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NOTES

Other People's Money

DRAWING THE CONSTITUTIONAL LINE BETWEEN THE RIGHT TO COUNSEL AND CONSTRAINTS ON OBSTRUCTIVE FEE ADVANCEMENT IN THE WAKE OF *UNITED STATES V. STEIN*

I. INTRODUCTION

In 2003, the U.S. Department of Justice (“DOJ”) issued its federal prosecutors a written set of guidelines to assist them in their investigation and prosecution of white-collar corporate crime.¹ Specifically, these guidelines, issued in a document commonly known as the Thompson Memorandum,² addressed the question of whether and under what circumstances Assistant U.S. Attorneys (“AUSAs”) conducting investigations into white collar crimes committed by employees and executives should bring a formal charge against the company itself.³ The Thompson Memo listed nine separate factors for prosecutors to evaluate when making the decision of whether or not to seek an indictment.⁴

In the AUSAs’ determination of whether to prosecute a company, the Thompson Memo stressed consideration of the

¹ Memorandum from Larry Thompson, Deputy Attorney General to the Heads of Department Components, United States Attorneys (Jan. 20, 2003) [hereinafter Thompson Memo], available at http://www.usdoj.gov/dag/cftf/business_organizations.pdf.

² Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1096 (2006).

³ Thompson Memo, *supra* note 1, at 1-2.

⁴ *Id.* at 3; see also Paul J. McNulty, Deputy Attorney General, DOJ, Statement Before the Committee on the Judiciary United States Senate Concerning “The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations” (Sept. 12, 2006) [hereinafter McNulty Statement], available at http://judiciary.senate.gov/testimony.cfm?id=2054&wit_id=2742.

authenticity of a company's "cooperation" with the government investigation.⁵ One measure of this cooperation was whether the company was advancing legal fees to its investigated employees.⁶ If the company possessed no legal obligation to advance legal fees to its implicated employees in connection with the investigation, then the AUSAs prosecuting the case, in accordance with the guidelines, were permitted to view the advancement of legal fees as a failure to cooperate with the government.⁷

However, this practice was recently condemned in a pair of decisions issued by Judge Lewis Kaplan of the Southern District of New York in *United States v. Stein*.⁸ In the first decision, issued in June 2006 ("*Stein I*"), the DOJ's practice of considering the advancement of legal fees as a failure to cooperate was challenged by former employees of accounting giant Klynveld, Peat, Marwick, Goerdeler⁹ ("KPMG").¹⁰ The DOJ had begun an investigation of KPMG and its employees over the "development, marketing and implementation of abusive tax shelters."¹¹ The DOJ sought cooperation from the KPMG employees suspected of misconduct as well as from KPMG as a company.¹² In doing so, the AUSAs leading the investigation inquired into KPMG's legal obligation to advance fees to its employees.¹³ When KPMG could show a history of advancing legal fees, but could not show any clear legal obligation to do so, the prosecutors pressured KPMG into limiting such assistance to its employees to demonstrate its

⁵ Thompson Memo, *supra* note 1, at 6.

⁶ *Id.* at 7-8.

⁷ *Id.* However, as will be discussed *infra* in Part II, this consideration was limited by certain factors in an effort to eliminate the risk of abuse by prosecutors. See McNulty Statement, *supra* note 4.

⁸ *United States v. Stein (Stein I)*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006); *United States v. Stein (Stein III)*, 495 F. Supp. 2d 390 (S.D.N.Y. 2007). See *infra* note 23.

⁹ KPMG: Our History, <http://www.kpmg.com/About/Who/History> (last visited Mar. 26, 2008); *Stein I*, 435 F. Supp. 2d at 336.

¹⁰ *Stein I*, 435 F. Supp. 2d at 338; Lynnley Browning, *Prosecutor Says KPMG Move Held No Sway*, N.Y. TIMES, May 10, 2006, at C13 [hereinafter Browning, *KPMG No Sway*].

¹¹ *Stein I*, 435 F. Supp. 2d at 336, 338 (internal citations omitted). For a more detailed description of the illegal tax shelter abuses alleged by the government, see David Cay Johnston, *U.S. Accuses 2 Audit Firms of Assisting Tax Violations*, N.Y. TIMES, July 10, 2002, at C1.

¹² *Stein I*, 435 F. Supp. 2d at 341.

¹³ *Id.*; Browning, *KPMG No Sway*, *supra* note 10.

cooperation with the government and possibly avoid an indictment against the company.¹⁴

The KPMG defendants claimed, and the *Stein I* court agreed, that the pressure placed on KPMG to disregard its “long-standing policy”¹⁵ of advancing legal fees to employees being investigated or indicted deprived the employees of their Sixth Amendment right to the assistance of counsel.¹⁶ Alternatively, the court held that this pressure violated the defendants’ substantive due process right to a fair criminal trial under the Fifth Amendment.¹⁷ The court noted that:

KPMG refused to pay because the government held the proverbial gun to its head. Had that pressure not been brought to bear, KPMG would have paid these defendants’ legal expenses. Those who commit crimes—regardless of whether they wear white or blue collars—must be brought to justice. The government, however, has let its zeal get in the way of its judgment. . . . Defendants had . . . an expectation that their expenses in defending any claims or charges brought against them by reason of their employment by KPMG would be paid by the firm. The law protects such interests against unjustified and improper interference.¹⁸

Because the court intended its substantive due process analysis to be used only as an alternative in the event that a reviewing court disagreed with its Sixth Amendment analysis,¹⁹ this Note will focus primarily on the protections the *Stein* court recognized under the Sixth Amendment.

In its decision in *Stein I*, the court first determined that KPMG would have advanced—and may even have been legally obligated to advance—legal fees to its employees.²⁰ This determination was based on a state statute that gives companies the authority to indemnify their employees through means which include the advancement of legal fees, as well as on KPMG’s history of paying the legal expenses of its partners and employees incurred as a result of their employment,

¹⁴ *Stein I*, 435 F. Supp. 2d at 342, 344.

¹⁵ *Id.* at 352; Browning, *KPMG No Sway*, *supra* note 10.

¹⁶ *Stein I*, 435 F. Supp. 2d at 336; Lynnley Browning, *U.S. Tactic on KPMG Questioned*, N.Y. TIMES, June 28, 2006, at C1 [hereinafter Browning, *Tactic Questioned*].

¹⁷ *Stein I*, 435 F. Supp. 2d at 356, 360; *see also Stein III*, 495 F. Supp. 2d 390, 409 n.80 (S.D.N.Y. 2007).

¹⁸ *Stein I*, 435 F. Supp. 2d at 336, 366-67.

¹⁹ *Stein III*, 495 F. Supp. 2d at 409 n.80.

²⁰ *Stein I*, 435 F. Supp. 2d at 353, 356; *see also Stein III*, 495 F. Supp. 2d at 394, 409.

regardless of cost.²¹ Next, the court found that the inherent threat of an indictment based on the guidelines in the Thompson Memo and the pressure supplied by the AUSAs' reinforcement of that threat caused KPMG to depart from its usual policy of paying legal fees and expenses.²²

These holdings were confirmed in July 2007 when the court issued a second opinion ("*Stein III*"²³) in which it dismissed the indictments of a number of the defendants and rejected arguments by the government challenging the correctness of the court's rulings in *Stein I*.²⁴ The *Stein III* court reinforced its holdings in *Stein I* by pointing to additional facts that showed KPMG's intent and desire to cover its employees' legal fees.²⁵ However, the *Stein* decisions are subject to a number of weaknesses that limit their effectiveness in preventing government prosecutors from infringing on the right to counsel while preserving the government's interest in prosecuting white collar crime.²⁶

First, in arriving at its conclusions, the court was forced to engage in a long, murky, and protracted analysis of the facts²⁷ that may subject its conclusions to alternative interpretation by other courts facing similar claims in the future.²⁸ Second, the claim of prosecutorial misconduct presented by the

²¹ *Stein I*, 435 F. Supp. 2d at 355-56; *Stein III*, 495 F. Supp. 2d at 405-09.

²² *Stein I*, 435 F. Supp. 2d at 352.

²³ The second decision is referred to as *Stein III* for purposes of consistency with the court, which referred to a July 2006 decision concerning suppression of statements made by the KPMG defendants as "*Stein II*." See *infra* note 198.

²⁴ *Stein III*, 495 F. Supp. 2d at 393-94.

²⁵ *Id.* at 407-09.

²⁶ The *Stein I* court held that the defendants' right to "obtain and use . . . resources lawfully available to him or her" in preparing a defense "free of knowing or reckless government interference" is a fundamental constitutional right protected under notions of substantive due process. 435 F. Supp. 2d at 360-62. Any government infringement of this right is subject to a strict scrutiny standard of review—the government's actions must be "narrowly tailored to achieve a compelling government interest." *Id.* at 362. As the Sixth Amendment right to counsel has also repeatedly been declared "fundamental" by the Supreme Court, see *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980); *Argersinger v. Hamlin*, 407 U.S. 25, 32 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), any government interest which would impede this right of a criminal defendant must also be compelling.

²⁷ The difficulty of the analysis for the *Stein* court is demonstrated by its reliance in *Stein III* on additional pieces of evidence, at least one of which had not been discovered, when it confirmed its conclusions and holding in *Stein I*. See *Stein III*, 495 F. Supp. 2d at 407.

²⁸ See *Browning, Tactic Questioned*, *supra* note 16 (reporting that while the district court ruling applies only to the KPMG case, it carries extra weight because of the large number of "high profile white-collar and corporate fraud cases" presented before the federal court in Manhattan).

defendants in the *Stein* cases still leaves courts unable to protect the right to the assistance of counsel for defendants until after that right has been violated. Finally, as in *Stein*, the need to hear such claims may force courts into the unwanted position of intruding on a prosecutor's broad discretion to determine whether or not to seek an indictment.²⁹ Since the decision to seek an indictment rests with the executive branch, judicial review of a prosecutor's authority threatens to undermine the doctrine of separation of powers.³⁰

This Note will argue that while modern application of the Sixth Amendment right to counsel³¹ *could* cover a company's agreement to advance attorney's fees in certain instances, the *Stein* decisions are only minimally effective in ascertaining where such coverage applies. First, the *Stein* decisions do not clearly distinguish between conduct constituting impermissible government interference with the right to counsel and voluntary choices of companies denying advancement to employees based on decisions which serve the companies' best interests.³² This requires an alternative solution to provide prosecutors with a clearer gauge of where government conduct exceeds the proper balance between prosecution of white-collar crime and individual constitutional rights. Second, such a solution must not excessively intrude on the government's compelling interest in prosecuting white-collar crime and limiting obstructive conduct.

Part II of this Note will review the history of the DOJ's implementation of the guidelines set forth in the Thompson Memo and recap the history of the guidelines as set forth five years before the DOJ brought action against the KPMG employees. A brief history of the KPMG investigation will be provided to re-establish the setting that brought these issues to

²⁹ See *Stein I*, 435 F. Supp. 2d at 359.

³⁰ See *infra* notes 261-262 and accompanying text.

³¹ Much has been written regarding the intent behind the right to counsel in the years preceding and immediately following American independence. See, e.g., WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 14-24 (1955); ELLIOTT EVANS CHEATHAM, A LAWYER WHEN NEEDED 14, 49-50 (1963); William M. Beane, *The Effective Assistance of Counsel*, in ARTHUR L. HARDING ET AL., FUNDAMENTAL LAW IN CRIMINAL PROSECUTIONS 39, 39-40 (1959). However, this Note will primarily focus on the last seventy years of Sixth Amendment jurisprudence dealing with the right to counsel.

³² See *Advanced Mining Sys., Inc. v. Fricke*, 623 A.2d 82, 84 (Del. Ch. 1992) (explaining that Delaware law leaves to the business judgment of the board "the task of determining whether . . . advancement of expenses would on balance be likely to promote [a] corporation's interests").

light, including specific incidences within the investigation that gave rise to some of the claims of abuse and misconduct that this Note's proposal attempts to remedy. Part III will briefly restate the scope, application, and limits of the Sixth Amendment right to counsel to highlight the protections guaranteed by the right. Part III will also discuss the district court's application of the right to the facts in the *Stein* cases.

Part IV will analyze the district court's decisions in *Stein I* and *III*. This analysis will highlight the weaknesses of the court's decisions and focus on balancing the need to grant prosecutors the necessary discretion to determine whether to bring charges while protecting individuals and companies from potential abuse of that discretion. This section will include analysis of state statutes addressing indemnification and advancement of legal fees to officers and employees.

Part V will propose a bright-line alternative to aid courts and prosecutors in determining when a defendant's right to the assets of a third party for the payment of legal fees is protected under the Sixth Amendment and when (and under what circumstances) government interference is appropriate. The proposal will resurrect a portion of the AUSAs' claim that the Sixth Amendment right to counsel does not cover "other people's money" in the form of a legislative enactment permitting prosecutors to use preliminary injunctive restraints that are already in use with current federal forfeiture provisions.

II. BACKGROUND

A. *The Thompson Memorandum*

Formally titled "Principles of Federal Prosecution of Business Organizations," the Thompson Memo was issued by Deputy Attorney General Larry Thompson as a "revised set of principles to guide³³ Department Prosecutors as they make

³³ While the memo explicitly states that the principles are intended as a "guide" for prosecutors, some analysts, as well as the court in *Stein* have concluded that the principles were used as hard rules in their assessments of corporate cooperation and determinations to bring an indictment. *See, e.g.*, Lynnley Browning, *Judges Press Companies That Cut Off Legal Fees*, N.Y. TIMES, Apr. 17, 2006, at C1 [hereinafter Browning, *Judges Press*] (pointing out that while prosecutors claim that the Thompson Memo was meant to serve as an internal guide for prosecutors, many prosecutors use the guidelines "like a bible" when investigating a company); *Stein I*, 435 F. Supp. 2d at 338 ("[T]he Thompson Memorandum is binding on all federal prosecutors. Thus, all United States Attorneys now are obliged to consider the

the decision of whether to seek charges against a business organization.”³⁴ It was issued in the wake of a number of corporate scandals involving high-profile companies such as MCI WorldCom, HealthSouth, and Adelphia³⁵ that followed shortly after the collapse of Enron.³⁶ These scandals “cost investors billions of dollars and thousands of workers lost their jobs,”³⁷ and they compelled the DOJ to take action against the corporate malfeasors.³⁸

While guiding prosecutors in their consideration of seeking an indictment against a company was at least one purpose of the Thompson Memo,³⁹ one of its primary purposes was to “increase[] emphasis on and scrutiny of the authenticity of a corporation’s cooperation” with the DOJ’s investigation.⁴⁰ Prosecutors from the DOJ had always sought cooperation from companies during the investigation of potentially illegal conduct,⁴¹ but the content of the Thompson Memo lends itself

advancing of legal fees by business entities . . . as at least possibly indicative of an attempt to protect culpable employees and as a factor weighing in favor of indictment of the entity.” (footnote omitted)).

³⁴ Thompson Memo, *supra* note 1, cover page. The memo was actually a “modest revision” of a document issued in June 1999 by then-U.S. Deputy Attorney General Eric Holder entitled “Federal Prosecution of Corporations,” commonly referred to as the “Holder Memo.” *Stein I*, 435 F. Supp. 2d at 336; *see also* Wray & Hur, *supra* note 2, at 1099 (characterizing the Holder Memo as the first “uniform policy on corporate prosecution”).

³⁵ Wray & Hur, *supra* note 2, at 1100.

³⁶ Browning, *Judges Press*, *supra* note 33. Speaking before Congress, Deputy Attorney General Paul McNulty called the year 2002 “a time of great concern to . . . Congress and to American workers and investors” based on the reduction in the public’s trust in corporate America due to the “large-scale bankruptcies of companies like Enron.” McNulty Statement, *supra* note 4. “The guidance contained in the Thompson Memorandum . . . must be viewed in the context of these massive corporate scandals.” *Id.*

³⁷ Browning, *Judges Press*, *supra* note 33.

³⁸ As McNulty testified:

The American people and their representatives . . . in Congress demanded that those responsible for corporate malfeasance be brought to justice The Department of Justice responded to this crisis in corporate America with vigor and action Since 2002, the Department of Justice obtained more than 1000 corporate fraud convictions and convicted more than 160 corporate presidents and executive officers.

McNulty Statement, *supra* note 4.

³⁹ The Thompson Memo also discussed the important public benefits that would flow from corporate prosecution, such as the likelihood that the company will take “immediate remedial steps,” specific deterrence in the form of a changed culture in the indicted corporation, and minimized risks of large-scale public harm, such as environmental crimes and financial fraud. Thompson Memo, *supra* note 1, cover page.

⁴⁰ *Id.*; Wray & Hur, *supra* note 2, at 1097, 1135.

⁴¹ *See* McNulty Statement, *supra* note 4 (calling the Thompson Memo “a time-tested and fair summary of the factors a prosecutor considers in charging a

to the inference that the DOJ and Thompson had become skeptical of the cooperation they were receiving: "Too 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."⁴²

The Thompson Memo, which acknowledged that only a minority of cases would result in a company itself being subjected to criminal charges,⁴³ listed a number of factors for prosecutors to consider in determining whether to bring charges against an entity.⁴⁴ Some of these factors were identical to those that prosecutors were already using to determine whether to bring charges against individuals, such as sufficiency of the evidence, success at trial, deterrence, rehabilitation, and alternative consequences of conviction.⁴⁵ However, due to a company's status as a "corporate person," additional factors were given for consideration.⁴⁶ These factors included, but were not limited to, the nature and seriousness of the offense, the extent of the wrongdoing within the company, the history of such conduct, voluntary disclosure of any wrongdoing by the company and willingness to cooperate,⁴⁷ corporate compliance programs, remedial measures (including

corporate entity [that] commits to paper what good prosecutors have been doing for decades").

⁴² Thompson Memo, *supra* note 1, cover page. This skepticism was even shared by attorneys working as in-house counsel for private companies under investigation as little as three months prior to the decision handed down in *Stein I*. See Nathan Koppel, *U.S. Pressures Firms Not to Pay Staff Legal Fees*, WALL ST. J., Mar. 28, 2006, at B1 (quoting Harvey Wolkoff, an in-house lawyer for Enterasys Networks, Inc., supporting government requests that Enterasys challenge Delaware law authorizing advancement of legal fees to the defendants: "If [the defendants] did something criminal, why should' their legal fees get reimbursed?").

⁴³ Thompson Memo, *supra* note 1, cover page. This was in part due to the recognition that a company "can act only through individuals," and that "imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing." *Id.* at 1; see also Wray & Hur, *supra* note 2, at 1106-07.

⁴⁴ Thompson Memo, *supra* note 1, at 3.

⁴⁵ Prosecutors had already been instructed to consider these factors in seeking indictments against individual defendants, as the factors had already been listed in the United States Attorneys Manual. See U.S. DEPT OF JUSTICE, U.S. ATTORNEY'S MANUAL § 9-27.220 (2007).

⁴⁶ Thompson Memo, *supra* note 1, at 3.

⁴⁷ In evaluating cooperation, the prosecutors could also consider whether a company waived corporate attorney-client and work product protection. *Id.* at 3. One reason the DOJ began looking at waivers of privilege and work product is that in previous corporate criminal investigations, counsel for the companies would run all of the companies' documentation through their in-house legal department so as to claim attorney-client or work product protection for documentation detailing routine business activity as well as accounting and financial records. McNulty Statement, *supra* note 4.

termination of responsible employees and making restitution), and the collateral effects of a potential indictment (including harm to shareholders, pension holders, and non-culpable employees).⁴⁸

In elaborating on the consideration that should be given to a company's level of cooperation, the Thompson Memo acknowledged the difficulties of conducting an investigation of a company, such as ascertaining who the culpable individuals are, their location, and the location of records.⁴⁹ These difficulties made obtaining company cooperation so critical that the Memo referenced guidelines for prosecutors to consider in determining whether to offer the company immunity or amnesty in the form of a non-prosecution agreement.⁵⁰ The Memo also stated that prosecutors should assess whether the company "appears to be protecting its culpable employees."⁵¹ This protection referred to company conduct that included advancing attorney's fees, retention of employees without sanction for any misconduct, and providing information to employees about the government's investigation.⁵² As it pertained to legal fees, if prosecutors felt that such protection was being used to limit or prevent the flow of truthful communication from employees to the government, or to protect the culpable employees or the company, such provision of fees could be weighed in evaluating the adequacy of cooperation.⁵³

⁴⁸ Thompson Memo, *supra* note 1, at 3.

⁴⁹ *Id.* at 6.

It will often be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions . . . and records and personnel may be spread throughout the United States Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a corporation's cooperation may be critical in identifying the culprits and locating relevant evidence.

Id.

⁵⁰ *Id.*; Wray & Hur, *supra* note 2, at 1103-04.

⁵¹ Thompson Memo, *supra* note 1, at 7.

⁵² *Id.* at 7-8. The Memo also addressed other concerns regarding whether an investigated company is engaged in conduct that impedes the investigation, such as making overly broad assertions of corporate representation of employees, and issuing directions to its employees not to cooperate. *Id.*

⁵³ McNulty Statement, *supra* note 4. The DOJ was primarily concerned about the abuse of fee advancement as a means of obstructing the government's investigation in conjunction with other indications of non-cooperation, such as "overly broad assertions of corporate representation of its employees, a refusal to sanction wrongdoers, a failure to comply with document subpoenas and a failure to preserve documents." *Id.* To the extent that these other indicators were not present, the

*B. The Investigation of KPMG*⁵⁴

The DOJ used the guidelines set out in the Thompson Memo when it began its investigation of KPMG.⁵⁵ In October 2001, the IRS initiated an investigation into the creation of and failure to register a number of “abusive” tax shelters that KPMG had participated in forming beginning in 1997.⁵⁶ Following the initiation of the investigation, as well as the issuance of a number of summonses for information on these abusive shelters,⁵⁷ a Senate subcommittee launched another investigation “into the development, marketing and implementation” of these shelters.⁵⁸ The subcommittee found that KPMG sold a number of these illegal shelters to at least 350 people in the four year span from 1997 to 2001.⁵⁹ In addition, KPMG earned \$124 million in fees, while depriving the Treasury of at least \$1.4 billion in unpaid taxes.⁶⁰ These investigations brought much negative attention to KPMG.⁶¹

As concern grew regarding the fallout from the conclusions of the Senate subcommittee and IRS investigations, KPMG chair Eugene O’Kelly retained a private law firm in an effort to develop a “cooperative approach” with the government.⁶² This approach included the decision to ask some of KPMG’s senior partners to vacate their positions within the company, including deputy chair and Chief Operating Officer Jeffrey Stein, vice-chair of tax services Richard Smith, and a partner in personal financial planning, Jeffrey Eischid.⁶³ However, in terminating their employments, KPMG negotiated

government would not maintain such concern with a company’s advancement of legal fees. *Id.*

⁵⁴ For purposes of simplicity, Part II.B will assume many of the facts of the investigation as they were determined by the court in *Stein I* and later in *Stein III*.

⁵⁵ *Stein I*, 435 F. Supp. 2d 330, 341 (S.D.N.Y. 2006).

⁵⁶ *Id.* at 338; see also Johnston, *supra* note 11; Superseding Indictment at 36-37, *Stein I*, 435 F. Supp. 2d 330 (No. S1 05 Cr. 0888) [hereinafter KPMG Indictment].

⁵⁷ KPMG Indictment, *supra* note 56, at 37.

⁵⁸ *Stein I*, 435 F. Supp. 2d at 338.

⁵⁹ Lynnley Browning, *KPMG Says Tax Shelters Involved Wrongdoing*, N.Y. TIMES, June 17, 2005, at C1.

⁶⁰ *Id.* Some sources have reported claims by prosecutors that the shelters cost the United States even more than this amount. See Bloomberg News, *KPMG Is Not Required to Pay Legal Fees, U.S. Contends*, N.Y. TIMES, Apr. 29, 2006, at C9 (reporting that the shelters generated over \$11 billion in falsely claimed tax losses, and cost the government at least \$2 billion in revenue).

⁶¹ *Stein I*, 435 F. Supp. 2d at 338-39.

⁶² *Id.* at 339.

⁶³ *Id.*

severance agreements with at least two of these individuals, specifically Messrs. Stein and Smith.⁶⁴

Mr. Stein, who held a senior position with the company, worked out an agreement with KPMG in which his departure would be “cushioned substantially.”⁶⁵ Under this agreement, Mr. Stein would be retained as a consultant for three years with a monthly compensation of \$100,000, would release all claims against the firm and its partners, and would be provided legal representation at the expense of the firm by counsel acceptable to both him and the firm in any suits brought against KPMG or its personnel and himself.⁶⁶ KPMG would also continue to cover Mr. Stein under its Professional Indemnity Insurance Program against any claims arising from his role with the company.⁶⁷ KPMG’s agreement with Mr. Smith contained an essentially identical clause, by which the firm agreed to pay the costs of Smith’s defense.⁶⁸

In early 2004, the IRS concluded its investigation and made a criminal referral to the DOJ recommending prosecution of KPMG.⁶⁹ The DOJ, in turn, referred the case to the United States Attorney’s Office (“USAO”) in February of that year.⁷⁰ Upon learning of the criminal referral, but prior to any meeting with the USAO, KPMG issued a voicemail message to its partners stating that it would pay for “competent counsel” for any present or former members of the firm who were asked to appear before the USAO in relation to the investigation.⁷¹ The message made no mention of any conditions on the payment, nor did it mention any limits on the amount of legal expenses KPMG would pay.⁷²

In the initial discussions between the USAO and the retained counsel for KPMG, the AUSAs immediately inquired whether KPMG was paying the legal fees of the investigated

⁶⁴ *Id.*; *Stein III*, 495 F. Supp. 2d at 408.

⁶⁵ *Stein I*, 435 F. Supp. 2d at 339.

⁶⁶ *Id.* It was also agreed that in the event that only Mr. Stein was named as a party in any suit arising out of his actions with the company, the counsel need only be reasonably acceptable to him. *Id.*

⁶⁷ *Id.* at 339 n.25; see also Lynnley Browning, *Prosecutor Denies Pressure on KPMG to Cut Off Legal Fees*, N.Y. TIMES, May 9, 2006, at C7 [hereinafter Browning, *Prosecutor Denies Pressure*] (reporting the value of the severance package to Mr. Stein at between \$8 and \$10 million).

⁶⁸ *Stein III*, 495 F. Supp. 2d at 408.

⁶⁹ *Stein I*, 435 F. Supp. 2d at 339.

⁷⁰ *Id.* at 340.

⁷¹ *Stein III*, 495 F. Supp. 2d at 407.

⁷² *Id.*

employees and what obligations or agreements it had made to do so.⁷³ KPMG's counsel indicated that the company's objective was not to protect its employees, but rather to save itself out of the fear that a formal indictment would be disastrous for the company, forcing the firm out of business.⁷⁴ As such, while lawyers for KPMG told the AUSAs that paying legal fees for employees had been the firm's "common practice,"⁷⁵ the vagueness of the firm's partnership agreement and the Delaware law governing the agreement gave KPMG the discretion to make its own determination.⁷⁶ Counsel for KPMG also indicated that in spite of this "common practice," it "still was checking on its *legal obligations*," and would not pay legal fees "for employees

⁷³ *Stein I*, 435 F. Supp. 2d at 346. Prior to the court's decision in *Stein I*, the parties had stipulated that before February 2004, KPMG had a "longstanding *voluntary practice*" of advancing and paying legal fees

without a preset cap or condition of cooperation with the government, for counsel for partners, principals, and employees of the firm in those situations where separate counsel was appropriate to represent the individual in any civil, criminal or regulatory proceeding involving activities arising within the scope of the individual's duties and responsibilities as a KPMG partner, principal, or employee.

Id. at 340 (emphasis added, internal citations omitted).

⁷⁴ *Id.* at 341. *Stein I* references the widely discussed and accepted conclusion that KPMG's primary concern was making sure it did not suffer the same fate as its competitor, Arthur Andersen LLP, *id.*, which "imploded shortly after its indictment in 2002 for allegedly obstructing the government's investigation of fraud at Enron Corp." Koppel, *supra* note 42; see also Browning, *Judges Press*, *supra* note 33 (calling a formal indictment "a virtual death knell for many companies, as it was for the accounting firm Arthur Andersen"); Bruce D. Fisher, *Andersen v. U.S.: A Shift in the Legal Winds for Public Auditors?* TENN. BAR J., Nov. 2005, at 22 (stating that "mere indictment—formal criminal accusation—proved to be the Andersen firm's downfall" because following the indictment, "Andersen's clients deserted it, and the firm eventually filed for bankruptcy and thousands lost their jobs and pensions"). The consequences of such negative publicity can be further seen by the fact that after Andersen was both indicted and convicted on trial, even the over-turning of the conviction by the United States Supreme Court "probably does not portend a significant change in the legal winds for either Andersen or for the thousands of former Andersen employees." *Id.* at 32.

⁷⁵ *Stein I*, 435 F. Supp. 2d at 342. KPMG claimed, and the DOJ did not dispute, that it could not recall any partner, principal, or employee who had been indicted for conduct arising within the scope of the duties of their position since two previous employees (both partners) were indicted in 1974. *Id.* at 340. Though the company could locate no documentation to support its claim that it paid pre- and post-indictment fees on behalf of those individuals, both sides stipulated that litigation expenses for those employees were covered by KPMG. *Id.*

⁷⁶ *Id.* at 342. Even after *Stein I*, the DOJ still emphasized that where a company has discretion in its business decision not to advance legal fees, it is the company's choice alone and is not controlled by the prosecution. McNulty Statement, *supra* note 4, at 7. "Experienced and sophisticated counsels weigh what is in the best interests of the corporation and its shareholders. . . . With the level of skill of opposing counsel we have in these cases, it is wrong to suggest that we make their decisions for them." *Id.*

who declined to cooperate with the government . . . as long as it had discretion to take that position.”⁷⁷ Sensing the government’s displeasure at the idea of severance packages for suspected individuals, KPMG chose not to sign the agreement it had negotiated with Richard Smith, which was still pending at the time of the initial meeting with the AUSAs.⁷⁸

Shortly thereafter, counsel for KPMG reported to the USAO that the firm did not believe any “binding legal obligation to pay legal fees” existed, “but that ‘it would be a big problem’ not to do so” due to the firm’s structure as a partnership.⁷⁹ KPMG announced in a form letter to its employees that it would advance the legal fees but would limit the amount it paid to up to \$400,000 per individual and that payment of the fees would be conditioned on that particular employee being fully cooperative with the government and the firm.⁸⁰ The form letter also stated that if any of its employees were charged with criminal wrongdoing, payment of legal fees would cease immediately.⁸¹ After viewing the letter, the USAO for the most part took no issue with the company’s announcement and proceeded in its investigation.⁸²

During the course of the investigation, when the AUSAs felt that the company personnel they were investigating were failing to adequately cooperate, the AUSAs would notify KPMG.⁸³ Counsel for the company would then inform the attorneys for the individuals that legal fees would be

⁷⁷ *Stein I*, 435 F. Supp. 2d at 342 (emphasis added). One of the AUSAs present at the initial meeting made a statement in reference to “federal guidelines” that misconduct was not to be rewarded. *Id.* While intended by the AUSA as a reference to federal sentencing guidelines, it was understood by counsel for KPMG as a reference to the Thompson Memo, *id.* at 342 n.45, and “as a reminder that payment of legal fees by KPMG, 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,” *id.* at 344. The court also determined that another AUSA present at the meeting made a comment that discretion regarding payment of legal fees would be looked at “under a microscope,” even though the comment appeared only in the notes of one attorney for KPMG, and no witness who testified at the hearing recalled the statement being made. *Id.* at 344, 344 n.52.

⁷⁸ *Stein III*, 495 F. Supp. 2d at 408-09.

⁷⁹ *Stein I*, 435 F. Supp. 2d at 344, 345; *see also* Browning, *Prosecutor Denies Pressure*, *supra* note 67 (“Partnerships like KPMG typically pay an employees legal fees. Nonetheless, KPMG had a choice.”).

⁸⁰ *Stein I*, 435 F. Supp. 2d at 345; *see also* Mark Hamblett, *Lawyers Spar over KPMG Legal Defense Fee Policy*, N.Y. L.J., May 9, 2006, at 1.

⁸¹ *Stein I*, 435 F. Supp. 2d at 345-46; Hamblett, *supra* note 80, at 1.

⁸² *Stein I*, 435 F. Supp. 2d at 346; *see also Stein III*, 495 F. Supp. 2d at 404 (referring to the government as “perfectly happy” to let KPMG advance the fees subject to those conditions).

⁸³ *Stein I*, 435 F. Supp. 2d at 347.

terminated absent indication from the government that the employees in question ceased in their refusal to participate in government interviews.⁸⁴ In some cases, the individuals relented under the pressure from KPMG's threats and participated in the interviews.⁸⁵ For those who refused, KPMG terminated their employment and cut off payment of their fees.⁸⁶

Subsequent meetings between the government and counsel for KPMG revealed the severance packages that had been granted to certain executives, including the one provided for Mr. Stein.⁸⁷ The Stein agreement became a particularly thorny issue⁸⁸ for both sides for two reasons. First, the agreement had no real restrictions or conditions on the payment of legal fees, which was inconsistent with KPMG's earlier statements to the government with regard to limitations it would impose on such payments to current employees under investigation.⁸⁹ Second, the amount that KPMG spent on Mr. Stein's defense—over \$640,000 for the criminal investigation *alone*—clearly exceeded any amount KPMG had represented to the AUSAs that it would pay in legal fees for employees.⁹⁰ Despite the cooperation KPMG had shown with respect to its remaining employees who were subject to investigation, the government's discontent with such rich severance packages and the risk that it would be perceived as a failure to cooperate greatly concerned KPMG.⁹¹ In May 2005, the company severed the consulting agreement with Stein and cut off payment of his legal fees in an effort to display full cooperation with the government under the guidelines of the Thompson Memo.⁹²

⁸⁴ *Id.*

⁸⁵ *Id.*; see also *Stein III*, 495 F. Supp. 2d at 404 (stating that by allowing KPMG to advance legal fees to its employee-defendants in the pre-indictment investigation stage, but subject to conditions of full cooperation, the government obtained leverage over the defendants through KPMG by "hold[ing] over their head their job").

⁸⁶ *Stein I*, 435 F. Supp. 2d at 347.

⁸⁷ *Id.*

⁸⁸ *Id.* at 347-48. The agreement KPMG negotiated with Mr. Smith did not raise an issue with the AUSAs because KPMG refused to effectuate it once it sensed the pressure from the government. See *Stein III*, 495 F. Supp. 2d at 409.

⁸⁹ *Stein I*, 435 F. Supp. 2d at 347-48.

⁹⁰ *Id.* at 348, nn.74, 80.

⁹¹ *Id.* at 347. The chief of the criminal division of the United States Attorney's Office, relayed to KPMG counsel and executives that such severance packages are a "troubling issue under the 'Thompson Memo,'" *id.* 344 n.51, which led to the firm viewing the severance agreements as a "ticking bomb," *id.* at 347.

⁹² *Id.* at 348; see also Browning, *Tactic Questioned*, *supra* note 16.

In late August 2005, the first nine indictments of individual KPMG employees, including that of Jeffrey Stein, were handed down by a federal grand jury.⁹³ As per the terms of advancement that it had disclosed to the USAO, the company ceased payments of legal fees for the indicted defendants.⁹⁴ Around that same period, KPMG and the government entered into a Deferred Prosecution Agreement (“DPA”).⁹⁵ Among the terms of the DPA were that KPMG would pay \$456 million in penalties, would forego the indictment process and be charged with one count of conspiracy to defraud the government, and would admit to criminal wrongdoing.⁹⁶ In exchange, the government would not prosecute the company, contingent on KPMG’s continued cooperation with the government’s investigation in accordance with the requirements of the DPA and the acceptance of certain restrictions on its tax practice.⁹⁷ Shortly thereafter, in January 2006, the KPMG defendants challenged the actions of the AUSAs authorized by the Thompson Memo, claiming, among other things, that the government interfered with their Sixth Amendment right to

⁹³ Jonathan Weil, *Nine Are Charged in KPMG Case on Tax Shelters*, WALL ST. J., Aug. 30, 2005, at C1. The indictments also named former senior tax chiefs Richard Smith and John Lanning, as well as Raymond Ruble, a former partner at the New York office of the law firm Sidley Austin Brown & Wood LLP, for his part in writing legal opinions supporting the tax shelters. *Id.* The indictments also disclosed allegations that “at least 14 KPMG partners used some of the shelters in question to shave their own tax bills.” *Id.* In all, sixteen indictments were handed down by May 2006, a little over a month before the *Stein I* decision. *See* Browning, *Prosecutor Denies Pressure*, *supra* note 67 (referring to the “tax shelter trial of 16 former employees of the accounting firm KPMG”).

⁹⁴ *Stein I*, 435 F. Supp. 2d at 350.

⁹⁵ Weil, *supra* note 93.

⁹⁶ *Id.* The DPA between KPMG and the government has been reported as a victory for the company because it “gives the firm a chance to avoid the kind of criminal case that proved fatal for . . . Arthur Andersen.” Jonathan D. Glater, *KPMG’s Gain, Partners’ Loss*, N.Y. TIMES, Aug. 29, 2005, at C1; *see also supra* note 74 and accompanying text.

⁹⁷ Weil, *supra* note 93; *see also* Jonathan D. Glater, *U.S. to Widen Inquiry of KPMG Tax Shelters*, N.Y. TIMES, Sept. 7, 2005, at C1. The terms of this continued cooperation required KPMG to promptly provide “all documents, records, information and [any] other evidence” that the USAO, the IRS, or any other government agency designated by the USAO would need for its continued investigation. *Stein I*, 435 F. Supp. 2d at 349. In addition, KPMG agreed not to assert any claim of privilege “including, but not limited to the attorney-client privilege and the work product protection” in regards to any of the documents, records and other information requested by the government. *Id.* at 349-50. Finally, under the DPA, KPMG agreed that even after the dismissal of the Information, which contained the one charge against the company in place of a formal indictment, KPMG would “continue to fulfill the cooperation obligations set forth” in relation to any investigation, prosecution or proceeding (criminal or civil) that arose out of the conduct being investigated. *Id.* at 350.

the assistance of counsel by hindering KPMG's advancement of attorneys' fees.⁹⁸ In addition, the defendants requested that the charges against them be dismissed.⁹⁹ The District Court heard the defendants' challenge and ruled in their favor, holding that the conduct of the AUSAs under the Thompson Memo did in fact infringe on the defendants' Sixth Amendment right.¹⁰⁰

III. OVERVIEW OF THE SIXTH AMENDMENT RIGHT TO COUNSEL AND ITS APPLICATION IN *STEIN*

The Sixth Amendment of the United States Constitution reads: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."¹⁰¹ While the assistance of counsel as a right in the United States traces its roots at least to the earliest days of the American Constitution,¹⁰² most of the modern interpretation and application of the right to counsel has only taken place in the last seventy-five years.¹⁰³ It is as a result of this modern interpretation that the court in *Stein* expressed the need to protect this right of the KPMG defendants.

A. *The Right to Counsel and the Development of the Modern Application*

The right to counsel guaranteed by the Sixth Amendment represents a deviation from the standard practice at the time of the American Revolution.¹⁰⁴ "Under English law, an accused had a right to have counsel in misdemeanor, but not

⁹⁸ *Stein I*, 435 F. Supp. 2d at 350.

⁹⁹ *Id.*

¹⁰⁰ Browning, *Tactic Questioned*, *supra* note 16. The government's activity "interfered with the ability of the KPMG Defendants to obtain resources they otherwise would have had . . . [which] almost certainly will affect what these defendants can afford to permit their counsel to do." *Stein I*, 435 F. Supp. 2d at 362. This in turn infringed on "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." *Id.* at 382.

¹⁰¹ U.S. CONST. amend. VI.

¹⁰² BEANEY, *supra* note 31, at 14-15 (stating that there is an ongoing debate over the extent of the influence of English common law on the right to counsel as it pertains to the pre- and post-Revolutionary period).

¹⁰³ CHEATHAM, *supra* note 31, at 8-9 (listing *Powell v. Alabama*, 287 U.S. 45 (1932), and *Johnson v. Zerbst*, 304 U.S. 458 (1938), as "the two leading cases that established the legal right to counsel" under the U.S. Constitution).

¹⁰⁴ STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY* 839 (7th ed. 2004).

felony, cases.”¹⁰⁵ Following the American Revolution, and upon adoption of the Constitution, only one of the original thirteen states continued to follow this practice.¹⁰⁶ The remaining twelve states “fully recognized the right to counsel in criminal prosecutions.”¹⁰⁷ However, the extent to which the individual states observed the right to counsel in state prosecutions was determined exclusively by state law and therefore could vary greatly between states.¹⁰⁸ The right to counsel guaranteed under the Sixth Amendment also did not immediately apply to the states, but rather applied only in federal prosecutions.¹⁰⁹

The modern interpretation of the Sixth Amendment right to counsel began in 1932, with the Supreme Court’s decision in *Powell v. Alabama*.¹¹⁰ The *Powell* Court determined that the state of Alabama’s failure to ensure proper counsel for defendants in a murder prosecution deprived the defendants of their Due Process rights under the Fourteenth Amendment.¹¹¹ The Court also outlined the essential protections that the assistance of counsel provides defendants:¹¹²

[N]otice and hearing are preliminary steps essential to the passing of an enforceable judgment, and . . . constitute basic elements of the constitutional requirement of due process of law Historically . . . , in our country at least, [a hearing] has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel.¹¹³

¹⁰⁵ *Id.* While the English Parliament “granted special treatment to those accused under the Treason Act of 1695, and required the court to appoint counsel upon the request of the accused,” defendants were not permitted to have counsel in ordinary felony cases in England until 1836. *Id.* (citing *Faretta v. Cal.*, 422 U.S. 806, 821-26 (1975)).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (citing *Powell v. Alabama*, 287 U.S. 45, 60-64 (1932), where Justice Sutherland noted that the new states embraced the right to counsel in their state constitutions although the extent of such acceptance did vary from one state to the next).

¹⁰⁸ *Id.* at 840.

¹⁰⁹ *Id.*

¹¹⁰ CHEATHAM, *supra* note 31, at 8; Danton Asher Berube, *Drug Proceeds Forfeiture and the Right to Counsel of Choice*, 43 VAND. L. REV., 1377, 1378 (1990).

¹¹¹ *Powell*, 287 U.S. at 69.

¹¹² *Id.* However the Court’s decision should not be construed as incorporating Sixth Amendment protections to state criminal prosecutions through the Due Process clause of the Fourteenth Amendment. This was clearly stated by the Supreme Court only ten years after *Powell* in *Betts v. Brady*. See 316 U.S. 455, 461-62 (1942).

¹¹³ *Powell*, 287 U.S. at 69.

Notably, the Court detailed the immense complexities of the criminal process that make the protection of the right to counsel so vital for criminal defendants:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable . . . of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires . . . counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.¹¹⁴

Since its decision in *Powell*, the Supreme Court has repeatedly asserted that the Sixth Amendment right to counsel is designed to guarantee a criminal defendant a fair trial in the adversarial criminal process.¹¹⁵ “The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause.”¹¹⁶ In its cases following *Powell*, the Court has further fleshed out the nature of the rights encompassed by the right to counsel. Most notably, in *Gideon v. Wainwright*, the Court ruled that the protections of the right to counsel are a “fundamental [safeguard] of liberty immune from federal abridgment [and are] equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment.”¹¹⁷

¹¹⁴ *Id.* at 68-69. Since *Powell*, courts have gone to great lengths to ensure that proper representation has been provided, even going so far as to force the defendant to accept counsel he wished to refuse when the defendant’s ability to represent himself was in question. See *Faretta v. California*, 422 U.S. 806 (1975) (holding that a State may not constitutionally force a lawyer upon a criminal defendant who “voluntarily and intelligently” chooses to proceed without counsel).

¹¹⁵ See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972) (“The assistance of counsel is often a requisite to the very existence of a fair trial.”); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”); see also *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Morrison*, 449 U.S. 361 (1981).

¹¹⁶ *Strickland*, 466 U.S. at 684-85.

¹¹⁷ *Gideon*, 372 U.S. at 341, 342. This decision also expressly overturned the Court’s holding in *Betts v. Brady* that the Sixth Amendment did not apply to states through the incorporation of Fourteenth Amendment Due Process. *Id.* at 345. See *supra* note 112 and accompanying text.

This decision made the appointment of counsel for defendants unable to obtain counsel on their own an affirmative obligation of both federal and state courts.¹¹⁸

Since its monumental holding delivered in *Gideon*, the Supreme Court has continued to expound on the extent to which the right to counsel applies. The Court's assessments have addressed the right as it pertains to, among other things: the different stages of court proceedings at which the right to counsel attaches,¹¹⁹ the different types and severity of offenses,¹²⁰ issues of self-representation,¹²¹ the requirement of effective counsel,¹²² and defendants' right to spend their own money to obtain their counsel of choice.¹²³

B. *The Sixth Amendment Protections at Issue in Stein*

While the court in *Stein* applied this modern interpretation to a number of questions presented before it, for the purposes of this Note, only two of these applications—the requirement of effective counsel and the defendants' right to spend their own money on counsel of their choice—are of significant importance.¹²⁴

¹¹⁸ *Gideon*, 372 U.S. at 340, 344, 345.

¹¹⁹ *United States v. Wade*, 388 U.S. 218 (1967) (holding that certain pre-trial proceedings such as suspect line-ups for witness identification are “critical confrontations of the accused by the prosecution,” and that the presence of counsel is “necessary to ensure a meaningful defense.”).

¹²⁰ *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1972). This case was critical in its interpretation of the right to counsel for two reasons. First, it held that coverage applies regardless of a crime's classification as a felony or misdemeanor and regardless of the severity of the punishment for the crime (i.e., fine or imprisonment). *Id.* at 33. Second, the Court took special notice of the difficulties that can arise when defendants attempt to cooperate with government prosecutors:

Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor as well as felony cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.

Id.

¹²¹ *Faretta v. California*, 422 U.S. at 807 (holding that even though defendants have a right to counsel, and despite the Sixth Amendment's purpose to ensure a fair trial, the State may not force a defendant to accept the assistance of counsel when that defendant insists on conducting his own defense); *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942) (holding that the Constitution does not force a lawyer on the individual).

¹²² *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

¹²³ *See Morris v. Slappy*, 461 U.S. 1, 10 (1983).

¹²⁴ The court in *Stein I* acknowledged that “[t]he Sixth Amendment attaches only upon indictment.” *Stein I*, 435 F. Supp. 2d 330, 373 (S.D.N.Y. 2006). However, as

1. The Right to Effective Assistance

The first application of the Sixth Amendment in *Stein I* was the court's suggestion that the KPMG defendants were deprived of the right to the effective assistance of counsel.¹²⁵ In *McMann v. Richardson*, the Supreme Court stated unequivocally that the right to counsel means the entitlement to "the effective assistance of competent counsel."¹²⁶ While this entitlement was put forth by the Court as early as its decision in *Powell*,¹²⁷ it is the Court's decision in *McMann* which clarified that the Sixth Amendment contained an implicit right to effective counsel.¹²⁸ "[I]f the right to counsel . . . is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel."¹²⁹

There has been extensive debate both within¹³⁰ and outside¹³¹ of the courts regarding what constitutes effective versus ineffective assistance of counsel. The Supreme Court has addressed claims of ineffective assistance pertaining to both the general incompetence of the attorney, as well as government interference with the defendant's efforts to mount a defense.¹³² While the *Stein* court stressed that the defendants were deprived of their rights to counsel "irrespective of the

the court also found that the government's pre-indictment actions were likely to have "an unconstitutional effect upon indictment," this warranted a finding of attachment of Sixth Amendment rights. *Id.* at 366. Since the court's decision regarding the attachment of the right has no bearing on the purpose of this Note, it does not warrant further discussion.

¹²⁵ *Stein I*, 435 F. Supp. 2d at 382.

¹²⁶ 397 U.S. at 771.

¹²⁷ "[S]uch designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard." *Powell v. Alabama*, 287 U.S. at 45, 53 (1932). Having found that the counsel for the defendants had made no investigation because no opportunity to do so had been given, the Court held that the "defendants were not accorded the right of counsel in any substantial sense." *Id.* at 58. "[T]he necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process . . ." *Id.* at 71.

¹²⁸ JOHN M. BURKOFF & NANCY M. BURKOFF, *INEFFECTIVE ASSISTANCE OF COUNSEL*, § 1.1 (summarizing the history of the right to effective assistance of counsel).

¹²⁹ *McMann v. Richardson*, 397 U.S. 759, 771 (1969).

¹³⁰ See generally *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Cronin*, 466 U.S. 648 (1984); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Herring v. New York*, 422 U.S. 853 (1975).

¹³¹ See BURKOFF & BURKOFF, *supra* note 128, at § 1:1; see, e.g., Kathleen M. Golden, *The Sequestration of Criminal Defendants: A Proposal For the Use of Harmless Error Analysis in the Aftermath of Geders v. United States*, 52 ALB. L. REV. 243, 246 (1988) (discussing the impact of sequestering criminal defendants during trial on their right to effective assistance of counsel).

¹³² *Strickland*, 466 U.S. at 686.

quality of representation they receive” due to the effects of the government’s interference, it also hinted at the potential risk of incompetent counsel.¹³³

a. Incompetent Counsel

The influence of the Thompson Memo and the conduct of the AUSAs created a risk of rendering private counsel for the KPMG defendants incompetent. In *Strickland v. Washington*, the Supreme Court developed a two-pronged test to evaluate a convicted defendant’s claim of defective assistance.¹³⁴ First, there must be a showing of deficient representation by proving that counsel made errors so grave that he or she was not functioning as counsel within the scope of the Sixth Amendment right.¹³⁵ Second, the defendant must show that this deficiency prejudiced his or her defense, depriving that defendant of a fair trial.¹³⁶ The quality of representation by the defendant’s counsel must fall “below an objective standard of reasonableness.”¹³⁷ Among the factors to consider in determining whether either of these prongs has been met are the attorney’s failure to maintain a duty of loyalty to the client by avoiding conflicts of interest, failure to advocate the defendant’s cause, failure to consult with the defendant on important decisions, and failure to keep the defendant informed of important developments in the course of the prosecution.¹³⁸ The inquiry looks at the totality of the circumstances to determine the reasonableness of counsel’s performance.¹³⁹

The Supreme Court specifically addressed conflicts of interest in *Cuyler v. Sullivan*.¹⁴⁰ In *Cuyler*, the Court ruled that

¹³³ *Stein I*, 435 F. Supp. 2d 330, 369-70, 382 (S.D.N.Y. 2006).

¹³⁴ *Strickland*, 466 U.S. at 687.

¹³⁵ *Id.*; see also *infra* notes 153-155 and accompanying text.

¹³⁶ *Strickland*, 466 U.S. at 687.

¹³⁷ *Id.* at 688; see also BURKOFF & BURKOFF, *supra* note 128, at § 1:2 n.4 (citing critics of *Strickland* who believe that the test is geared more towards judicial efficiency in adjudicating such claims, as opposed to removal of injustices caused by incompetent trial counsel).

¹³⁸ *Strickland*, 466 U.S. at 688.

¹³⁹ *Id.*

¹⁴⁰ 446 U.S. 335 (1980); see also BURKOFF & BURKOFF, *supra* note 128, ch. 3 (providing a ranging overview of different factors to be considered by courts hearing claims of ineffective counsel due to attorney conflicts of interest, including claims raised before and after trial, obligations of trial courts to identify and inquire into potential conflicts, and harmonization with ethical standards for attorneys).

a defendant is denied the right to effective assistance when counsel for the defendant has a conflict of interest which prejudices the defense.¹⁴¹ The Court also ruled that a defendant is entitled to the same measure of effectiveness when he or she employs retained counsel as when counsel is appointed by the court: “The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant’s entitlement to constitutional protection.”¹⁴²

In *Stein I*, though ineffectiveness based on a prejudicial conflict of interest of retained counsel was not explicitly found, the possibility was certainly raised.¹⁴³ The court analyzed the pressure placed by the AUSAs on KPMG to limit its assistance in the form of advancing legal fees to its employees:

[T]he government [did not] question the obvious conflict of interest manifest in [counsel for KPMG]’s offer to recommend as counsel to targeted KPMG employees “law firms that were familiar with these types of proceedings and who understood that cooperation with the government was the best way for KPMG to proceed.”¹⁴⁴

The conflict of interest in *Stein* stemmed from KPMG’s conditioning and limiting of fee payment to counsel for its targeted employees. This created a risk that attorneys for the KPMG employees might not provide full assistance based on the perceived need to avoid risking a criminal indictment against their clients resulting in the termination of payment of their fees and the need to cooperate with the government in order not to risk an indictment of the company.¹⁴⁵ However, as

¹⁴¹ *Cuyler*, 446 U.S. at 350; see also *Mickens v. Taylor*, 535 U.S. 162, 167-68 (2002) (distinguishing between conflict of interest cases warranting an automatic reversal of any conviction when defense counsel objects to representing divergent interests, and cases requiring defendants to establish prejudice to the defense where the conflict is not objected to, and the trial court does not know of, nor reasonably should know of the conflict, prompting an inquiry).

¹⁴² *Cuyler*, 446 U.S. at 344. The Court also held that, despite the private relationship between a criminal defendant and his retained counsel, since a state criminal proceeding is an action of the state, the mere obtaining of a conviction in a trial where the defendant is inadequately represented constitutes the necessary state action to give rise to a due process violation. *Id.* at 343; see also *BURKOFF & BURKOFF*, *supra* note 128, at § 1:8.

¹⁴³ *Stein I*, 435 F. Supp. 2d 330, 345 n.54, 370 (S.D.N.Y. 2006).

¹⁴⁴ *Id.* at 345 n.54; see also *Cuyler*, 446 U.S. at 347 (requiring trial courts to initiate inquiries into conflicts of interest where the court “knows or reasonably should know that a particular conflict exists”).

¹⁴⁵ *Stein I*, 435 F. Supp. 2d at 344-46; see also *Berube*, *supra* note 110, at 1395 (discussing similar conflicts of interest arising in criminal cases where defendants’ assets, including attorneys’ fees, may be forfeited prior to trial).

any risk of ineffective counsel was created by the government's actions and the influence of the Thompson Memo, the *Stein* court did not focus on incompetence of counsel, but rather analyzed the case in terms of government interference. In addition, for the reasons discussed below, the *Stein I* court did not require a showing of prejudice to the defense. Regardless, it is important to highlight how a conflict of interest risks rendering defense counsel incompetent as a potential byproduct of excessive government scrutiny over how white collar defendants retain and pay for their representation.

b. Claims of Ineffective Assistance Based on Government Interference

Government interference with the ability of counsel to make “independent decisions about how to conduct the defense” also constitutes a violation of a criminal defendant’s right to the effective assistance of counsel.¹⁴⁶

More specifically, the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact-finding process that has been constitutionalized in the Sixth and Fourteenth Amendments.¹⁴⁷

Examples of government interference that have been found to render counsel’s assistance ineffective include state statutes permitting judges the discretion to bar closing summations in non-jury trials,¹⁴⁸ court orders denying defendants the right to speak with their counsel,¹⁴⁹ state rules requiring a defendant to testify first or not at all,¹⁵⁰ and state rules declaring defendants unfit to testify under oath at trial on their own behalf.¹⁵¹

¹⁴⁶ *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

¹⁴⁷ *Herring v. New York*, 422 U.S. 853, 857 (1975).

¹⁴⁸ *Id.* at 864 (discussing the different arguments that the defendant’s attorney might have made during closing arguments, potentially altering the ultimate judgment rendered in the case).

¹⁴⁹ *Geders v. United States*, 425 U.S. 80, 88 (1975) (discussing the importance of allowing defense counsel to speak with the defendant during an overnight recess in a criminal trial due to “tactical decisions to be made and strategies to be reviewed”).

¹⁵⁰ *Brooks v. Tennessee*, 406 U.S. 605, 612-13 (1972) (“By requiring the accused and his lawyer to make [the choice to testify first or not at all] without an opportunity to evaluate the actual worth of their evidence, the statute restricts the defense—particularly counsel—in the planning of the case.”).

¹⁵¹ *Ferguson v. Georgia*, 365 U.S. 570, 592-94, 596 (1961) (holding that allowing a defendant to make only an unsworn statement during trial and preventing defense counsel from conducting a direct examination of the defendant denied the defendant of his rights to counsel and due process).

In *Stein I*, the court found a violation of the defendants' right to counsel based on the Thompson Memo and the AUSAs' scrutiny of KPMG's fee advancement policy. The court held that the government obstructed the employees' access to a valid source of funding for their legal defense and therefore improperly intruded on the manner in which the individual employees wished to defend themselves.¹⁵² In arriving at its holding, the court took notice of the immense amount of time, document review, and complexity involved in the preparation of what the court recognized was at least one of the "largest tax fraud case[s] in United States history."¹⁵³ This also warranted consideration of the vast amount of money that would be needed in order for the defendants to mount the defense they desired.¹⁵⁴ The court in *Stein I* and again in *Stein III* highlighted the potential risks ensuing from such an obstruction, pointing out that "[a]t least most of [the defendants] likely will be unable to afford to pay their attorneys to review all or even most of the documents the government has produced or . . . to interview even a fraction of the witnesses the government has interviewed."¹⁵⁵ The court in

¹⁵² *Stein I*, 435 F. Supp. 2d at 362. "The government here acted with the purpose of minimizing these defendants' access to resources necessary to mount their defenses or, at least, in reckless disregard that this would be the likely result of its actions. In these circumstances, it is not unfair to hold it accountable." *Id.* at 366-67.

¹⁵³ *Id.* at 362; see also Lynnley Browning, *Judge Delays KPMG Tax Trial Over Legal Fees Dispute*, N.Y. TIMES, Nov. 15, 2006, at C3. In its decision in *Stein III*, the court again raised this issue, pointing out the significant increases in the amount of documentation produced since its decision in *Stein I*, obstacles arising in accessing the documents, numerous motions raised over the course of the investigation, and the expected length of the trial. *Stein III*, 495 F. Supp. 2d 390, 417-18 (S.D.N.Y. 2007).

¹⁵⁴ *Stein I*, 435 F. Supp. 2d at 362 n.163, 371; *Stein III*, 495 F. Supp. 2d at 423-24.

¹⁵⁵ *Stein I*, 435 F. Supp. 2d at 371; see also *Stein III*, 495 F. Supp. 2d at 423 (stating that the relatively small net worth of some of the defendants in the case, compared with the large amounts already owed to their attorneys, illustrates that "[n]one of them can afford to defend this case at any meaningful level"). These considerations seem to indicate concern on the part of the *Stein* court that the defendants might not be effectively represented within the minimum requirements of the Sixth Amendment, discussed *supra* Part III.B.1.a, due to the need for counsel to make "strategic choices . . . after thorough investigation of law and facts." *Strickland*, 466 U.S. at 690. However, two determinations by the court in *Stein I* and *III* remove this point from consideration. First, the *Stein I* court found that the defendants were deprived of their rights to counsel "irrespective of the quality of representation they receive[d]." *Stein I*, 435 F. Supp. 2d at 369. Second, the *Stein III* court recognized that appointed counsel, which would statutorily receive dramatically lower fees and would likely be more restricted in its ability to investigate, could still potentially "provide the minimally effective defense" required by the Constitution. *Stein III*, 495 F. Supp. 2d at 421. Therefore, this particular Sixth Amendment concern does not warrant speculation in this Note.

Stein I also addressed the costs of tax experts that would likely be needed to rebut expert testimony presented by the government.¹⁵⁶

However, the KPMG defendants were not required to prove that their defense had been prejudiced, as is customary for a finding of ineffective assistance of counsel.¹⁵⁷ The *Stein I* court ruled that the government's conduct that interfered with the defendants' right "to be represented as they choose" constituted a complete deprivation of their right to counsel without it hinging on the quality of the representation they received.¹⁵⁸ Thus, before any criminal trial could even begin, the court had to determine whether corrective action could allow the defendants to defend themselves as they had wished, guaranteeing them their right to a fair trial.¹⁵⁹

Additionally, prejudice is not required where the governmental interference is severe enough that it creates an overarching structural defect in a defendant's trial.¹⁶⁰ Such a defect could prohibit even fully competent counsel from providing effective assistance,¹⁶¹ and would warrant a presumption of prejudice against the defendant.¹⁶² In *Stein I*, the court found that such a defect existed in violation of the defendants' right to counsel as a direct result of the Thompson Memo and the actions of the AUSAs.¹⁶³ The court expressly held that the government's obstruction of the defendants' access to funds created a very high risk of contaminating the entire proceeding and that due to the immense amount of documentation involved, the substantial time and cost expended, and the complexity of the case, it would be impossible to know whether the defendants could have altered the outcome absent the limitations imposed by the government.¹⁶⁴ Thus, a presumption of prejudice was warranted without need to review specific

¹⁵⁶ *Stein I*, 435 F. Supp. 2d at 371.

¹⁵⁷ *Id.* at 369.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2564-65 (2006) (citing *Arizona v. Fulimante*, 499 U.S. 279, 306-10 (1991)) (dividing constitutional errors into "trial errors," which occur during presentation of the case to the jury and are subject to harmless-error review, and "structural defects," which affect the framework of the entire trial).

¹⁶¹ *Gonzalez-Lopez*, 126 S. Ct. at 2563-64.

¹⁶² *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

¹⁶³ *Stein I*, 435 F. Supp. 2d at 371.

¹⁶⁴ *Id.* at 371-72.

details of any ensuing trial.¹⁶⁵ This entitled the defendant employees to relief to the extent that “the Thompson Memorandum and the activities of the USAO . . . interfered with the rights of such employees to a fair trial and to the effective assistance of counsel.”¹⁶⁶

2. The Defendants’ Right to Spend Their Own Money on Counsel of Their Choice

The second application of the right to counsel in the *Stein* cases is the district court’s holding in *Stein III* that the defendants were improperly deprived of their right to counsel of their choice.¹⁶⁷ The right of defendants to obtain the counsel of their choice is another application of the Sixth Amendment right to counsel that has been recognized since *Powell*.¹⁶⁸ However, the extent to which a defendant may choose his or her own counsel has been circumscribed by the restriction that the defendant be able to afford that counsel.¹⁶⁹ This limitation was made clear by the Supreme Court in *Morris v. Slappy*.¹⁷⁰

In *Morris*, the Court was presented with an indigent defendant who was represented by an appointed attorney, which the trial court had replaced due to illness.¹⁷¹ The defendant argued for a continuance, over the objections of his

¹⁶⁵ However, the Supreme Court has also held that the mere need to review large amounts of documentation, complexity of the case, and time constraints in preparing an adequate defense do not give rise to an automatic finding of ineffective representation by counsel. See *United States v. Cronin*, 466 U.S. 648, 652-53 (1984) (holding that representation of a criminal defendant by an appointed attorney who had only twenty-five days to prepare a defense in a fraud case involving review of thousands of documents, and where the government had over four and a half years to investigate and prepare, does not create an automatic presumption of ineffectiveness). This would still require the accused to show specific errors made by his counsel that “undermined the reliability of the finding of guilt,” *Id.* at 659 n.26, without which reversal would be required even when counsel’s actual representation was flawless. *Id.* at 653. However such factors are relevant considerations in determining whether counsel made errors prejudicial to the defendant *in his particular case* and the extent to which those errors and prejudice rendered counsel ineffective. *Id.* at 663; see also *United States v. Cronin*, 839 F.2d 1401, 1402-04 (10th Cir. 1988) (finding, on remand from the Supreme Court, that errors made by counsel during trial due to inadequate preparation time and counsel’s inexperience caused prejudicial error to the defendant warranting a finding of ineffectiveness).

¹⁶⁶ *Stein I*, 435 F. Supp. 2d at 382.

¹⁶⁷ *Stein III*, 495 F. Supp. 2d 390, 415 (S.D.N.Y. 2007).

¹⁶⁸ *Powell v. Alabama*, 287 U.S. 45, 52 (1932) (“It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice.”).

¹⁶⁹ See *Morris v. Slappy*, 461 U.S. 1, 11-15 (1983).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 5.

second attorney, claiming that his new counsel did not have enough time to prepare an adequate defense.¹⁷² The trial court denied the defendant's motion, and the defendant was subsequently convicted.¹⁷³ On appeal, the Circuit Court found that defendant's Sixth Amendment right was violated due to the absence of a "meaningful attorney-client relationship" with his appointed counsel.¹⁷⁴ The Supreme Court rejected the ruling by the Circuit Court, holding that where a defendant is unable to afford counsel of his choice, the Sixth Amendment does not require the defendant have a meaningful relationship with his appointed counsel.¹⁷⁵

Even when a defendant has sufficient assets to retain counsel of his choosing, further limitations on the guarantee may apply. In *Wheat v. United States*,¹⁷⁶ the Supreme Court evaluated a potential conflict of interest when the defendant's desired counsel was disqualified by the trial court due to already representing other defendants charged in the same conspiracy.¹⁷⁷ The attorney had already been involved in substantial contact with the prosecution, and the government was concerned that if one of the other defendants were to testify against the petitioner, the attorney would fail in his responsibility to provide effective counsel.¹⁷⁸ The Court ruled that the trial court did not err in its disqualification of the defendant's counsel of choice and the defendant's conviction was upheld.¹⁷⁹ The court made it clear that

[t]he Sixth Amendment right to choose one's own counsel is circumscribed in several important respects. . . . [A] defendant may not insist on representation by an attorney he cannot afford, or who for other reasons declines to represent the defendant. Nor may a defendant insist on the counsel of an attorney who has a previous or

¹⁷² *Id.* at 6.

¹⁷³ *Id.* at 6-7, 9.

¹⁷⁴ *Id.* at 10.

¹⁷⁵ *Id.* at 13 ("No court could possibly guarantee that a defendant will develop the kind of rapport with his attorney—privately retained or provided by the public—that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel.").

¹⁷⁶ 486 U.S. 153 (1988).

¹⁷⁷ *Id.* at 157.

¹⁷⁸ *Id.* at 155.

¹⁷⁹ *Id.* The Court also weighed the risk of government abuse in manufacturing conflicts to prevent defendants from being represented by "able defense counsel," but chose to rely on trial courts being aware of such a tactic. *Id.* at 163.

ongoing relationship with an opposing party, even when the opposing party is the Government.¹⁸⁰

Where a defendant is wrongfully denied his counsel of choice, such a deprivation is also a complete violation of the Sixth Amendment right to counsel, and a defendant might not be required to show prejudice to his defense.¹⁸¹ In *United States v. Gonzalez-Lopez*, the Supreme Court stated that “the right to select counsel of one’s choice . . . has never been derived from the Sixth Amendment’s purpose of ensuring a fair trial,” but rather is “regarded as the root meaning of the constitutional guarantee.”¹⁸² Thus, erroneous deprivations of counsel of choice may constitute structural errors which pervade the entire trial, removing any requirement to show prejudice.

To determine the effect of wrongful denial of choice of counsel [is not to look] for mistakes committed by the actual counsel, but for differences in the defense that would have been made by the rejected counsel We would have to speculate upon what matters the rejected counsel would have handled differently [a]nd then we would have to speculate upon what effect those different choices had or different intangibles might have had. The difficulties of conducting [assessments of prejudice for wrongful denial of counsel of choice and ineffective assistance of counsel] are not remotely comparable.¹⁸³

The court’s holding in *Stein III* came after it noted that at least some of the defendants had retained multiple counsel prior to being indicted but were forced to terminate some of their counsel when KPMG cut off payments for their legal fees.¹⁸⁴ However, the right to counsel of choice was implicated even prior to the district court’s affirmative holding in *Stein III*

¹⁸⁰ *Wheat*, 486 U.S. at 159. “The right to counsel of choice . . . is not absolute. When a defendant’s selection of counsel, under the particular . . . circumstances of a case, gravely imperils the prospect of a fair trial, a court may justifiably refuse to accede to the choice. Thus a trial court may in certain situations reject a defendant’s choice of counsel on the ground of a potential conflict of interest, because a serious conflict may indeed destroy the integrity of the trial process.” *Id.* at 166 (Marshall, J., dissenting); see also *Lainfiesta v. Artuz*, 253 F.3d 151, 154 (2d Cir. 2001) (stating that the right may be overcome if it is “outweighed by competing interests in the fair administration of justice or maintaining orderly trial procedures”).

¹⁸¹ *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2562 (2006).

¹⁸² *Id.* at 2563.

¹⁸³ *Id.* at 2565. *But see also Lainfiesta*, 253 F.3d at 157 (holding, where a trial court limited cross-examination of witnesses to only one of defendant’s two attorneys, that such a denial may not warrant automatic reversal since it does not constitute an “[a]ctual or constructive denial of the assistance of counsel altogether” (internal quotation marks omitted)).

¹⁸⁴ *Stein III*, 495 F. Supp. 2d 390, 415 (S.D.N.Y. 2007).

when the *Stein I* court dismissed the government's claim that the Sixth Amendment did not entitle the KPMG defendants to spend "other people's money" on expensive defense counsel.¹⁸⁵ The linchpin of the government's argument against protection of the individual defendants' use of other people's money¹⁸⁶—in this case KPMG's—was the Supreme Court's decisions in *Caplin & Drysdale, Chartered v. United States*,¹⁸⁷ and *United States v. Monsanto*.¹⁸⁸ In *Caplin* and *Monsanto*, the Court addressed whether a federal statute allowing the government to seek a restraining order prohibiting the transfer of a defendant's assets that were potentially forfeitable to the government as fruits of a violation of federal drug laws infringed on that defendant's Sixth Amendment right to counsel of his choice.¹⁸⁹ The Court held both in *Caplin* and *Monsanto* that no Sixth Amendment violation occurred since the statute only prohibited the use of forfeitable assets to obtain one's counsel of choice.¹⁹⁰

Nevertheless, the *Stein I* court rejected the government's reliance on these cases as relevant precedent for such an argument.¹⁹¹ First, the court pointed out that *Caplin* and *Monsanto* dealt with a defendant who sought to spend money that, being forfeitable under federal law, belonged to the government.¹⁹² Second, it interpreted *Caplin* as standing for the

¹⁸⁵ *Stein I*, 435 F. Supp. 2d 330, 367 (S.D.N.Y. 2006).

¹⁸⁶ *Id.*; see also Bloomberg News, *supra* note 60 (reporting on the federal prosecutors argument that "[t]he constitution only guarantees defendants the right to a lawyer, 'not the best lawyer money can buy or a particular lawyer'").

¹⁸⁷ 491 U.S. 617 (1989).

¹⁸⁸ 491 U.S. 600 (1989).

¹⁸⁹ *Caplin*, 491 U.S. at 623-24; *Monsanto*, 491 U.S. at 614.

¹⁹⁰ *Caplin*, 491 U.S. at 625. "A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice . . . [when t]he money, though in his possession, is not rightfully his . . ." *Id.* at 626. *Caplin* and *Monsanto* were companion cases that were handed down by the Supreme Court on the same day. Consequently, the Court relied on its decision in *Caplin* to answer the same question in *Monsanto*. *Monsanto*, 491 U.S. at 614.

¹⁹¹ *Stein I*, 435 F. Supp. 2d at 367.

¹⁹² *Id.* at 367. In *Caplin*, the Supreme Court also compared defendant's use of funds obtained through federal drug violations for payment of legal fees to that of a defendant wishing to use the proceeds of a bank robbery for the same purpose. 491 U.S. at 626. However the comparison between the government's interest in forfeited assets due to a drug transaction, and its interest in assets resulting from a bank robbery has been criticized by commentators. See Bruce J. Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765, 814 (1989) (claiming that the bank analogy fails because the assets are the rightful property of the bank, and must be returned). However, the purpose of the analogy in *Caplin* was to show that whether the

proposition that the Sixth Amendment protects “a defendant’s right to spend his own money on a defense”¹⁹³ and that the expectation of the KPMG employees that KPMG would cover their legal expenses arising out of any claims or charges based on their service with the firm was a property right that could not be interfered with by the government.¹⁹⁴ The court went on to hold in *Stein III* that even though many of these defendants still retained their own counsel for their defense after KPMG had cut off legal fees, the right to counsel of choice “includes the right to a second lawyer or law firm if the defendant can afford it, either from his own resources or from those lawfully available to him from others.”¹⁹⁵

C. *The Remedy Granted to the KPMG Defendants for Violation of Their Constitutional Rights and Its Impact on the Prosecution*

After determining that the KPMG defendants’ Sixth Amendment rights had been violated, the court in *Stein I* and *Stein III* considered the appropriate remedy. In *Stein I*, the court did not grant the defendants’ motion to dismiss the indictments against the employees.¹⁹⁶ Rather, it gave the defendants limited relief “tailored narrowly to the injury suffered”¹⁹⁷ by suppressing certain statements made by the defendants that the government obtained as a result of its constitutional violations.¹⁹⁸ However, the court did reserve the ability to make a decision regarding “whether to grant additional relief,”¹⁹⁹ including the option to dismiss the indictments at a later time.²⁰⁰

forfeitable assets are obtained by the defendant from a legally possessing third party (i.e., the bank), or obtained by the defendant without intruding on a legitimate third party claim (i.e., in drug cases), the fact that the assets are “tainted” by the illegal acquisition is what vests the government with its property interest through forfeiture. *Caplin*, 491 U.S. at 627.

¹⁹³ *Stein I*, 435 F. Supp. 2d at 367.

¹⁹⁴ *Id.*

¹⁹⁵ *Stein III*, 495 F. Supp. 2d at 422.

¹⁹⁶ Browning, *Tactic Questioned*, *supra* note 16.

¹⁹⁷ *Stein I*, 435 F. Supp. 2d at 374.

¹⁹⁸ *Stein III*, 440 F. Supp. 2d 315, 338 (S.D.N.Y. 2006).

¹⁹⁹ *Stein I*, 435 F. Supp. 2d at 382.

²⁰⁰ See Lynnley Browning, *Judge Raises New Concerns About Tactics In Shelter Case*, N.Y. TIMES, July, 14, 2006, at C3 [hereinafter Browning, *Judge Raises*] (reporting that one month after *Stein I* the judge suggested “he might consider postponing the trial or even dismissing the case”).

In *Stein III*, the court reexamined appropriate relief for the defendants after it was unable to force the government to reimburse the legal fees to the individual defendants as a result of the government's sovereign immunity protection.²⁰¹ In addition, the defendant's efforts to seek civil action against KPMG to have their legal fees paid failed for lack of jurisdiction.²⁰² As a result, the court (albeit "with the greatest reluctance") dismissed the indictments of thirteen employee defendants whose rights were violated due to KPMG's discontinuing the payment of legal fees.²⁰³ However, it denied dismissal to the remaining three defendants who were former employees of the firm and who had not shown that KPMG would have paid their defense costs "as a matter of either grace or obligation."²⁰⁴ In spite of this and as a result of its overreaching, the government lost the opportunity to prosecute many of the suspected individuals for their alleged criminal misconduct.

IV. THE DISTRICT COURT'S FACTUAL FINDINGS IN *STEIN* AND ITS WEAKNESSES

Before concluding that the government intruded on the Sixth Amendment right to counsel of the defendant employees, the *Stein* court arrived at a number of factual conclusions in order to ascertain whether the Sixth Amendment was even implicated. First, the court determined that KPMG would have advanced legal fees to its employees.²⁰⁵ This conclusion was based partly on a state statute giving KPMG the option (but not necessarily the obligation) to indemnify its employees through means which include the advancement of legal fees²⁰⁶ as well as on evidence showing that KPMG had a history of

²⁰¹ *Stein I*, 435 F. Supp. 2d at 376.

²⁰² The court in *Stein I* had originally held that it had the requisite jurisdiction over the defendants' claims against KPMG for reimbursement and advancement of their legal fees. *Stein I*, 435 F. Supp. 2d at 379. However, this ruling was overturned by the Second Circuit on appeal. See *Stein v. KPMG, LLP*, 486 F.3d 753, 756 (2d Cir. 2007).

²⁰³ *Stein III*, 495 F. Supp. 2d at 423, 427.

²⁰⁴ *Id.* at 426-27.

²⁰⁵ *Stein I*, 435 F. Supp. 2d at 353; *Stein III*, 495 F. Supp. 2d at 405.

²⁰⁶ *Stein I*, 435 F. Supp. 2d at 355 n.117 (citing the Delaware Revised Uniform Partnership Act, DEL. CODE ANN. tit. 6, § 15-110 (providing that, subject to the partnership agreement, "a partnership may, and shall have the power to, indemnify and hold harmless any partner or other person from and against any and all claims and demands whatsoever"))).

doing so.²⁰⁷ This finding was bolstered in *Stein III* by additional evidence that the court felt revealed KPMG's true desire to cover litigation expenses for the indicted defendants.²⁰⁸ This included the voicemail message from KPMG to its partners offering to pay for counsel for any current or former members of the firm involved in the investigation, the severance agreement negotiated with Richard Smith that KPMG refused to sign after it sensed the pressure from the AUSAs, and notes taken by counsel for KPMG from the firm's initial meeting with the USAO.²⁰⁹

Next, the court concluded that the threat of an indictment based on the guidelines in the Thompson Memo and the pressure applied on KPMG by the AUSAs during the course of the investigation caused the company to "consider departing from its long-standing policy of paying legal fees and expenses."²¹⁰ However in arriving at these conclusions, the court was forced to make a number of circumstantial inferences that illuminate the difficulties faced in making constitutional determinations regarding the advancement of legal fees and that illustrate the weaknesses of the *Stein* court's decisions.

A. *The Court's Holdings Regarding Indemnification and Advancement*

In assessing what legal obligation KPMG had to advance legal fees to its employees, the *Stein I* court first looked at whether the company was subject to state indemnification laws.²¹¹ Aware that all states have laws addressing company indemnification of employees and that these laws differ in terms of whether indemnification is

²⁰⁷ As the *Stein* court wrote:

KPMG had an unbroken track record of paying the legal expenses of its partners and employees incurred as a result of their jobs, without regard to cost. All of the . . . defendants therefore had, at a minimum, every reason to expect that KPMG would pay their legal expenses in connection with the government's investigation and, if they were indicted, defending against any charges that arose out of their employment by KPMG.

Stein I, 435 F. Supp. 2d at 355-56; see also *Stein III*, 495 F. Supp. 2d at 402, 406.

²⁰⁸ *Stein III*, 495 F. Supp. 2d at 407.

²⁰⁹ *Id.* at 407-08.

²¹⁰ *Stein I*, 435 F. Supp. 2d at 352 (also determining that KPMG had considered departing from its practice of advancing fees, even before any conversations with the AUSAs took place, based merely on the inherent threat of indictment posed in the Thompson Memo); *Stein III*, 495 F. Supp. 2d at 400.

²¹¹ *Stein I*, 435 F. Supp. 2d at 354.

permissive or required, the court had to determine what statutory obligations attached to KPMG.²¹² The court recognized that these statutes differ not just between states but also between different types of business entities within the same state.²¹³ Since KPMG is a Delaware company, the court applied the indemnification laws of the state of Delaware.²¹⁴ Next, since KPMG was formed as a limited liability partnership, the court distinguished between the indemnification statutes governing Delaware corporations²¹⁵ and statutes governing Delaware partnerships.²¹⁶ Finally, the court noted that the law governing individual defendants may change when an individual is an employee rather than a partner in the firm and works in a different state.²¹⁷

This analysis illustrates three issues courts must consider in evaluating a company's statutory obligation to indemnify its employees. First, the court must identify the type of business entity employing the person subject to the litigation and whether it is covered under a state's indemnifi-

²¹² *Id.* at 354-55 (citing 3A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1344.10 (2002)).

²¹³ *Id.* at 354. While indemnification laws vary between states, this Note will focus on Delaware's indemnification law, both for simplicity as well as due to KPMG's status as a Delaware Limited Liability Partnership.

²¹⁴ *Id.* at 355 n.117.

²¹⁵ Delaware law provides:

A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any . . . pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative . . . by reason of the fact that the person is or was a director, officer, employee or agent of the corporation . . . against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with such action, suit or proceeding if the person acted in good faith and in a manner the person reasonably believed to be in . . . the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful.

DEL. CODE ANN. tit. 8, § 145(a) (2006). Section 145(b) continues:

[N]o indemnification shall be made in respect of any claim . . . as to which such person shall have been adjudged to be liable to the corporation unless . . . the court . . . shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court . . . shall deem proper.

Id. § 145(b).

²¹⁶ *Id.* tit. 6, § 15-110; *Stein I*, 435 F. Supp. 2d at 355 n.117.

²¹⁷ See *Stein I*, 435 F. Supp. 2d at 356 n.119 (discussing KPMG defendants who were entitled to mandatory indemnification under California law).

cation law.²¹⁸ Second, the court must then ascertain what classes of employees within the company (that is, officers, directors, partners, employees, etc.) are intended to be covered by the indemnification statute in question and whether a specific employee falls within that class. Finally, depending on those first two factors, the court must be sure that it is applying the indemnification statute of the proper state. This analysis becomes even more confusing when one realizes that, as in *Stein*, the state statute may *permit* indemnification but not *require* it.²¹⁹

The *Stein I* court noted that the Delaware indemnification law is subject to any “standards and restrictions” set out in KPMG’s partnership agreement.²²⁰ The court inferred that since KPMG’s agreement contained no such restrictions, rendering it “entirely free to indemnify its personnel,” KPMG would have necessarily done so.²²¹ However, this argument also cuts the other way. KPMG’s statutory freedom to indemnify its personnel does not necessarily create an obligation to do so.²²² Depending on the state whose indemnification law is applied, the statutory requirements, and the type of company in question, a showing of good faith by the individual being investigated may be required before he or she might be eligible for indemnification.²²³

²¹⁸ As a general example, the law in the state of Delaware governing companies set up as corporations does not govern companies set up as limited liability partnerships. See DEL. CODE ANN., tit. 8, § 145(a) (establishing permissive indemnification for Delaware corporations); *id.*, tit. 6., § 15-110 (establishing permissive indemnification for Delaware partnerships).

²¹⁹ See Kurt A. Mayr, II, Note, *Indemnification of Directors and Officers: The Double Whammy of Mandatory Indemnification Under Delaware Law in Walutch v. Conticommodity Services, Inc.*, 42 VILL. L. REV. 223, 223-24 (1997) (noting that, in response to concerns regarding director and officer personal liability, states enacted statutes to limit director and officer exposure through “indemnification statutes that empower corporations to indemnify their directors and officers . . . and, in some instances, requiring such indemnification” (emphasis added)).

²²⁰ *Stein I*, 435 F. Supp. 2d at 355 n.117 (quoting DEL. CODE ANN. tit. 6, § 15-110)).

²²¹ *Id.*

²²² *Sr. Tour Players 207 Mgmt. Co. v. Golftown 207 Holding Co.*, 853 A.2d 124, 127 n.5 (Del. Ch. 2004) (comparing the nearly identical language under Delaware limited liability company and limited partnership law, and stating that “[t]he statutory language is permissive and does not *per se* create a right to indemnification”).

²²³ See DEL. CODE ANN. tit. 8, § 145(a) (requiring that the person seeking indemnification act “in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person’s conduct was unlawful”); Julie J. Bisceglia, *Practical Aspects of Directors’ and Officers’ Liability Insurance—Allocating and Advancing Legal Fees and the Duty to Defend*, 32 UCLA L.

This exposes a weakness in the *Stein* court's presumption that, absent the presence of the Thompson Memo, KPMG would have paid the defense costs for its partners and employees simply because it had the discretion to do so. With nothing in KPMG's partnership agreement making any mention of indemnification,²²⁴ it is entirely possible that KPMG, or any company subject to government investigation, may choose to inquire as to whether an employee, partner, officer or director's acts were in good faith and perceived as lawful before determining eligibility for indemnification.²²⁵ Additionally, as noted by the *Stein I* court, virtually all indemnification laws have one common characteristic: the right to indemnification is contingent on the defense to the legal proceedings being successful on the merits.²²⁶ Therefore, any obligation KPMG had to indemnify would not exist if the individual defendants were found guilty of the charges.

REV. 690, 696-97 (1985) (discussing how states have followed Delaware, permitting indemnification for expenses, fines, and judgment and settlement costs where the defendant acts in good faith and, in criminal actions, has no reasonable cause to believe his conduct is illegal); see also J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, PARTNERSHIP LAW AND PRACTICE: GENERAL AND LIMITED PARTNERSHIPS § 10:6 (2007) (stating that a requirement of good faith may be set as a standard for indemnification); *Sr. Tour Players*, 853 A.2d at 128 (interpreting the operating agreement of a limited liability company which expressly denied indemnification for actions involving bad faith).

²²⁴ *Stein I*, 435 F. Supp. 2d at 340.

²²⁵ Indeed, it appears that even in KPMG's case, an argument that good faith and perception of lawful conduct were absent could be made. See Weil, *supra* note 93, at C1 (reporting that one former partner who was indicted testified before the Senate Subcommittee regarding "his attempts to dissuade senior partners from approving one of the four shelters in question. . . . Emails showed he cautioned other KPMG partners that the strategy wasn't legitimate"). This argument may be advanced even further by considering that KPMG's decision to terminate the employment of some of its senior partners, see *supra* Part II.B, came even before its initial discussions with USAO. *Stein I*, 435 F. Supp. 2d at 339.

²²⁶ *Stein I*, 435 F. Supp. 2d at 355 (citing *Homestore Inc. v. Tafteen*, 888 A.2d 204, 211 (Del. 2005) as stating that while Delaware's law "allows corporate officials to defend themselves in legal proceedings 'secure in the knowledge that, if vindicated, the corporation will bear the expense of litigation[,]'. . . indemnification cannot be established until after the defense to legal proceedings has been 'successful on the merits or otherwise'" (footnotes omitted)); see also DEL. CODE ANN. tit. 8, § 145(c) ("To the extent that a . . . director or officer of a corporation has been successful on the merits . . . in defense of any action . . ., such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred . . ."); CALLISON & SULLIVAN, *supra* note 223 (suggesting "success on the merits" as a "method for determining whether the standard for indemnification has been met" in the creation of a partnership agreement); *Majkowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 586 (Del. Ch. 2006) ("[A]n indemnification dispute cannot be resolved until after the merits of the underlying controversy are decided because the good faith standard requires a factual inquiry in the events that gave rise to the lawsuit.").

Even assuming that indemnification does apply and that the defense can succeed on the merits, individual defendants in these types of criminal proceedings, without more, might still be faced with the extreme difficulty of covering the cost of the litigation.²²⁷ This exposes the defendants to “the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with investigations and legal proceedings.”²²⁸ At least in part out of these concerns, indemnification statutes generally allow for the advancement of legal fees before the conclusion of the case.²²⁹ One rationale for this is that advancement is needed as an inducement to attract the most capable individuals to positions of high responsibility in companies.²³⁰

However, a major drawback to indemnification statutes that allow for the advancement of legal fees is that such advances are entirely permissive.²³¹ A company *may* advance legal expenses in defense of litigation to its officers, directors, partners or employees, but may also choose not to provide for advancement at all, or to limit situations in which it would do so.²³² One significant limitation is that defendants seeking advancement of legal fees prior to the final disposition of a proceeding may be required to deliver a written undertaking to repay any funds advanced if it is determined that they are not entitled to indemnification by the company.²³³

²²⁷ *Stein I*, 435 F. Supp. 2d at 355. “The cost of a trial is out of the financial reach of many white-collar defendants. ‘It is hard to defend a white-collar case for less than \$100,000, and most cost much, much more than that.’” Koppel, *supra* note 42 (quoting a Georgetown University McDonough School of Business professor).

²²⁸ *Homestore*, 888 A.2d at 211.

²²⁹ 18B AM. JUR. 2D *Corporations* § 1651 (2004); *see also* John J. Falvey, Jr. & Janet E. Taylor, *Federal Prosecutors and Advancement of Legal Defense Fees: Don’t Ask, Don’t Tell*, BOSTON BAR J., Jan./Feb. 2008, at 14.

²³⁰ *Homestore*, 888 A.2d at 211; Falvey & Taylor, *supra* note 229, at 14 (arguing that advancement allows directors to act in the best interests of the corporation while knowing that they can resist meritless suits and not be forced to fund their own legal defense).

²³¹ 18B AM. JUR. 2D *Corporations* § 1651; Bisceglia, *supra* note 223, at 709-10.

²³² 18B AM. JUR. 2D *Corporations* § 1651.

²³³ 3A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §1344.10 (perm. ed., rev. vol. 2002) (discussing statutory indemnification and advancement in the context of corporations); DEL. CODE ANN. Tit. 8, § 145(e) (requiring an officer or director to deliver an undertaking to repay legal fees where a corporation chooses to advance); *see also* *Sr. Tour Players*, 853 A.2d at 127 n.5, 129 (discussing the “broad authority” given to limited liability companies and limited partnerships under Delaware law to set their indemnification provisions and “to require a written undertaking as a condition to advancement”).

Thus, while indemnification and advancement may be correlative, they are “separate and distinct legal actions. [A defendant’s] right to advancement is not dependent on [his or her] right to indemnification.”²³⁴

[A] corporation may, through its certificate of incorporation or bylaws, or in a contract specifically addressing the issue, make mandatory the advancement of expenses to a director or former director for defending in a covered proceeding. Such a provision may be enforced as a contract. However, if the applicable corporate indemnification statute is permissive, then a provision in a corporation’s bylaws requiring the corporation to indemnify its directors, officers, employees, and agents to the extent permitted by law is not mandatory and does not require the corporation to advance litigation expenses before the termination of the proceeding in which the expenses were incurred.²³⁵

This presents another issue that courts must address: determining what, if any, provisions regarding indemnification and advancement exist in a company’s bylaws or partnership agreement, or in other express contractual agreements, and then whether any such provision entitles a particular employee to advancement.²³⁶ If a company has no expressly stated provisions regarding indemnification and advancement in its corporate bylaws or partnership agreement, this becomes substantially more difficult.²³⁷

As this was the case for KPMG in *Stein*, the court overcame this difficulty in two ways. First, the court found that

²³⁴ *Homestore*, 888 A.2d at 212; accord *Sr. Tour Players*, 853 A.2d at 128.

²³⁵ 18B AM. JUR. 2D *Corporations* § 1651; accord *Homestore*, 888 A.2d at 212 (stating that while the advancement authority granted by the indemnification statutes is permissive, “mandatory advancement provisions are set forth in a great many corporate charters, bylaws and indemnification agreements”).

²³⁶ *Id.* at 213 (“The scope of an advancement proceeding is usually summary in nature and limited to determining the issue of entitlement in accordance with the corporation’s own uniquely crafted advancement provisions.”).

²³⁷ CALLISON & SULLIVAN, *supra* note 223 (explaining that partnership agreements usually contain indemnification provisions where the limited partnership promises to indemnify for liabilities incurred as a result of partnership business, as long as the liabilities are not the result of “bad faith, willful misconduct, or gross negligence” and that these provisions should be drafted to authorize advancement of litigation costs prior to a determination of liability while requiring repayment if it is determined that the partner breached the standard of care); see also *Sr. Tour Players*, 853 A.2d at 130 n.23 (distinguishing between cases where an undertaking by an employee defendant was not required under Delaware corporate law since advancement was provided for under a corporation’s specific bylaws and was not conditioned on an undertaking, and cases where a corporation was entitled to deny advancement even where the corporate officer offered to submit to an undertaking since no mandatory advancement provision existed in the certificate of incorporation or bylaws).

the employees' expectations of advancement based on KPMG's prior practice of advancing legal fees constituted a property interest with which the government was not permitted to interfere.²³⁸ Second, the court suggested (although it admittedly declined to decide in this ruling) that all of the defendants were protected by a contract implied-in-fact (with the exception of Stein who had an express agreement with the company).²³⁹ These conclusions, however, are flawed.

The first flaw is that any expectation the employees' had based on KPMG's "long-standing policy," as well as the suggestion that a contract implied in fact existed, is misplaced since one of the stipulations between the government and KPMG was that the company's practice of advancing and paying legal fees prior to February 2004 was "voluntary."²⁴⁰ Such a voluntary policy suggests that KPMG was free to exercise its discretion to deny advancement, either during the investigation or later during criminal proceedings, to any employee or former employee that it suspected did not act in good faith and was guilty of a criminal violation.²⁴¹ Two factual circumstances in *Stein* highlight this flaw: First, KPMG refused to extend payments for legal fees to certain former employees despite their involvement in the investigation. Second, KPMG also refused to extend fee payment to current employees even after the court found a Sixth Amendment violation in *Stein I*.

With respect to the first circumstance, one might view KPMG as having already exercised such discretion under its voluntary practice when it declined to extend payment of legal fees to three former employees implicated in the alleged wrongdoing.²⁴² Two of the former employees had left KPMG

²³⁸ *Stein I*, 435 F. Supp. 2d at 366.

²³⁹ *Id.* at 356, n.119.

²⁴⁰ *Id.* at 352, 340; see also *Stein v. KPMG, LLP*, 452 F. Supp. 2d 230 (S.D.N.Y. 2006), *rev'd*, 486 F.3d 753, 762 n.3 (2d Cir. 2007) (stating in dictum that the stipulation by the defendants that KPMG chose to voluntarily advance legal fees in the past arguably estopped them from now arguing that KPMG had a contractual obligation—"implied or otherwise"—to pay their post-indictment legal fees, and that it is far from certain that KPMG would "lose on the merits" of any implied contract claim since the alleged "uniform practice" of paying legal fees for employees consists of "a single instance in which KPMG paid the legal fees of two partners indicted and convicted in a 1974 criminal case").

²⁴¹ See *Advanced Mining Sys., Inc. v. Fricke*, 623 A.2d 82, 84-85 (Del. Ch. 1992) (holding that a mandatory indemnification provision in a corporate by-law which is silent as to advancement does not "deprive the board of its function . . . to evaluate the corporation's interest with respect to advancement of expenses").

²⁴² *Stein III*, 495 F. Supp. 2d 390, 425 (S.D.N.Y. 2007).

prior to the start of the investigation, but were suspected in the misconduct partially through conduct prior to their departure from the firm and partially through their formation of a separate company which played a “central role in the transactions at issue.”²⁴³ Yet the court in *Stein III* did not find the rights of those defendants to have been violated, despite evidence from the KPMG voicemail that the firm would cover expenses for “any present and former members of the firm.”²⁴⁴ Therefore, it may be argued that KPMG never intended to create an expectation that legal fees would be advanced unconditionally.

The other factual circumstance is that even after the district court’s finding in *Stein I* that the government had violated the defendant’s Sixth Amendment rights, KPMG still refused to extend payment of the legal expenses for their defendant employees either voluntarily²⁴⁵ or by conceding a contractual obligation to do so.²⁴⁶ This is significant because the *Stein I* court had viewed stipulations by KPMG to the AUSAs that it had no legal obligation to pay fees as being borne of the firm’s own self-interest in avoiding an indictment and not necessarily out of its actual belief.²⁴⁷ Yet even with the government’s obstructions removed, KPMG chose to exercise discretion even with regards to defendants who were *current* employees during the course of the suspected criminal wrongdoing. Such considerations cast further doubt on future courts’ efforts to reconcile such claims by attempting to infer what a company would have done, especially when a company chooses,

²⁴³ *Id.* at 426.

²⁴⁴ The *Stein III* court found that it could not be determined that KPMG had any legal obligation to defend, nor did the defendants show that the firm would have covered their legal costs “as a matter either of grace or of obligation, given that [they] left the firm so long ago.” *Id.* With respect to a third former defendant, the court found no intention of KPMG to cover his costs due to his departure under “strained circumstances” from the firm two years before the indictment, and that he had expressly released KPMG from any claims that he may have had against the firm. *Id.*

²⁴⁵ See Browning, *Judge Raises New Concerns*, *supra* note 200 (reporting a month after the *Stein I* decision was handed down that the firm had no intention of paying the legal fees for its defendant employees because while they had already paid \$12 million in fees to that point, the employees had cost the firm \$500 million by breaching their fiduciary duty).

²⁴⁶ *United States v. Stein*, 452 F. Supp. 2d 230, 260 (S.D.N.Y. 2006) (noting that KPMG contested claims of a contract implied in fact by asserting that past decisions regarding payment of employee legal expenses were made pursuant to “voluntary, unilateral decisions . . . on a case by case basis”).

²⁴⁷ *Stein I*, 435 F. Supp. 2d at 345 n.54 (“KPMG had an interest in avoiding advancement of fees if its legal obligation to do so might be questioned, as the government might view advancement of fees as protecting culpable personnel.”).

as KPMG did, to change course in its discretion as an investigation wears on.

A second major flaw in the court's reasoning regarding the employees expectations is that KPMG arguably never intended to advance legal expenses to all employees being investigated by the DOJ. The only affirmative action taken by the company regarding advancement was to create an express contract for the two individuals the company unmistakably intended to cover: Jeffrey Stein and Richard Smith.²⁴⁸ Such action undercuts the argument that KPMG impliedly obligated itself to advance fees to all of its employees connected to the investigation. A better indication of the company's true intent could be ascertained by looking at whether the company planned for such litigation expense issues by obtaining a liability insurance policy that provided protection in such instances.²⁴⁹ Such protection could make indemnification and advancement through company assets unnecessary.²⁵⁰

²⁴⁸ *Id.* at 339. See generally Karl E. Stauss, *Indemnification in Delaware: Balancing Policy Goals and Liabilities*, 29 DEL. J. CORP. L. 143 (2004) (pointing out, at least with corporations, the inherent risks in blanket authorizations and clauses regarding mandatory advancement).

Mandatory advancement clauses have been broadly interpreted to apply, even in situations where the advancement request was borne out of a lawsuit brought by the company providing the advance. *Specific contract language is needed to entitle a person to mandatory advancement.* A provision mandating indemnification "to the full extent permitted by Delaware law" will not "deprive the board of its function under Section 145(e) to evaluate a corporation's interest with respect to advancement of expenses.["] Where a bylaw mandates the advance of expenses, it creates a vested right, which cannot be unilaterally terminated, to advances once a triggering event for advances occurs. Without a bylaw or contract mandating the advance of expenses, a board determination to advance their personal litigation expenses is treated as a self-dealing transaction, governed by entire fairness. "A rubber-stamp resolution authorizing advances will not pass muster."

Id. at 163-64 (emphasis added) (footnotes omitted).

²⁴⁹ See David B. Bayless, *Defending Your Client in the World of SEC Enforcement, Part 2: Cooperation and Litigation*, SEC. LITIG. REP., Apr. 2006, at 1. The Bayless article tackles concerns arising from the Securities and Exchange Commission's use of the Seaboard Report that are nearly identical to those emanating from the Thompson Memo, including pressure to cooperate with government investigations and a requirement that companies, in order to obtain settlements with the government, not exercise their right to indemnify individuals. *Id.* For corporations, this makes the purchase of a director and officer ("D&O") insurance policy essential. *Id.* In addition, when purchasing such policies, companies can elect a "pay as you go" clause, which would permit advancement of defense costs on a current or quarterly basis. *Id.* But see John C. Tanner & David E. Howard, *Blowing Whistles and Climbing Ladders: The Hidden Insurance Issues Behind Sarbanes-Oxley and Recent Corporate Governance Reform*, ACC DOCKET, Apr. 2005, at 32, 35-37 (pointing out that many policies impose limits on cost coverage of government investigations, may contain terms that are subject to interpretation regarding coverage of certain costs, and may

B. The Court's Findings Regarding the Threats and Pressure Imposed by the Government

In addition to finding that KPMG had a policy of advancing legal fees on which its employees were entitled to rely, the *Stein* decisions also focused on the effect that actions and threats by the government had on KPMG's desire to advance fees.²⁵¹ The court concluded first that the inherent threat of an indictment for failing to cooperate contained in the Thompson Memo caused KPMG to consider abandoning its policy of advancing legal fees, even before it first met with the AUSAs.²⁵² One premise for this conclusion was the court's belief that the Thompson Memo was "binding on all federal prosecutors."²⁵³ Next, the court found that the threat of indictment was consistently reinforced by the USAO by focusing early and often on KPMG's legal obligations regarding advancing legal fees and by allowing it to comply only with those obligations that were demonstrable.²⁵⁴ Third, the court found that the government's conduct manifested a desire to minimize the involvement of defense counsel.²⁵⁵ Finally, the court determined that the firm's decision to cease payments to any indicted employees and the conditions placed on the receipt of these payments were the product of direct pressure applied by the government pursuant to the Thompson Memo.²⁵⁶ Again, however, a number of weaknesses limit the effectiveness of the court's decision.

First, KPMG's fear of prosecution had little, if anything, to do with the Thompson Memo and more to do with the government's general discretion to bring an indictment, which would have effectively crippled the company. As the *Stein I*

also contain rescission clauses which deny coverage in the event of particular instances of conduct, such as restating previously certified financial statements).

²⁵⁰ Bayless, *supra* note 249. *But see* William A. Boeck, *Don't Assume D&O Policy Covers Individuals' Defense Expenses*, BUS. INS., Nov. 6, 2006, at 10 (warning specifically in the wake of the *Stein* cases that where prosecutors attack corporate indemnification of defense expenses, the assumption by many defendants that D&O policies will fill this gap may be wrong if the policy contains a provision which triggers payment only once the company begins indemnifying its employees who are subject to the investigation).

²⁵¹ *Stein I*, 435 F. Supp. 2d at 352; *Stein III*, 495 F. Supp. 2d at 400.

²⁵² *Stein I*, 435 F. Supp. 2d at 352.

²⁵³ *Id.* at 338.

²⁵⁴ *Id.* at 352; *Stein III*, 495 F. Supp. 2d at 402.

²⁵⁵ *See Stein I*, 435 F. Supp. 2d at 352.

²⁵⁶ *Id.*

court recognized, this discretion was grounds for concern for KPMG following the investigation, indictment, and prosecution of KPMG's former competitor, Arthur Andersen.²⁵⁷ Since prosecutorial discretion to seek an indictment against a company exists independently of the Thompson Memo guidelines,²⁵⁸ the decision to seek an indictment could hinge on the government's satisfaction with a company's cooperation irrespective of any procedural requirement²⁵⁹ that it be considered.

Second, courts attempting to resolve such disputes regarding the advancement of legal fees risk intruding on the government's compelling interest and legitimate discretion in prosecuting individuals and companies liable for misconduct.²⁶⁰ Prosecutors have broad discretion in determining when and what charges to bring against a defendant.²⁶¹ Claims of abuse of prosecutorial discretion are rarely reviewed as such discretion is grounded in the separation of powers doctrine of constitutional theory.²⁶² The *Stein* cases agreed with the need for such

²⁵⁷ *Id.* at 341; see also *supra* notes 74, 97 and accompanying text.

²⁵⁸ See McNulty Statement, *supra* note 4, at 2 ("Federal prosecutors could lawfully exercise their discretion to charge a corporation in many instances where we have stayed our hand.").

²⁵⁹ The *Stein I* court found that AUSAs, in determining whether to bring an indictment against a company under the Thompson Memo, are "obliged" to consider a company's cooperation and that the advancement of legal fees are a measurement of that cooperation. *Stein I*, 435 F. Supp. 2d. at 338. The court used this logic to differentiate between the Thompson Memo and the Holder Memo from 1999. *Id.* As authority for this holding, however, the court referred to a memorandum from Robert D. McCallum, Jr., Acting Deputy Attorney General. Memorandum from Robert D. McCallum, Jr., Deputy Attorney Gen. on Waiver of Corporate Attorney-Client and Work Product Protection to the Heads of Dep't Components, U.S. Attorneys (Oct. 21, 2005). However, this memo was dated October 21, 2005—over a year after the IRS made its criminal referral to the DOJ. *Id.* The meetings between the AUSAs and counsel for KPMG took place on February 25, 2004, twenty months before the McCallum memo. *Stein I*, 435 F. Supp. 2d at 341.

²⁶⁰ See *Braswell v. United States*, 487 U.S. 99, 115 n.9 (1988) ("White collar crime is 'the most serious and all-pervasive crime problem in America today.' Although this statement was made in 1980, there is no reason to think the problem has diminished in the meantime." (quoting John Conyers, Jr., *Corporate and White-Collar Crime: A View by the Chairman of the House Subcommittee on Crime*, 17 AM. CRIM. L. REV. 287, 288 (1980)).

²⁶¹ See *Fisher*, *supra* note 74, at 30 ("It is well settled that business entities may be indicted. . . . Prosecutors have discretion as to whom to prosecute. This discretion is limited by constitutional considerations [but otherwise] the prosecutor is virtually without legal limit as to whom she prosecutes . . ." (paragraph break omitted)).

²⁶² Greg Hollon, Note, *After the Federalization Binge: A Civil Liberties Hangover*, 31 HARV. C.R.-C.L. L. REV. 499, 508 (1996); BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 4:3, at 4-6 (2d ed. 2001) (cautioning that while judicial deference to prosecutors arises from the separation of powers doctrine and respect for

discretion, stating that “prosecutors appropriately are given great latitude in the arguments they make to juries,”²⁶³ and remarking on the importance of the government’s efforts to obtain cooperation during its investigations:

Any government’s interest in investigating and fairly prosecuting crime is compelling. . . . In order properly to accomplish that task, the government must have the ability to make just charging decisions and to prevent obstruction of its investigations. Hence, no one disputes the proposition that a willingness to cooperate with the government is an appropriate consideration in deciding whether to charge an entity. Nor does anyone suggest that an entity’s obstruction of a government investigation . . . should be ignored in a charging decision.²⁶⁴

In the post-Enron environment of company accountability, this government interest is also seen through the increased use of regulation designed to provide greater oversight of company conduct.²⁶⁵ Legislatures and administrative agencies have responded to a surge in white collar crime in recent years with statutes that increase transparency and reporting requirements and enhance criminal penalties for fraudulent conduct.²⁶⁶ However, as white collar corruption becomes increasingly complex, prosecution of such conduct remains an essential enforcement and deterrence mechanism.²⁶⁷ While

prosecutorial expertise, “[t]he combination of prosecutorial discretion and judicial passivity can be dangerous”).

²⁶³ *Stein I*, 435 F. Supp. 2d at 359.

²⁶⁴ *Id.* at 363; *see also Stein III*, 495 F. Supp. 2d at 427.

²⁶⁵ *See* McNulty Statement, *supra* note 4 (arguing that following the outbreak of corporate scandals after the collapse of Enron, the DOJ’s ensuing “vigor and action” in prosecuting corporate crime along with congressional reform “have helped to instill a climate of accountability in corporate boardrooms, and to restore investors’ confidence in the integrity of our markets”).

²⁶⁶ *See, e.g.,* Sarbanes Oxley Act, Pub. L. No. 107-204, 116 Stat. 745 (2002) (establishing penalties for criminal fraud in corporate record keeping in Title VIII, and increasing criminal penalties for mail and wire fraud, as well as under federal sentencing guidelines for white-collar offenses under Title IX); Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, Securities Act Release No. 8188, Exchange Act Release No. 47,304, Investment Company Act Release No. 25,922 (Jan. 31, 2003) (requiring mutual fund companies to provide disclosures on proxy voting policies relating to portfolio securities they hold, due in part to recent corporate scandals that have generated new investor interest in issues of corporate governance, as well as due to increased voting power that mutual funds enjoy as major shareholders and their effects on corporate accountability).

²⁶⁷ *See* Fisher, *supra* note 74, at 31 (commenting on accuracy and credibility in financial reporting, the effects of distrust on shareholders, creditors, managers and regulators, and the potential need to make an example of Arthur Andersen); *see also* Wray & Hur, *supra* note 2, at 1106 (“Satisfaction of the government’s interests of

abuse of prosecutorial discretion and the potential for vindictiveness by prosecutors are important concerns,²⁶⁸ forcing courts to evaluate such claims creates the risk that courts will overstep judicial authority under the separation of powers doctrine.²⁶⁹

A third weakness limiting the effectiveness of the court's holding is that decisions like those in *Stein I* and *III* may serve as catalysts for prosecutors to use alternative methods to obtain company cooperation, making legal fee advancement a moot point. The DOJ and USAO were chastised in *Stein* for placing an unfair burden on the individual KPMG defendants by denying them access to a source of funds they were lawfully entitled to for purposes of presenting a defense.²⁷⁰ However, the defendants' access to these funds was subject to a second limitation: availability. Should a criminal indictment render a company insolvent, a separate burden would be placed on defendants wishing to gain access to these funds.²⁷¹

The negative financial impact that a formal indictment against a company has on that company's assets and survivability may give prosecutors an interest in not seeking an indictment against that company.²⁷² However, frustrating government investigations of illegal activity by burdening their acquisition of cooperation from a legitimate additional defendant—in this case the company—creates a risk that the government will simply bring an indictment, potentially rendering a company (as in the case of Arthur Andersen)

retribution, deterrence, rehabilitation and restitution through the prosecution of culpable individuals will weigh against prosecution of the business entity.”).

²⁶⁸ Fisher, *supra* note 74, at 32 (discussing how prosecutors can obtain indictments with “relative ease” and by using “questionable or even contrived evidence”); *see also*, Hollon, *supra* note 262, at 508 (stating that a prosecutor's charging decisions are entitled to the presumption that they were made in good faith); Note, *Prosecutorial Vindictiveness in the Criminal Appellate Process: Due Process Protection After United States v. Goodwin*, 81 MICH. L. REV. 194, 195-96 (1982).

²⁶⁹ Hollon, *supra* note 262, at 508.

²⁷⁰ *Stein I*, 435 F. Supp. 2d at 362.

²⁷¹ *See* Tanner & Howard, *supra* note 249, at 46 (arguing that even where employees such as in-house attorneys have mandatory indemnification through state law or written agreements, “individual financial resources will be at risk if the company files for bankruptcy or becomes insolvent”); Bisceglia, *supra* note 223, at 710-11.

²⁷² *See* Thompson Memo, *supra* note 1, at 3 (explicitly raising adverse risks to shareholders, pension holders, and innocent employees as factors to consider in deciding whether to charge a company); McNulty Statement, *supra* note 4.

insolvent.²⁷³ This will place the burden of legal fees more heavily on defendants who would otherwise have sought company funds.²⁷⁴ Even assuming prosecutors did abuse their discretion in seeking an indictment, it is arguable whether a reversal or the dropping of any charges would restore the company's financial position.²⁷⁵

This Note does not claim that the *Stein* court erred in its conclusions, or misrepresented the issues in arriving at its holdings. It merely seeks to present the wealth of issues, arguments, and claims that could be made in response to the ruling issued by the *Stein* court, as well as may be made to other courts in similar, if not identical, situations moving forward.²⁷⁶ In the face of these complications related to judicial reconciliation of legal fee disputes for defendants charged with corporate crime, an easier solution is needed.²⁷⁷

²⁷³ See Irvin B. Nathan & Michael S. Lewis, *Will the Recent KPMG Decisions Change White-Collar Defense?* BUS. CRIMES BULL., Oct. 18, 2006 (arguing that companies "with an instinct for self-preservation[] may well recognize that advancing legal fees to indicted individuals is only likely to antagonize prosecutors who have discretion to indict the company"); Koppel, *supra* note 42; Fisher, *supra* note 74, at 30-31, 32.

²⁷⁴ See Bisceglia, *supra* note 223, at 699 (arguing for the procurement of D&O liability insurance because "no matter how well disposed the board may be toward the embattled director, the corporation may have its own financial troubles and thus be unable to help him").

²⁷⁵ See Fisher, *supra* note 74, at 32; see also Nathan & Lewis, *supra* note 273 (stating that while the *Stein* decision was highly acclaimed, "it may ultimately produce little change in the world of white-collar criminal defense" since "the risk of a lawsuit for fees is far outweighed by the risk of alienating prosecutors by funding the legal defense of their quarry").

²⁷⁶ See, e.g., United States v. Galante, No. 3:06CR161, 2006 WL 3826701, at *3 (D. Conn. Nov 28, 2006) (differentiating *Stein* in a case concerning federal prosecutors' use of a legislative forfeiture provision). However, one can only hope that situations presenting similar fact patterns will be extremely limited; see also Nathan & Lewis, *supra* note 273 (projecting that the *Stein I* decision will "prompt corporate policy-makers to rethink charter and bylaw provisions and their past practices relating to reimbursement of legal fees to indicted or targeted officers, directors or employees").

²⁷⁷ In December 2006, in order to bring the guidelines listed in the Thompson Memo into compliance with the decision handed down in *Stein*, the DOJ issued a revised memorandum instructing prosecutors that they "generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment." Memorandum from Paul J. McNulty, Deputy Attorney Gen. to the Heads of Dep't Components, U.S. Attorneys (Dec., 2006) [hereinafter, McNulty Memo]; see also Jason McLure, *Justice Officials Moderate Thompson Memo Tactics*, N.Y. L.J., Dec. 13, 2006, at 1. However the new guidelines, which still permit prosecutors to consider fee advancement in certain circumstances, have already come under criticism for their inadequacy since prosecutors seeking to consider fee advancement in their decisions to indict can obtain this permission from the Deputy Attorney General, which essentially still leaves the decision in the discretion of the prosecutors. See *id.* (reporting that obtaining permission to consider fee advancement is less rigorous than obtaining permission to push companies to waive privilege); Lynnley Browning, *U.S. Moves to Restrain Prosecutors*, N.Y. TIMES, Dec. 13,

V. PROPOSING A LEGISLATIVE SOLUTION

In arriving at its final conclusions, the court in the *Stein* cases engaged in a long and complicated analysis of the arguments presented by both the government and the defendants, while also balancing policy concerns. The court rejected the government's claim that the right to counsel does not include the right to spend other people's money.²⁷⁸ However, the government's argument indirectly presents a more viable solution for balancing its interest in preventing the obstructive use of legal fee advancement and a defendant's right to use a lawful source of funding to secure counsel and mount a defense. This solution is the use of preliminary injunctive relief in future government claims of obstructive fee advancement by employers to employees. Such relief would be similar to the injunctions granted under current legislative forfeiture provisions.²⁷⁹

A. *Use of Legislative Injunctive Restraints*

The use of legislative preliminary injunctions, similar to those at issue in *Caplin* and *Monsanto*,²⁸⁰ is a superior alternative to the approach taken by the Thompson Memo because it reduces the risk of subsequent disputes among the government, employers, and their employees over the advancement of legal fees while withstanding constitutional scrutiny of Sixth Amendment claims. Such injunctions also alleviate the burden on future courts forced to reconcile similar claims and arguments, and they preserve a defendant's Sixth Amendment rights *prior* to the need for judicial intervention to restore what the government has violated. This alternative would also minimize judicial intrusion on prosecutorial discretion, while at the same time limiting over-zealous prosecutors. This in turn reduces the risk of damage to legitimate criminal prosecutions caused by suppression of statements and other evidence and, in

2006, at C1; Martha Neil, *Thompson Memo Changes Not Enough, ABA Says*, A.B.A. J. & REP., Dec. 15, 2006 (reporting the inadequacy of the new policy for waiver, which requires only "high level department approval").

²⁷⁸ *Stein I*, 435 F. Supp. 2d at 367.

²⁷⁹ See *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989); *United States v. Monsanto*, 491 U.S. 600 (1989).

²⁸⁰ See discussion *supra* Part III.B.2.

cases like *Stein*, forced dismissal of unprosecuted criminal indictments should be tried on their merits.²⁸¹

The legislative injunction at issue in *Caplin* and *Monsanto*, which this Note suggests as a model, is the Continuing Criminal Enterprise Act (“CCE”).²⁸² The CCE is one of two federal criminal statutes that were amended by the Comprehensive Forfeiture Act of 1984 (“CFA”)²⁸³ to give greater effect to government efforts to fight different types of crime.²⁸⁴ The CCE, as modified by the CFA, authorizes the forfeiture of “property constituting, or derived from, any proceeds . . . obtained . . . as the result of such [drug] violation[s].”²⁸⁵ Included in such property is the forfeiture of any “interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.”²⁸⁶ The statute also declares that any “right, title, and interest” in the property obtained via a violation of the drug law “vests in the United States upon the commission of the act giving rise to forfeiture” even when those assets are subsequently transferred to a third party.²⁸⁷

The forfeiture statute has a significant preemptive feature. This feature gives the government the ability to apply for a restraining order or injunction in order “to preserve the availability of [the] property” either upon the filing of an indictment or information charging a violation, or prior to the filing of an indictment or information if the court determines that there is a substantial probability that the U.S. will prevail on the issue of forfeiture and that failure to restrain the property will result in its being made unavailable.²⁸⁸ The court must also weigh the need to preserve the property against

²⁸¹ *Stein III*, 495 F. Supp. 2d at 427 (“This indictment charges serious crimes. They should have been decided on the merits as to every defendant.”).

²⁸² 21 U.S.C. §§ 848, 853 (2006).

²⁸³ *Id.* § 881(e).

²⁸⁴ See Roderick D. Vereen, Comment, *Attorneys Rights to Fees Under the Comprehensive Forfeiture Act of 1984: The “Bona Fide Purchaser,”* 16 S.U. L. REV. 407, 408-09 (1989) (“[The CFA] revised the forfeiture provisions of both the RICO and the CCE statutes. . . . which attack[] the enterprises of drug trafficking and racketeering. . . . Congress believed that since profit and economic power were the motivating factors for this type of criminal activity enforcement of those statutes would strip these offenders and organizations of this economic power.”).

²⁸⁵ 21 U.S.C. §853(a)(1) (2006).

²⁸⁶ *Id.* § 853(a)(3).

²⁸⁷ *Id.* § 853(c). However, an exception applies when the third party who has obtained the assets proves that he or she is a “bona fide purchaser” of the property “reasonably without cause to believe” it is forfeitable. *Id.*

²⁸⁸ *Id.* § 853(e).

the hardship on the individual whose assets have been “preserved.”²⁸⁹ The duration of the restraint is limited to ninety days, unless either good cause is shown to the court to extend the order, or an indictment is filed against the individual.²⁹⁰

A carefully drawn statutory enactment allowing the government, with certain limitations, to request that companies be enjoined from advancing legal fees to certain employees can achieve the goals of easing judicial reconciliation, preserving defendants’ Sixth Amendment right to counsel, and limiting intrusion on prosecutorial discretion, while also addressing other policy concerns. Such a provision would consist of two parts. The first part would allow prosecutors, after initiating a formal investigation against an employee suspected of wrongdoing in the capacity of his employment, to seek, subject to limitations, a preliminary injunction from a court barring the advancement of legal fees from the employer to that employee. Like the CCE, the government would not be required to bring an indictment against the individual employee or the company. However, in order for the court to grant such an injunction, the government would be required to show to the magistrate evidence sufficient to obtain an indictment against the company and a substantial likelihood that the fee advancement is being used for the purpose of obstructing the government’s investigation. In addition, all injunction requests would allow potential defendants as well as their employers to rebut the government’s claims through presentation of evidence sufficient to show either a lack of obstructive conduct or excessive hardship to the potential defendant.

The first part of this proposed injunction provision accomplishes two goals. First, it preserves the government’s interest in obtaining cooperation and preventing obstruction by giving prosecutors the authority to seek judicial intervention in the prevention of companies using fee advancement as a mode of improperly obstructing a criminal investigation.²⁹¹ At the same time, the government’s interest would be sufficiently checked by setting a minimum on what must be proven to

²⁸⁹ *Id.* § 853(e)(1)(B)(ii).

²⁹⁰ *Id.*

²⁹¹ See Wray & Hur, *supra* note 2, at 1146 (discussing the DOJ’s “more aggressive pursuit of obstructive conduct since the Thompson Memo’s issuance,” but also arguing that companies which impede investigators have for a long time been more likely to face criminal prosecution at the hands of the Justice Department).

establish the necessary urgency implicating that interest.²⁹² Second, this provision would preserve the Sixth Amendment right to counsel for individual defendants by placing the burden on the government to show good cause for judicial interference with a company's right to advance fees to its employees. It also removes the government's unrestrained consideration of legal fee advancement in its evaluation of a company's cooperation, alleviating the threat contained in the Thompson Memo of prosecutors seeking an indictment against the company.²⁹³ Should the court grant the injunction, the company would have no choice but to comply. Should the court deny the injunction, prosecutors would be otherwise barred, both before and after the denial of the motion, from considering fee advancement in deciding whether or not to seek an indictment.

The second part of the injunction provision would place additional limits on when such an injunction would be appropriate. First, prosecutors would not be permitted to request an injunction when it would be construed as forcing an employer to violate the terms of a statutory obligation requiring the advancement of legal fees. Second, prosecutors would not be able to seek an injunction that would intrude on any insurance policy obtained by the company from a third party insurer for the purpose of guaranteeing the availability of advanced legal fees. Third, prosecutors would be unable to seek an injunction when a company already has an existing uncontradicted and express agreement with its employees to advance legal fees, unless prosecutors can show that the agreement was put in place for purposes of obstructing the government's investigation. In such a case the government would be required to prove the obstruction in accordance with part one of the provision. Courts would also be required to weigh the government's interest in injunctive relief against any hardship to the defendant and could limit the time period of any restraint based on those perceived hardships. Finally, if none of the

²⁹² See *Stein I*, 435 F. Supp. 2d at 363 (conceding the need of the government to prevent obstruction in its criminal investigations, but pointing out that "the Thompson Memorandum does not say that payment of legal fees may cut in favor of indictment *only if* it is used as a means to obstruct an investigation"). "If the government means to take the payment of legal fees into account in making charging decisions only where the payments are part of an obstruction scheme—and thereby narrowly tailor its means to its ends—it would be easy enough to say so." *Id.* at 364.

²⁹³ See *Wray & Hur*, *supra* note 2, at 1103 (stating that the use of alternatives such as "pre-trial diversion" agreements or "deferred prosecution and non-prosecution agreements," encourages greater cooperation by removing the "all-or-nothing choice between indicting (and destroying) a company and giving it a complete 'pass'").

above limitations apply and if the court finds that abrogation of fee advancement is necessary, nothing in the injunction provision would intrude on a company's right or obligation to indemnify its employees at the conclusion of any litigation in accordance with any obligation imposed by statute or by a company's bylaws, partnership agreement, or other express contractual obligations.

These limitations accomplish a number of goals. The first limitation protects the interests of states that wish to preserve the use of indemnification and fee advancement as a significant inducement to attract capable individuals to positions of high responsibility in a company.²⁹⁴ The second and third limitations prevent companies that may only be subject to permissive statutes dealing with fee advancement from being effectively punished by prosecutors for their attempts to plan for such a contingency, while encouraging other companies that have not yet done so to undertake one of these options in an effort to eliminate the issue from consideration going forward.²⁹⁵ All three limitations would constitute express legal obligations of companies to advance legal fees—obligations that the Thompson Memo had recognized by prohibiting prosecutors from considering such mandatory payments as a failure to cooperate. Thus, prosecutors would be in no worse position than they had voluntarily undertaken under the Thompson Memo,²⁹⁶ while also receiving an additional tool to combat a company's obstruction under the guise of cooperation. The expensive nature of complex white-collar criminal litigation, such as that presented in the *Stein* cases, would also be taken into consideration by courts evaluating hardship to defendants.

²⁹⁴ See *supra* note 230 and accompanying text.

²⁹⁵ See Jonathan C. Dickey, *Recent Decisions Concerning the Right of Advancement of Defense Costs*, SEC. LITIG. REP., Feb. 2006, at 6 (explaining while companies can do only so much to mitigate the risk of being punished by prosecutors for supporting officers and directors through indemnification and advancement, certain steps such as amending company bylaws to make advancement mandatory; contractual exclusions eliminating the obligation to advance fees to employees who plead guilty to criminal misconduct; and purchasing non-rescindable D&O liability insurance are some suggestions to preserve the right to pay for the defense of officers and employees); see also Falvey & Taylor, *supra* note 229, at 16.

²⁹⁶ Thompson Memo, *supra* note 1; McNulty Statement, *supra* note 4 (removing from consideration a company's statutory obligation to pay employee defense costs in the government's evaluation of that company's cooperation).

B. *Arguments Against and Rebuttals in Favor of the Use of Injunctive Restraints*

While this Note proposes using injunctive restraint as a tool against obstructive fee advancement, injunctive provisions similar to the one proposed have been increasingly criticized out of concerns pertaining to prosecutorial abuse as well as risks regarding availability and adequacy of counsel.²⁹⁷ The first criticism is that such injunctive provisions have undesirable impacts on the adversarial criminal justice system.²⁹⁸ The argument is that such provisions remove any incentive for private criminal defense attorneys to represent defendants whose assets are subject to pre-trial restraint because the defendant's ability to cover his legal expenses is suddenly called into question.²⁹⁹ Under forfeiture provisions involving drug offenses, if the defendant is convicted, the restrained assets would become forfeited, potentially leaving nothing to cover attorney's fees.³⁰⁰ Critics might argue that the proposal suggested by this Note creates a similar risk through the possibility that defendants who are found guilty would no longer be entitled to indemnification from their respective companies, a notable concern where defense costs can reach extraordinary levels.³⁰¹

A second argument against the use of an injunction provision is that such a restraint on a defendant's assets has a direct implication on his or her Sixth Amendment right to counsel of choice and, more indirectly, on the right to the effective assistance of counsel.³⁰² Third, it may be argued that

²⁹⁷ See Winick, *supra* note 192; Berube, *supra* note 110, at 1395.

²⁹⁸ Winick, *supra* note 192, at 771-72, 777; Lisa F. Rackner, *Against Forfeiture of Attorney's Fees Under RICO: Protecting the Constitution's Rights of Criminal Defendants*, 61 NYU L. REV. 124, 126-27 (1986).

²⁹⁹ Berube, *supra* note 110, at 1395; Winick, *supra* note 192, at 779, 785. The argument is that many private criminal defense attorneys require a fee that defendants cannot afford to pay if their assets are seized. *Id.* at 773. This argument is furthered in the sense that criminal defendants whose assets are subject to forfeiture and have been frozen prior to an indictment, can claim indigency, and have counsel appointed to them, while defendants whose assets have not been frozen are unable to claim indigency, are unable to retain counsel since "lawyers will refuse to represent him, fearing subsequent forfeiture of their fees." Rackner, *supra* note 298, at 134.

³⁰⁰ This concern is increased by the requirement that the illegal assets transferred to a third party are also subject to forfeiture, including legal fees paid to defense attorneys. Vereen, *supra* note 284, at 409.

³⁰¹ See *supra* note 154 and accompanying text.

³⁰² Winick, *supra* note 192, at 784-85, 800-01 (arguing that, even where courts have accepted government contentions that giving defendants who have had their assets forfeited appointed counsel satisfies the requirements of the Sixth Amendment,

such an injunctive provision would not remove the risk of abuse by prosecutors seeking pre-trial freezing of assets in order to purposely eliminate a defendant's chosen defense counsel.³⁰³ However, these arguments are weakened by a number of considerations.

1. Overcoming Negative Impacts on the Adversarial Criminal Justice System

First, the arguments regarding the impact of preemptive restraints and forfeiture on the adversary system rely on the assumption that private defense attorneys will be hesitant to represent defendants out of the fear that they either will not be paid or that the government will forfeit those fees that have already been already paid.³⁰⁴ Second, the argument also relies on the absence of any exception for legitimate attorney's fees³⁰⁵ and the overly broad use of seizures and injunctions by prosecutors in freezing the defendant's personal assets, making no distinction between those which are tainted by the illegality and those which are legitimate. The effect is to leave the defendants with little or no other source to finance their defense.³⁰⁶

"[a] criminal justice system relying on appointed rather than retained counsel . . . is not the adversary system contemplated by the sixth amendment, no matter how effective such appointed advocates are").

³⁰³ *Id.* at 777-78 (arguing that such a result was neither anticipated nor intended by Congress); Peter W. Salsich, III, *A Delicate Balance: Making Criminal Forfeiture a Viable Law Enforcement Tool And Satisfying Due Process After United States v. James Daniel Good Real Property*, 39 ST. LOUIS U. L.J. 585, 586 (1995). This was also an express concern and conclusion of the *Stein* court when it ruled that one of the purposes of the AUSAs in exerting such pressure on KPMG pursuant to the Thompson Memo was their "desire to minimize the involvement of defense attorneys." *Stein I*, 435 F. Supp. 2d at 353.

³⁰⁴ Winick, *supra* note 192, at 777-81; Berube, *supra* note 110, at 1395.

³⁰⁵ While an exception is carved out under the CCE for bona fide recipients of potentially forfeitable funds who are without cause to believe that the received funds are forfeitable, *supra* note 287, defense attorneys are almost always excluded from this category. Winick, *supra* note 192, at 785 ("[C]riminal defense lawyers are almost inevitably on notice that their clients' payments may be from the proceeds of crime."); Vereen, *supra* note 284, at 410-11; *see also supra* note 296.

³⁰⁶ *See* Jon E. Gordon, *Prosecutors Who Seize Too Much and the Theories They Love: Money Laundering, Facilitation, and Forfeiture*, 44 DUKE L.J. 744, 744-45 (1995) ("Since 1970, federal prosecutors have increasingly relied on civil and criminal forfeiture as tools for law enforcement. . . . [This] gives prosecutors undesirable power to seize property."); *see also* Winick, *supra* note 192, at 770-71 (arguing that the ease with which prosecutors obtain pre-trial restraining orders combined with the threat of post-conviction forfeiture of assets "have deterred or prevented private criminal defense attorneys from taking such cases," and give prosecutors "almost unfettered discretion to deprive defendants of the use of their assets to hire counsel of choice").

However, the solution proposed in this Note assuages these concerns.

The injunction provision proposed here would actually give private defense counsel less reason to hesitate since it is not concerned with the seizure of illegal, and therefore forfeitable, assets such as in drug cases, but rather with preventing legal assets from being used for illegal purposes. As a result, the provision would not subject fees already paid to defense attorneys to any retroactive forfeiture by the government and would only apply to the further advancement of legal fees from the employer to the employee, leaving the employee's personal assets unaffected. Thus, the employee would be free to expend his own assets in retaining an attorney for his defense³⁰⁷ since all sources of personal financial income, such as an employee's salary and investment income (assuming no other illegitimacy) are preserved. As a result, private defense counsel would receive some compensation from the defendant's personal assets, while still retaining the prospect of indemnification at the conclusion of the trial, alleviating at least some of the risk that attorneys will be deterred from representing such defendants.³⁰⁸ Additionally, not subjecting fees already paid to retroactive forfeiture and preservation of a defendant's personal assets prevents prosecutors from sweeping too broadly in their application of such a provision.³⁰⁹

³⁰⁷ Winick, *supra* note 192, at 811 (“[The problem] is not whether exercise of the right to counsel of choice can be regulated, such as by restrictions on the choice of counsel who is otherwise engaged in order to prevent undue delay, or on the choice of an attorney disqualified by a factor such as a conflict of interest. Rather, it is whether the right may be completely destroyed by governmental action that renders the defendant unable to choose any private counsel.”). Since the provision leaves a defendant's personal assets intact, such a concern would not be implicated under this proposal. As critics such as Winick note, “There is a vast difference between overriding a defendant's choice of a particular lawyer and preventing him from employing any lawyer at all.” *Id.*

³⁰⁸ See Browning, *Judges Press*, *supra* note 33 (reporting that in at least one white collar criminal case against a former Enron accountant, retained defense counsel continued to represent the defendant at a “small fraction of his usual charges” because he was “convinced of her innocence”); *Stein III*, 495 F. Supp. 2d 390, 423-24 (S.D.N.Y. 2007) (finding that while some of the KPMG defendants had gone into debt in financing their defenses, most of the defendants were in “better financial circumstances,” and only one was threatened with a motion to withdraw by their chosen counsel).

³⁰⁹ One example of the broad application of forfeiture provisions in criminal cases is seen in charges of money laundering where, when dealing with assets subject to forfeiture, “dirty money” that is tainted by the alleged illegality is mixed with “clean money” that is unconnected. Gordon, *supra* note 306, at 744. When prosecutors have great difficulty sorting the dirty from the clean, they may attempt to try and seize it all. *Id.* at 744-45.

2. Overcoming Negative Impacts on Rights to Counsel of Choice and Effective Assistance of Counsel

Second, criticism based on the impact of injunctive restraint on a defendant's rights to counsel of choice and the effective assistance of counsel is also addressed by the provision suggested in this Note. Part of this concern is based, again, on current forfeiture provisions which leave defendants with no other source of funding for their defense.³¹⁰ Another source of this concern, however, is that private defense attorneys who agree to take on such cases are presented with a conflict of interest by having a pecuniary interest in the outcome of a criminal litigation.³¹¹ However, the narrow application of the provision recommended here subverts these concerns. Under this proposal, prosecutors would be unable to request a restraint of fee advancement in cases where such a restraint contravenes a statutory obligation imposed by the state or impinges on a company's clearly demonstrated legal obligation to its employees through express provisions in their bylaws or other contractual agreement. This provision would therefore protect any property interest claim in fee advancement that an employee may have.³¹² To the extent that the government can seek such a restraint, it would be limited to the prosecutor's ability to show that the fee advancement is being used for purposes of, or in connection with, efforts to obstruct their investigation, in which case the advancement would further an illegal interest not protected under the Constitution. Thus, even where a company is not protected by a prior existing legal obligation, either contractual or statutory, as long as their voluntary advancement of fees to investigated employees is done in good faith, the government will not be permitted to intrude.

³¹⁰ See Winick, *supra* note 192, at 785; Rackner, *supra* note 298, at 135; Berube, *supra* note 110, at 1395.

³¹¹ Rackner, *supra* note 298, at 140-41 (arguing that such a conflict could violate the defendant's Sixth Amendment right to conflict-free counsel); Winick, *supra* note 192, at 776-77 (discussing the added risk that defense attorneys will be representing a criminal defendant on a contingency basis, presenting an ethical violation of the Model Rules of Professional Conduct).

³¹² To the extent that a company uses a third party insurer to provide indemnification and advancement protection in the event of litigation, the problem could be avoided entirely.

3. Overcoming Risks of Prosecutorial Abuse

Third, the limitations in the proposal address the concerns of prosecutorial abuse.³¹³ These arguments are based on a number of factors. The first is that prosecutors have increasingly relied on forfeiture provisions in their efforts to fight crimes such as money laundering, racketeering, drug trafficking, and mail or wire fraud.³¹⁴ The second is that as this reliance has increased, so has prosecutors' dependency on theories³¹⁵ that allow them to sweep more broadly in order to seize and restrain a larger portion of a defendant's assets while also enjoying a low burden of proof to establish the grounds necessary to implement the restraint.³¹⁶ The provision proposed here eliminates these risks of abuse for a number of reasons.

First, prosecutorial reliance on this provision will be limited since, as was originally intended in the Thompson Memo, it is intended to assist prosecutors in deciding when to bring criminal charges against a company. As the memo itself stated, instances in which a company will be subject to indictment will be only in a minority of cases.³¹⁷ Second, by placing the decision in the hands of a court, theoretically the only thing the prosecution can do to abridge the advancement of legal fees is request an injunction.³¹⁸ Until the court grants

³¹³ See Gordon, *supra* note 306, at 744-45 (warning against giving prosecutors "undesirable power to seize property"); Salsich, *supra* note 303, at 585-86.

³¹⁴ Gordon, *supra* note 306, at 744.

³¹⁵ An example of this is prosecutorial use of certain theories such as "taint" or "facilitation." See *id.* at 744-45. The premise behind these theories is that prosecutors seeking the restraint of "dirty" money obtained as a result of money laundering or drug transactions will also seize "clean" money, not obtained through these activities by claiming either that the clean money was used to facilitate the illegal transaction, or that the dirty money was commingled with the clean money, causing it to be tainted and subject to forfeiture. *Id.* at 755.

³¹⁶ *Id.* at 749. Under a number of forfeiture provisions prosecutors use, only a standard of probable cause is required to effectuate the restraint. See, e.g., 21 U.S.C. § 853 (e)(2) (1994) (allowing the government to obtain a pre-indictment temporary restraining without notice or opportunity for a hearing order upon a showing of probable cause that the property is forfeitable, and that notice would jeopardize the availability of the property for forfeiture); see also *Monsanto*, 491 U.S. at 615; Gordon, *supra* note 306, at 749-50.

³¹⁷ Thompson Memo, *supra* note 1, at 1.

³¹⁸ In this way, such a proposal also alleviates a potential conflict of interest created by the McNulty Memo, which requires prosecutors wishing to consider fee advancement as a failure to cooperate to obtain permission from the Deputy Attorney General. See *supra* note 277. By requiring a court to consider the merits of an injunction on the advancement of legal fees from employers to employees, this provision inserts the objectiveness of a neutral magistrate, eliminating the risk of abuse by prosecutors. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 449-55 (1971) (invalidating a warrant authorizing the Fourth Amendment search and seizure

one, companies are free to advance. Third, as preserving the availability of forfeitable property is not a concern, a higher burden of proof, such as a “clear and convincing evidence” standard, should be required to establish the necessary presumption of obstruction to warrant the issuance of an injunction. This would require prosecutors to be more selective and present only the more egregious cases of potential misconduct.

Furthermore, even critics of current forfeiture provisions have acknowledged that prosecutors advancing attenuated claims have achieved only limited success in court with such theories.³¹⁹ Thus, vesting the decision in the hands of a court serves as an effective barrier to prosecutorial abuse. Finally, binding prosecutors to a higher burden of proof to show intent on the part of the company to commit obstruction ensures that some measure of evidence and not mere conclusory statements will further limit risks of prosecutorial abuse. While this may seem like a substantial limitation to put on prosecutors, should a motion for the restraint of fee advancement be denied and should company conduct warrant such an action, prosecutors would still possess the ability to seek an indictment against the company for obstruction. This would serve as an effective deterrent to misconduct on the part of the employer.

VI. CONCLUSION

In the effort to reform the balance among prosecutors, individual defendants, and the role of private companies in white collar criminal cases, special concerns must be granted to the interests of all parties involved. The ability to place limits on prosecutorial abuse, establish effective deterrents to company misbehavior, and encourage companies subject to white-collar criminal investigations to plan for contingencies not only helps to remove barriers to an effectuation of the

of a defendant's automobile where it is not issued by a “neutral and detached magistrate,” and holding that a state's Attorney General cannot serve as a neutral, detached magistrate for the purpose of determining probable cause and issuing warrants). “[T]he whole point of [this] basic rule . . . is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations—the ‘competitive enterprise’ that must rightly engage their single-minded attention.” *Id.* at 450.

³¹⁹ Gordon, *supra* note 306, at 760 (“Prosecutors have enjoyed mixed success in achieving forfeiture . . . under [a civil forfeiture provision] under the facilitation theory. . . . [S]everal courts have applied the theory to justify forfeiture . . . [while] [o]n the other hand, most attempts to apply the theory to accounts containing proceeds of other offenses have failed, and some courts have rejected the theory altogether.”).

interests for all involved, but also preserves the ideal of the adversary system—assessing responsibility for culpable conduct and meting out proper punishment while ensuring a fair trial for defendants. While the court in *Stein* was forced to embark on an arduous fact-finding process in order to resolve competing interests on both sides of the investigation, a more balanced and direct approach, which preserves the interests on both sides and reduces the risk of disputes and abuse, presents a superior alternative for courts to resolve future controversies over these matters.

This Note analyzed the resolutions the *Stein* court had to make with respect to the actions and intentions of the government, KPMG, and the KPMG employees who were subject to the investigation; the company's obligations to its employees; and the company's reaction to the Thompson Memo. The court struggled to apply these facts in its determination of the employees' rights to effective assistance and counsel of choice under the Sixth Amendment and of the scope of the protections afforded by those rights. The difficulties of such a piecemeal, fact-intensive analysis demonstrate the need for a clearer alternative.

The injunctive provision proposed here would simplify this process for future courts by removing from contention many of the disputed issues in *Stein*. The proposed provision would encourage both the government and private employers to preempt these contentions and refrain from abusive conduct. The narrowly drawn injunctive provision suggested should also assuage fears of abuse that arise with respect to similar provisions in other criminal contexts. The injection of the court as an intermediary to ensure an early and neutral consideration of the facts presented and the interests implicated would significantly limit, or at least ease the resolution of, Sixth Amendment violations to the right to the assistance of counsel pertaining to the advancement of legal fees from employers to employees.

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