilege as a prerequisite for avoiding indictment. Senator Specter stated, "[t]he Thompson Memorandum is really to me surprising and shocking, that the government would consider charging based on whether you waive attorney-client privilege . . . ."[240] The Senator complained that the Department did not respond quickly enough to criticism of Department policies, noting there was "no need for the Justice Department to publicly express a policy that encourages waivers of attorney-client privilege . . . especially where the policy is backed by the heavy hammer of possible criminal charges."[241] Both the ABA and the Coalition to Preserve the Attorney-Client Privilege support the enactment of the ACCPA.[242]

On January 4, 2007, only 3 weeks after the Department released the McNulty Memo, Senator Specter re-introduced into the 110th Congress the Attorney-Client Privilege Protection Act of 2007 or S. 186.[243] S.186 prohibits an agent or attorney for the United States from demanding, requesting, or otherwise pressuring a corporation or organization to take certain actions.[244] These actions include (1) disclosing information that is protected by the attorney-client privilege or attorney work product doctrine, (2) refusing to provide counsel to a current or former employee, (3) withholding any contribution to the legal expenses of such an employee, and (4) terminating or sanctioning an employee for exercising his or her

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[238] *Id.* at 4-5.
[239] Letter from Lee H. Rosenthal, Chair, Committee on Rules of Practice and Procedure, to Patrick J. Leahy, Chairman, Committee on the Judiciary, and Arlen Specter, Ranking Member, Committee on the Judiciary (Sept. 26, 2007), *available at* http://www.uscourts.gov/rules/Hill_Letter_re_EV_502.pdf.
[240] Senator Arlen Specter, Chairman, Senate Committee on the Judiciary, *National Association of Criminal Defense Lawyers Seminar* (Sept. 15, 2006), *available at* http://www.nacdl.org/public.nsf/PrinterFriendly/A0610p55?openDocument.
[241] McLure, *supra* note 24. During the earlier September 2006 hearings before the Senate Committee on the Judiciary, Senator Specter commented, "As I read this policy . . . I think it is coercive. It may even rise to the level of being a bludgeon." *Id*.
[242] Martha Neil, *Thompson Memo Changes Not Enough, ABA Says*, 5 No. 49 ABA J. E-REPORTS 1 (Dec. 15, 2006) *available at* http://www.abanet.org/journal/ereport/d15specter.html. The Coalition has been described as a "coalition of strange bedfellows whose interests ordinarily diverge," and is comprised of 1) the American Chemistry Council, 2) the American Civil Liberties Union, 3) the Association of Corporate Counsel, Business Civil Liberties, Inc., 4) the Business Roundtable, 5) the Financial Services Roundtable, 6) Frontiers of Freedom, 7) the National Association of Criminal Defense Lawyers, 8) the National Association of Manufacturers, 9) the National Defense Industrial Association, 10) the Retail Industry Leaders Association, 11) the U.S. Chamber of Commerce and 12) the Washington Legal Foundation. *Id*. The ABA is not formally part of the Coalition but has worked closely with it achieve common goals. *See also* McLure, *supra* note 24.
[243] The Attorney Client Privilege Protection Act of 2007, S. 186, 110th Cong. § 3(b)(1)-(2) (2007), *available at* http://www.govtrack.us/congress/bill.xpd?bill=s110-186.
[244] *Id*.

constitutional rights or other legal protections.[245] On September 18, 2007, the Senate Committee on the Judiciary held a hearing entitled "Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum."[246] Several of the witnesses discussed S. 186.[247]

C. The Department Issues the McNulty Memo

On December 12, 2006, Deputy Attorney General Paul J. McNulty issued a 19-page memorandum under increasing pressure to reform the Department's policies.[248] The McNulty Memo begins by reaffirming that "[t]he prosecution of corporate crime is a high priority for the Department of Justice."[249] McNulty explained:

> [T]here are two things that American business has always needed, and will always need to remain competitive – freedom and integrity. By helping the government in its effort to root out fraud, you restore integrity and public confidence in your company. My message for you is simple: Fraud is bad for business and your cooperation promotes investor trust.[250]

Therefore, like its predecessors, the McNulty Memo lists a "corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate . . ." as one of the nine factors for a federal prosecutor to consider in the charging decision.[251] As did the previous memos, the McNulty Memo declares that the "waiver of the attorney-client and work product protections is not a prerequisite to a finding that the company has cooperated in the government's investigation."[252]

However, the McNulty Memo differs from its predecessors in several ways. Whereas the Thompson Memo described the controversial fourth factor as "Cooperation and Voluntary Disclosure," the McNulty Memo refers to this factor as "The Value of Cooperation."[253] Furthermore, the McNulty Memo explicitly acknowledges the attorney-client privilege as "one of the oldest and most sacrosanct privileges under U.S. law;" a statement that was

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[245] *Id.*

[246] *See* Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum, September 18, 2007; *available in* United States Senate Committee on the Judiciary, http://judiciary.senate.gov/hearing.cfm?id=2886.

[247] *See, e.g.*, Testimony of Karin Immergut, *available at* http://judiciary.senate.gov/testimony.cfm?id=2886&wit_id=6653 (last accessed November 10, 2007) (describing how "S. 186 . . . goes far beyond the Department's corporate charging policy" and "[t]he McNulty Memorandum strikes the proper balance"); Testimony of Dick Thornburgh, *available at* http://judiciary.senate.gov/testimony.cfm?id=2886&wit_id=6654 (last accessed November 10, 2007) (describing why "Congress should enact legislation such as S. 186 promptly to restore the attorney-client privilege").

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

[249] *Id*.

[250] Paul McNulty, Deputy Attorney General, Speech before the 11th Annual Corporate Counsel Institute (March 8, 2007), *available at* http://www.usdoj.gov/archive/dag/speeches/2007/dag_speech_070308.htm [hereinafter the McNulty Speech].

[251] *See* McNulty Memo *supra* note 250, at 4.

[252] *Id.* at 8.

[253] *Compare* McNulty Memo *supra* note 250, at 7 ("Charging a Corporation: The Value of Cooperation") *with* Thompson Memo *supra* note 20 ("Charging a Corporation: Cooperation and Voluntary Disclosure").

lacking in its previous memos.[254] Unlike earlier memos, the McNulty Memo establishes a system for the supervisory review of wavier requests.

According to the McNulty Memo, a federal prosecutor may only request a corporate waiver of privileged information when there is "a legitimate need for the information to fulfill their law enforcement obligations."[255] A legitimate need does not arise merely because the privileged information is either desirable or convenient; but rather, a legitimate need requires a "careful balancing of important policy considerations . . . and the law enforcement needs of the government's investigation."[256] If a legitimate need exists, then a federal prosecutor must pursue the least intrusive waiver required to conduct a comprehensive investigation.[257] The McNulty Memo establishes a step-by-step approach to requesting such information.[258]

The McNulty Memo segregates corporate information into two categories. Category I information encompasses purely factual information, and includes but is not limited to copies of key documents, witness statements, factual chronologies, purely factual interview memoranda regarding the underlying corporate misconduct, and reports containing investigative facts as documented by corporate counsel.[259] Category II information comprises attorney-client communications or non-factual attorney work-product including the legal advice given to the corporation before, during, and after the underlying corporate misconduct occurred.[260]

Prior to requesting Category I information, a federal prosecutor must (1) describe the legitimate need for the information, and (2) identify the scope of the proposed corporate waiver.[261] Furthermore, "prosecutors must obtain written authorization from the United States Attorney who must provide a copy of the request to, and consult with, the Assistant Attorney General for the Criminal Division before granting or denying the request."[262] If the request is authorized, then the United States Attorney must communicate to the corporation the waiver request in writing.[263] In assessing the corporation's level of cooperation in the government's investigation, a federal prosecutor may consider the corporation's response to the request for a waiver of Category I information.[264]

The Memo also establishes a supervisory review process for a federal prosecutor's request for a corporate waiver of Category II information. If Category I information provides an incomplete basis to conduct a thorough investigation, only then is a waiver of Category II

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[254] McNulty Memo *supra* note 250, at 8.
[255] *Id.*
[256] *Id.* at 9. The McNulty Memo frames the balancing test as "depend[ing] upon:

> (1) the likelihood and degree to which the privileged information will benefit the government's investigation;
> (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;
> (3) the completeness of the voluntary disclosure already provided; and
> (4) the collateral consequences to a corporation of a waiver." *Id*.

[257] *Id*.
[258] McNulty Memo *supra* note 250.
[259] McNulty Memo *supra* note 250.
[260] *Id.* at 10.
[261] *Id.* at 9.
[262] *Id.*
[263] *Id.*
[264] McNulty Memo *supra* note 250.

information appropriate.[265] The McNulty Memo cautions that a Category II waiver "should only be sought in rare circumstances."[266] The Category II waiver authorization process varies from that of Category I in that the United State Attorney must receive written authorization from the Deputy Attorney General rather than from the Assistant Attorney General for the Criminal Division.[267] Unlike a Category I request, a federal prosecutor may not consider in the charging decision a corporation's refusal to comply with the request for waiver of Category II information.[268]

The McNulty Memo outlines two exceptions to the supervisory review process for requests for Category II information. First, if the information requested pertains to legal advice contemporaneous to the underlying misconduct when either the corporation or an employee relies upon an advice-of-counsel defense, then a federal prosecutor should follow the written authorization process established for Category I information. Second, a federal prosecutor should follow the Category I approval process when the requested information pertains to legal advice or communications exchanged in furtherance of a crime or fraud, which information falls within the crime-fraud exception to the attorney-client privilege.[269] Furthermore, if the corporation under investigation voluntarily offers to the government privileged corporate documents, then the McNulty Memo does not require a federal prosecutor to obtain authorization for a waiver.[270] A federal prosecutor must, however, report to the United States Attorney or the Assistant Attorney General in the Division where the case originated any voluntary corporate waiver.[271]

The Department used the McNulty Memo to address the objections to Department policies raised by the *Stein* decision. Accordingly, the McNulty Memo advised that a federal prosecutor should not consider in the charging decision whether a corporation is advancing attorneys' fees to its employees or agents.[272] The McNulty Memo does allow a federal prosecutor to consider the advancement of attorneys' fee in rare cases "when the totality of the circumstances show that it was intended to impede a criminal investigation."[273] In these instances, fee advancement is among other "telling facts" that the "corporation is acting improperly to shield itself and its culpable employees . . . ."[274]

D. The Response to the McNulty Memorandum

The McNulty Memo is nothing short of polarizing. Many people believe that the McNulty Memo is "a limited response calculated to do just enough to appease critics and forestall further judicial and congressional action . . . ."[275] Attorney William McGuinness

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[265] *Id.* at 10.
[266] *Id.*
[267] *Id.*
[268] *Id.*
[269] McNulty Memo *supra* note 250.
[270] *Id.* at 11.
[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] McNulty Memo *supra* note 250.
[275] William M. Sullivan, Jr., *The McNulty Memorandum: New DOJ Policies on Attorney-Client Privilege and Attorney Work Product Protections*, 15 No. 2 METROPOLITAN CORP. COUNS. 34, (Feb. 2007), at 34, *available at* http://winston.com/siteFiles/publications/SullivanMCC_Feb2007.pdf.

commented, "I regard it as strategic retreat -- when you're going to lose a battle, you back up to the point you think you can defend."[276] Others believe that the McNulty Memo "fails to incorporate the fundamental reevaluation of corporate criminal liability that many critics have requested, and that is indeed warranted."[277] Critics of the Department's policies quickly digested the McNulty Memo, and identified three ways in which the Memo failed to protect attorney-client privilege and attorney work-product.

First, the McNulty Memo only establishes internal Department policies. "The Memorandum sets forth non-binding internal guidelines that seem to merely entrench and even expand an internal deliberative process predisposed to request attorney-client privileged information and attorney work product." [278] Because these guidelines are unenforceable at law, and there is no remedy for prosecutorial violation of internal policy,[279] critics believe that the McNulty Memo provides little incentive for prosecutors to adhere to the guidelines.[280]

Second, although the McNulty Memo creates two categories of privileged information and provides an administrative procedure for federal prosecutors to follow when requesting a waiver of the privileged information,[281] "[t]hese factors, however, provide little guidance (or clear, affirmative limits) on what will and will not constitute a 'legitimate need' for purposes of requesting otherwise privileged and protected materials."[282] The Chairman of the American Corporate Counsel testified that "human nature" complicates the supervisory review process.[283] "[C]olleagues within the same organization are poor candidates to be objective decision-makers about the validity of their peers' shared working practices. [284] Furthermore, the distinctions between the two supervisory approval processes "are unlikely to be recognized by courts or accepted by third parties seeking the waived materials."[285]

Third, the pressure for a corporation to waive the attorney-client privilege or the work-product protection has not subsided. Although a federal prosecutor is now forbidden from considering a corporation's "refusal to provide 'the most sensitive' attorney-client information," the McNulty Memo allows a prosecutor to consider any such waiver favorably.[286] As the Chairman of the American Corporate Counsel testified, "[t]he McNulty Memorandum addresses only formal waiver demands, but in the real world prosecutors'

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[276] Marcia Coyle, *The 'McNulty Memo': Real Change, or Retreat?*, NAT'L. L.J., (2006) *available at* http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1166522800100 (quoting William McGuinness, chairman of the New York litigation department at Fried, Frank, Harris, Shriver & Jacobson) [hereinafter the McGuinness Statement].
[277] Sullivan, *supra* note 275, at 34.
[278] *Id.*
[279] Coyle, *supra* note 276.
[280] *The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security*, 110th Cong. 5 (2007) (statement of William M. Sullivan, Jr., Partner, Winston Strawn) [hereinafter the Sullivan statement], *available at* http://www.winston.com/siteFiles/publications/Sullivan_TestimonyFinal.pdf.
[281] *Id.*
[282] *Id.*
[283] *The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security*, 110th Cong. 10 (2007) (statement of Richard T. White, Chairman of the Board of Directors of the Association for Corporate Counsel), [hereinafter the White Statement], *available at* http://judiciary.house.gov/media/pdfs/White070308.pdf.
[284] *Id.*
[285] Coyle, *supra* note 276.
[286] *Id.; see also* McNulty Memo, *supra* note, at 250.

demands are more often *informal* and subtle." [287] In practice, a corporation must waive the privileges because the threat of being labeled "uncooperative" by a federal prosecutor will have a "profound effect not just on charging and sentencing decisions, but on each company's public image, stock price, and credit worthiness . . . ."[288]

ABA President Karen J. Mathis described the Department's new policies as "fall[ing] far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product, and employee protections during government investigations."[289] According to Mathis, the McNulty Memo "merely requires high level [d]epartment approval before waiver requests can be made," and therefore, represents "a modest improvement" over the Thompson Memo.[290] The McNulty Memo, she continued, "threatens to further erode the ability of corporate leaders to seek and obtain the legal guidance they need to effectively comply with the law."[291] Because "the McNulty Memorandum falls short of the 'comprehensive and effective remedies' outlined in Sen[ator] Specter's bill," Mathis implored Congress to "promptly consider and pass the Specter bill . . . ."[292]

Former federal prosecutor Andrew Weissmann noted that while the Department "acted to remedy certain problems in its corporate charging policy, many remain. There is no reason to believe those problems will disappear with the passage of time since they are still embedded in the McNulty Memorandum."[293] On September 18, 2007, Weissmann emphasized that the Memo does not require Main Justice in Washington, D.C. to review a federal prosecutor's

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[287] The White Statement, *supra* note 283.

[288] *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the Committee on the Judiciary of the United States Senate,* 110th Cong. 5 (2007) (statement of Karen J. Mathis, President of the ABA) [hereinafter the Mathis Statement], *available at* http://www.abanet.org/poladv/letters/attyclient/060912testimony_mathis-acpriv.pdf*; see also The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security,* 110th Cong. 1-2 (2007) (statement of Andrew Weissmann, Partner at Jenner & Block and a former AUSA) [hereinafter the Weissmann Statement], *available at* http://www.jenner.com/files/tbl_s20Publications/RelatedDocumentsPDFs1252/1643/House_Written_Testimony_Jenner_3-6.pdf. Weissmann testified, "[t]he Department of Justice's McNulty Memorandum, like the Thompson Memorandum before it, leaves completely intact the government's ability to penalize a company that does not take punitive action against employees for asserting a constitutional right to remain silent, and reward those companies that do take such action." *Id.*

[289] Statement by ABA President Karen Mathis regarding revisions to the Justice Department's Thompson Memorandum (Dec.12, 2006) *available at* http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=59.

[290] *Id.*

[291] *Id.*

[292] *Id.*

> Because the McNulty Memorandum fails to solve the problem of government coerced waiver, the ABA urges members of the Subcommittee to introduce or support legislation, like S. 186, that would: (1) prohibit federal prosecutors from demanding, requesting, or encouraging, directly or indirectly, that companies waive their attorney-client or work product protections during investigations, (2) specify the types of factual, non- privileged information that prosecutors may request from companies during investigations as a sign of cooperation, and (3) clarify that any voluntary decision by a company to waive the attorney-client privilege and the work product doctrine shall not be considered when assessing whether the entity provided effective cooperation. *Id* . at 12.

[293] The Weissmann Statement, *supra* note 288, at 7.

decision to charge a corporation. "Such a lack of national oversight is bewildering given the wide array of relatively minor decisions that are overseen by Main Justice and the enormity of the potential consequences of charging a corporation. . . . [and] [i]n spite of the potentially devastating consequences of a corporate indictment . . ."[294] Another aspect of the Memo that troubles Weissmann relates to what information the government regards as purely factual. He notes that "[i]n practice, however, the line between what is 'purely factual' and what contains attorney work product is rarely clear-cut. Moreover, information that is deemed by the McNulty Memorandum to be allegedly 'purely factual' is in fact usually clearly protected by the attorney-client and/or work product privileges."[295]

In recent Congressional testimony, former Attorney General Dick Thornburgh claimed that "the McNulty Memorandum is so inherently problematic that there is nothing to be gained by continuing to wait and see how it is implemented."[296] Thornburgh urged Congress to "enact legislation such as S.186 promptly to restore the attorney-client privilege, the work product doctrine and the Constitutional rights . . . ."[297] The former Attorney General dismissed the argument that S.186 "improperly or unwisely impinges on the discretion of federal prosecutors."[298] "S.186 does not in any way impair federal prosecutors from doing their proper jobs. They would remain free to prosecute – or refrain from prosecuting – as warranted by the evidence and the law."[299]

Like Thornburgh, The Association of Corporate Counsel also endorses the enactment of legislation. "Given DOJ's intransigence, and the fact that the McNulty Memo does not address our concern with their belief that they have any right to unilaterally require waivers of the attorney-client privilege of their potential targets, ACC must conclude that legislation is necessary." [300]

On the other end of the spectrum, the Department is optimistic. At a March 2007 Congressional hearing, Deputy Assistant Attorney General Barry M. Sabin urged the Subcommittee "at a minimum, to allow the guidance a chance to work before considering any legislation."[301] Although Sabin noted that the McNulty Memo was only "recently issued and it is much too early to assess its effect,"[302] he noted that the McNulty Memo appears to be effective:

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[294] *Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum: Hearing Before the United States Senate Committee on the Judiciary*, 110th Cong. (2007) (statement of Andrew Weissmann, Partner, Jenner & Block, LLP), *available at* http://judiciary.senate.gov/testimony.cfm?id=2886&wit_id=6655.
[295] *Id.*
[296] *Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum: Hearing Before the United States Senate Committee on the Judiciary*, 110th Cong. (2007) (statement of Richard Thornburgh, Kirkpatrick & Lockhart Preston Gates Ellis LLP), *available at* http://judiciary.senate.gov/testimony.cfm?id=2886&wit_id=6654.
[297] *Id.*
[298] *Id.*
[299] *Id*
[300] The White Statement, *supra* note 288, at 4.
[301] *The Right to Counsel in Corporate Investigations: Hearing Before the Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security*, 110th Cong. 6 (2007) (statement of Barry M. Sabin, Deputy Assistant Attorney General), [hereinafter the Sabin Statement], *available at* http://judiciary.house.gov/media/pdfs/Sabin070308.pdf.
[302] *Id.*

> In the nearly three months since the *McNulty Memorandum* was issued, the Deputy Attorney General's office has not received a single request seeking a waiver of legal advice and strategy. Moreover, the Criminal Division has received only a few requests to seek purely factual information since the *Memorandum* was issued. In each of those instances, the Criminal Division, which must consult with the district requesting the waiver, has engaged in a meaningful dialogue regarding the request.[303]

Because "[t]he charging factors in the *McNulty Memorandum* are prudent, necessary and time- tested," Sabin urged the Subcommittee to examine the revised memo in detail and to allow the policies to "take root."[304]

Current United States Attorney Paul Perez believes that "McNulty maintains the ability of the prosecutor to hammer away and get that kind of information that is important to us in the field, because we need the facts, we need to develop the facts."[305] The Department has also recently addressed corporate concerns regarding the actions of rogue federal prosecutors.

> I have also heard many complaints from you about the conduct of Assistant United States Attorneys – namely, that you run into some "rough and tough" prosecutors who "coerce" a particular result. If you encounter that problem, get the United States Attorney involved. I know, I know – you have responded to me, "easier said than done" because you don't want an angry AUSA to retaliate. I say again – get the United States Attorney involved. I have spoken to USAs throughout the country. They want to hear from you, they may even share some of your concerns, and they will support full and frank dialogue to come to the right resolution in your case.[306]

Deputy Attorney General McNulty stressed that if, and when, a corporation encounters a rogue prosecutor, then the corporation needs to contact a member of the Department who outranks the federal prosecutor.

Regarding a federal prosecutor's request for a corporate waiver, Attorney General Alberto Gonzales recently told the American Bar Association's white-collar crime section that "the McNulty memo strikes the right balance in this area."[307] He stressed that "[p]rivilege waivers will not be sought without internal process within the department, and will not be sought without need. When sought, waivers will be limited in scope to what is needed."[308]

Professor Michael Seigel, a former federal prosecutor, also believes that the critics' claims are "hugely overstated."[309] He noted that "the attorney-client privilege is not an end unto itself

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[303] *Id.*
[304] *Id.* at 7.
[305] Gary Blankenship, *Attorney-Client Privilege Task Force Gets Down to Work*, FLA. B. NEWS, VOL. 34, NO. 4 (Feb. 15, 2007).
[306] McNulty Speech, *supra* note 250.
[307] Lynnley Browning, *Some Lawyers Urge More Safeguards on Rights in Corporate Fraud Cases*, N.Y. TIMES, Mar. 8, 2007, *available at* http://www.nytimes.com/2007/03/08/business/08legal.html?ex=1331010000&en=2c3fc8ef4054d9b5&ei=5090&partner=rssuserland&emc=rss.
[308] *Id.*
[309] Micheal Seigel, *Corporate America Fights Back*, WASH. POST, Feb. 26, 2007, at A15, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/02/25/AR2007022501257.html.

[,]but [rather, the privilege is] a means to an end."[310] "Its main purpose is to encourage individuals to be candid with their lawyers."[311] Accordingly, the Department "does not 'coerce' corporations to waive their attorney-client privilege any more than it 'coerces' drug dealers to waive their Fifth Amendment privilege against self-incrimination when they agree to testify."[312] In his recent testimony before the Senate Committee on the Judiciary, Professor Seigel explained his position:

> American prosecutors have been striking deals with cooperators at least since the nineteenth century. Is the process of convincing a putative defendant to cooperate against others coercive? Of course it is. Does it require the defendant to give up fundamental rights? Again, the answer is, "of course." To facilitate cooperation, a non-corporate (human) defendant must waive his Fifth Amendment right against self incrimination, along with his Seventh Amendment right to trial by jury, in addition to his right to appeal a guilty verdict. He must also go through the ordeal of being debriefed and prepared to testify against his confederates. He can choose this unpleasant experience or fight the charges. *His Hobson's choice is not caused by an unfair or overbearing government; rather, it is the direct result of his prior criminal conduct*.[313]

"[T]he employee's trilemma is of her own making; that is, it is a result of her apparent participation in criminal activity[,]. . . . not DOJ waiver policy."[314] Consequently, Seigel believes that "S.186 is ill-advised. . . . [but instead] the McNulty Memorandum, perhaps with some tweaking around the edges, provides the proper balance between vigorous law enforcement and the prospect of governmental overreaching."[315]

Similarly, Professor Daniel Richman believes that legislative action seems a bit premature. During Congressional testimony, Richman posed this question: "What would federal criminal enforcement in the white collar area look like, were Congress to bar federal prosecutors, when evaluating a corporation's cooperation, from considering whether a corporation is willing to waive its attorney-client and work product privileges?"[316] According to Richman, the answer to that question is "highly speculative – a point that itself counsels against legislative action at this time."[317] As support for his conclusion, Richman noted that pending legislation such as S.186 does not "advance the interests of these individuals,

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[310] *Id.*
[311] *Id.*
[312] *Id.*
[313] *Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum: Hearing Before the United States Senate Committee on the Judiciary*, 110th Cong. (2007) (statement of Michael L. Seigel, Professor of Law at the University of Florida) (second emphasis added), *available at* http://judiciary.senate.gov/testimony.cfm?id=2886&wit_id=6657.
[314] *Id.*
[315] *Id.* Seigel also noted that the new Model Rule 1.6(b)(2) of Professional Responsibility now allows an attorney to disclose privileged information when such disclosure is necessary to prevent "substantial injury to the financial interests" of another person. *Id.*
[316] *Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum: Hearing Before the United States Senate Committee on the Judiciary*, 110th Cong. (2007) (statement of Daniel Richman, Professor, Columbia Law School), *available at* http://judiciary.senate.gov/testimony.cfm?id=2886&wit_id=6656.
[317] *Id.*

however – except to the extent that their interests coincide with the company's self-interest. There is thus no reason to expect that the proposed legislation would change the level of candor – or the apprehension – that mark corporate counsel's contacts with officers and employees."[318] Richman stressed that that the Department's policies have "evolved considerably over a relatively short period of time," and that the Department continues to receive feedback regarding how its policies are implemented. For at least these reasons, Professor Richman urged that that legislative action was "troubling and, at least for now, unnecessary."[319]

Karin Immergut, the United States Attorney for the District of Oregon and the Chair of the White Collar Subcommittee for the Attorney General's Advisory Committee, emphasized that critics of the McNulty Memo "tend to focus solely upon the role that corporate cooperation plays in a prosecutor's decision as to whether to charge a corporation."[320] Immergut stressed that "cooperation is but one factor in the analysis," and that "there has been no empirical evidence to suggest that prosecutors were routinely coercing privilege waivers in corporate criminal investigations."[321] Immergut characterized legislation as S. 186 as "problematic" because it "creates two sets of rules, one more favorable set of rules for corporations and their employees and another set of rules for everybody else."[322]

The Department has also recently addressed corporate concerns regarding the actions of rogue federal prosecutors.

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Deputy Attorney General McNulty stressed that if, and when, a corporation encounters a rogue prosecutor, then the corporation needs to contact a member of the Department who outranks the federal prosecutor.

E. Other Reasons for Concern

Because a publicly traded corporation is more susceptible to substantial harm as a result of negative publicity than is a private corporation, a public corporation is particularly vulnerable

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[318] *Id.*
[319] *Id.*
[320] *Examining Approaches to Corporate Fraud Prosecution and the Attorney-Client Privilege Under the McNulty Memorandum Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Karen Immergut, United States Attorney) [hereinafter Immergut statement], *available at* http://judiciary.senate.gov/testimony.cfm?id=2886&wit_id=6653.
[321] *Id.*
[322] *Id.*
[323] McNulty Speech, *supra* note 250.

to a federal prosecutor's demands for waiver of the attorney-client privilege and work-product protection.[324] For example, a loss of investor confidence and damage to a corporation's reputation "may well be overwhelming before it is even clear that someone violated the law . . . ."[325] The "combination of a regulatory or criminal inquiry with negative press can be lethal for a public corporation."[326] Conversely, a private corporation does not have regular disclosure and reporting requirements to the SEC and its shareholders. Because negative publicity is not as pressing a concern, a private corporation can refute alleged facts, challenge legal theories, and "actually resist demands for waiver"[327] more easily than a public corporation. In short, a private corporation can develop its defenses without the pressure to cooperate or face indictment.[328]

Other critics stress that the Department's growing demand for waiver of privileged materials affects the "willingness of business leaders to assume board positions."[329] Despite recent increases in directors' pay, the number of individuals who want to serve on corporate boards is decreasing. Dennis C. Carey, Vice-Chairman of Spencer Stuart, noted that "most searches these days are not a layup . . . the number of turndowns has increased dramatically over the past couple of years."[330] As the number of administrative responsibilities increases and the corporate managing maneuverability decreases, the market is "drain[ed] [of] the most qualified human capital."[331]

VIII. CONCLUSION

When corporate America misbehaved, the Department of Justice responded by developing policies that, in its opinion, would serve the public good. While the Department's policies are effective, there is strong opposition to the tactics employed by federal prosecutors. Over the last eight years, the Department has countered this opposition by modifying its guidelines; a tactic that has produced four different memos.

There is no doubt that the Department's policies are polarizing. Since the Department first issued the Thompson Memo in 1999, federal prosecutors have obtained over 1200 convictions for corporate crimes. At one end of the spectrum, the Department is certain that the McNulty Memo provides a federal prosecutor with the tools necessary to "hold[] corporations responsible for their wrongdoing," and does not create a "culture of waiver."[332] Hence, the Department warns that the "impact of this legislation [S. 186] will fall on American retirees and pension holders."[333] At the other end of the spectrum, proponents of S.186 emphasize the "ominous dangers that the Justice Department's McNulty Memorandum poses to the attorney-

[324] McLucas, Shapiro & Song, *supra* note 124, at 640.
[325] *Id.* at 641.
[326] *Id.* at 641.
[327] *Id.* at 640.
[328] *Id.*
[329] *Id.* at 641.
[330] Eric Dash, *Executive Pay: A Special Report; For Directors, Great Expectations (and More Pay)*, N.Y. TIMES, April 4, 2004, *reprinted in* 2004 WLNR 5379134 (quoting Dennis C. Carey, vice chairman of Spencer Stuart).
[331] McLucas, Shapiro & Song, *supra* note 124, at 641.
[332] Immergut Statement, *supra* note 320.
[333] *Id.*

client privilege, the work product doctrine and the rights of the individuals."[334] For now, one potential source of corporate comfort – the selective waiver – is unavailable.

As S. 186 works its way through the Senate, Congress appears poised to take action. Conversely, the Department is dedicated to demonstrating the even-handedness of the McNulty Memo. Meanwhile, interested parties offer a smattering of commentary. In short, this is a very exciting but potentially unsettling time as all involved parties hold their collective breaths and wait for the dust to settle.

[334] Thornburgh Statement, *supra* note 296.