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## Ending a Decade of Federal Prosecutorial Abuse in the Corporate Criminal Charging Decision

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## ENDING A DECADE OF FEDERAL PROSECUTORIAL ABUSE IN THE CORPORATE CRIMINAL CHARGING DECISION

*Dane C. Ball & Daniel E. Bolia\**

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## I. INTRODUCTION

Congress should take swift and aggressive action to curb ongoing prosecutorial abuse by federal prosecutors directed at corporations and corporate constituents under investigation. Federal prosecutors have long wielded enormous power in their discretion to charge a corporation with a crime based on the alleged illegal acts of its employees, officers, or directors; discretion virtually unchallengeable in a court of law.<sup>1</sup> And though the theory of vicarious criminal liability for corporations<sup>2</sup> has changed little since its inception, aggressive prosecutorial tactics adopted over the past decade in response to three Department of Justice memoranda<sup>3</sup> have caused many in the corporate, legal, academic, and political worlds to cry out that the government has gone too far.<sup>4</sup>

On August 28, 2008, in response to growing criticism, the Department of Justice issued new Guidelines purporting to reign in prosecutorial discretion in two key areas—requests for or consideration of corporate privilege waivers, and consideration of corporations’ advancement of their constituents’ legal fees.<sup>5</sup> But

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<sup>1</sup> See *Hartman v. Moore*, 126 S. Ct. 1695, 1704–05 (2006) (noting that a prosecutor is absolutely immune from liability based on a decision to charge). See also Joseph A. Grundfest, *Over Before It Started*, N.Y. TIMES, June 14, 2005 at A23 (arguing that the downside of absolute immunity in prosecutorial authority to charge a corporation is that the prosecutor acts as both judge and jury, killing the corporation by indictment long before trial).

<sup>2</sup> Many of the principles discussed in this article apply equally to partnerships or other limited liability business entities. For purposes of clarity and consistency, however, this article will use the term corporation or company throughout.

<sup>3</sup> See Memorandum from the Dep’t of Justice, Eric H. Holder, Deputy Attorney Gen., *Bringing Charges Against Corporations* (June 16, 1999), available at <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html> (last visited Sept. 1, 2008) [hereinafter Holder memo]; Memorandum from the Dep’t of Justice, Larry D. Thompson, Deputy Attorney Gen., *Principles of Fed. Prosecution of Bus. Orgs.* (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm) (last visited Sept. 1, 2008) [hereinafter Thompson memo]; Memorandum from the Dep’t of Justice, Paul J. McNulty, Deputy Attorney Gen., *Principles of Fed. Prosecution of Bus. Orgs.*, available at [http://www.usdoj.gov/dag/speech/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf) (last visited Sept. 1, 2008) [hereinafter McNulty memo].

<sup>4</sup> See *infra* Part III.

<sup>5</sup> See *infra* Part V.B.

the question remains whether the Guidelines alone, if adhered to, will change the culture among federal prosecutors pursuing corporate crime, or whether the result simply will be a “don’t ask, don’t tell” policy that drives the privilege waiver and legal fees issues underground.<sup>6</sup>

On the same day the Department of Justice issued its new Guidelines, the Second Circuit issued a landmark decision that, in many instances, will prohibit prosecutors from considering advancement of legal fees when deciding whether to charge.<sup>7</sup> Yet even these two important developments—the new Guidelines and the Second Circuit decision—may not be enough to reverse course.<sup>8</sup> Thus, legislation has been proposed, and should be enacted, to comprehensively address these issues and curb prosecutorial abuse.<sup>9</sup>

This article (1) discusses the aggressive tactics adopted by federal prosecutors in response to what the government perceived as increasing criminal conduct committed by or on behalf of corporations;<sup>10</sup> (2) explains recent attempts to put an end to such aggressive tactics,<sup>11</sup> and (3) analyzes whether these attempts will work, or whether more still needs to be done.<sup>12</sup>

Part II discusses a brief history of corporate vicarious criminal liability and some of its pros and cons.

Part III documents the move, beginning in the late 1990s, towards more aggressive prosecutorial tactics in fighting corporate crime, including the use of pressured privilege waivers and consideration of whether a corporation has advanced legal fees to its employees in deciding whether to charge the corporation itself.

Part IV focuses on illustrations of government prosecutorial abuse: the conviction—and ultimately the reversal of the conviction—of Arthur Andersen LLP after the collapse of Enron; and the case against partners and employees of KPMG International for orchestrating allegedly illegal tax shelter schemes.

Part V considers the backlash from what many perceive to be prosecutorial abuse in the form of (1) deterring the assertion of legitimate privileges, and (2) unconstitutional interference with criminal defendants’ right to counsel. Part V also analyzes proposed legislation intended to curb such prosecutorial abuse.

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<sup>6</sup> See *infra* Part VI.

<sup>7</sup> See *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008).

<sup>8</sup> See *infra* Part VI.

<sup>9</sup> See *infra* Part V.C.–VI.

<sup>10</sup> See *infra* Part III.

<sup>11</sup> See *infra* Part V.

<sup>12</sup> See *infra* Part VI.

Part VI analyzes where the issues raised in this Article currently stand, whether the new prosecutorial Guidelines will solve the problems or are really just a small step in the right direction, and compares the Guidelines to proposed legislation intended to solve the same problems.

Part VII concludes with a call for aggressive legislative action.

## II. A BRIEF HISTORY OF CORPORATE CRIMINAL LIABILITY

### A. *Let's Hold the People Responsible*

At common law, it originally was thought that a corporation could not be held criminally liable for the acts of its constituents. Blackstone himself agreed with this principle: "A corporation cannot commit treason, or felony, or other crime in its corporate capacity, though its members may, in their distinct individual capacities."<sup>13</sup> The foundation for this belief appears to have arisen, at least in part, from an apocryphal quote attributed to Lord Holt from a case in 1701, where he is reported to have said "[a] corporation is not indictable, but the particular members of it are."<sup>14</sup> Shaky though it was, this foundation lasted until 1840, when Westminster Hall finally expressly held that a corporation was susceptible to criminal indictment.<sup>15</sup> Even then, common law courts were reluctant to hold corporations criminally liable for affirmative acts that required a specific *mens rea*, focusing instead on criminal nonfeasance.<sup>16</sup> The belief remained for some time that a corporation was not a "person," and thus could not form the requisite criminal intent to accompany an illegal act.<sup>17</sup>

### B. *Respondent Superior Opens the Door to Corporate Vicarious Criminal Liability*

Once the doctrine of corporate criminal liability became generally accepted, most early indictments directed at corporations involved cases analogous to public

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<sup>13</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 464 (1768).

<sup>14</sup> Anonymous Case, 88 Eng. Rep. 1538 (1701). See also *State v. Morris & Essex Ry. Co.*, 23 N.J.L. 360, 364–65 (1852) (doubting the veracity of the statement attributed to Lord Holt and discussing cases in Lord Holt's own court in which the Crown had indicted quasi-corporations for failure to maintain roads and bridges).

<sup>15</sup> *R. v. Birmingham & Gloucester Ry. Co.*, 9 Car. & Payne 469, 3 Q.B. 223 (1840).

<sup>16</sup> See *Morris & Essex Ry. Co.*, 23 N.J.L. at 366–67 ("It is true that there are crimes (perjury for example) of which a corporation cannot, in the nature of things, be guilty. There are other crimes, as treason and murder, for which the punishment imposed by law cannot be inflicted upon a corporation. Nor can they be liable for any crime of which a corrupt intent or *malus animus* is an essential ingredient.").

<sup>17</sup> See BLACK'S LAW DICTIONARY Appendix B, Legal Maxims (8th ed. 2004) ("*Actus non facit reum, nisi mens sit rea*: An act does not make a person guilty unless the mind is guilty.").

nuisance torts, in which criminal intent was not a required element.<sup>18</sup> Once the camel's nose was under the tent, however, criminal liability for offenses requiring a *mens rea* soon followed. Indeed, through the “feat of anthropomorphic sleight of hand,” it was not long before common law courts and legislatures changed the inanimate corporation into a “person” in the eyes of the law and eventually shackled it with the additional responsibility of “committing criminal delicts and harboring criminal intent.”<sup>19</sup>

1. *The Floodgates Open*—New York Central & Hudson River R.R. v. United States

In 1909, the United States Supreme Court affirmed the conviction of a common carrier for giving illegal rebates in violation of the Elkins Act.<sup>20</sup> In *New York Central and Hudson River R.R. Co. v. United States*, the Court declared that the law

cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through [corporations] . . . and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.<sup>21</sup>

Addressing the issue of whether a corporation can form criminal intent, the Court held: “We think that a corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element.”<sup>22</sup> Finally holding that a corporation could form criminal intent, *New York Central* “opened the floodgates” for prosecutorial action directed towards both the corporation and its employees,

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<sup>18</sup> Frederic P. Lee, *Corporate Criminal Liability*, 28 COLUM. L. REV. 1, 7–8 (1928). The early cases generally involved strict liability offenses such as permitting gaming at fair grounds, unlicensed practice of medicine, failing to repair highways, violating child labor laws, and delivering liquor to minors. *Id.*

<sup>19</sup> Kathleen Brickey, *Rethinking Corporate Criminal Liability Under the Model Penal Code*, 19 RUTGERS L.J. 593, 593 (1988).

<sup>20</sup> N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 499 (1909).

<sup>21</sup> *Id.* at 495–96.

<sup>22</sup> *Id.* at 493 (quoting *Telegram Newspaper Co. v. Commonwealth*, 52 N.E. 445, 446 (Mass. 1899)) (noting that there is no real difference in imputing intent in a criminal proceeding than in a civil one, and that while a corporation cannot be arrested or imprisoned, its property may be seized and used to either compensate victims or as punishment for public wrong). Nine years later, English courts imputed to a corporation its manager's criminal intent to avoid toll payments. See *Mousell Bros. v. London & N. W. R.R.*, 2 K.B. 836, 845 (1917).

setting the stage for a new era in judicial and legislative action that “transformed the rules of corporate criminal liability.”<sup>23</sup>

2. *A More Developed System—Introducing Vicarious Liability into Corporate Criminal Law*

By the mid-twentieth century, the generally accepted rule had developed, adopted from the theory of civil vicarious liability, that “[a] corporation may be held criminally responsible for acts committed by its agents, provided such acts were committed within the scope of the agents’ authority or course of their employment.”<sup>24</sup> Federal law dealing with corporate criminal liability had fully developed by the middle of the twentieth century, whereas the states had a “large and somewhat more fetal but nonetheless readily recognizable” body of jurisprudence confronting the issue.<sup>25</sup> Recognizing that a “great mass of legislation call[ed] for corporate criminal liability statutes,” in the 1950s the American Law Institute revised section 2.07 of the Model Penal Code and its provisions dealing with corporate criminal liability in an attempt to unify the existing state of the law.<sup>26</sup> Rather than unifying “this unruly branch of the law,” however, state courts and legislatures instead have tended to pick randomly from section 2.07’s “grab bag of rules.”<sup>27</sup>

3. *A Complete and Coherent Theory—The Basic Principles of Corporate Vicarious Criminal Liability*

For corporate vicarious criminal liability to attach, a corporate agent must be acting within the scope of employment.<sup>28</sup> This requires that the agent had been “performing acts of the kind which he is authorized to perform,” and that the agent was motivated at least in part by the intent to benefit the employer.<sup>29</sup> Thus, if a criminal act benefits only the employee, officer, or director, vicarious liability does not apply.<sup>30</sup> The typical example lacking corporate benefit is when

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<sup>23</sup> Lance Cole, *Corporate Criminal Liability in the 21st Century: A New Era?*, 45 S. TEX. L. REV. 147, 147 (2003).

<sup>24</sup> *Old Monastery Co. v. United States*, 147 F.2d 905, 908 (4th Cir. 1945) (quoting 19 C.J.S. *Corporations* § 1362) (internal quotations omitted).

<sup>25</sup> Gilbert Geis & Joseph F.C. Dimento, *Empirical Evidence and the Legal Doctrine of Corporate Criminal Liability*, 29 AM. J. CRIM. L. 341, 348 (2002).

<sup>26</sup> MODEL PENAL CODE § 2.07 cmt. 1(c) (Tentative Draft No. 4, 1956).

<sup>27</sup> Brickey, *supra* note 19, at 631–32.

<sup>28</sup> *United States v. Cincotta*, 689 F.2d 238, 241 (1st Cir. 1982).

<sup>29</sup> *Id.* at 241–42. “Scope of employment” is a broad phrase that includes “acts on the corporation’s behalf in performance of the agent’s general line of work.” *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972).

<sup>30</sup> *Cincotta*, 689 F.2d at 242.

an employee accepts a bribe paid directly to the employee, which does not benefit the shareholders of the corporation.<sup>31</sup>

The agent need not be a high-level corporate officer or director to impute criminal liability to the corporation.<sup>32</sup> And because the corporation should not “obtain the fruits of violations which are committed knowingly by agents of the entity within the scope of their employment,”<sup>33</sup> vicarious criminal liability may attach even in the face of actions that were contrary to express company policies or to explicit instructions from others within the organization.<sup>34</sup> In addition, under the collective-knowledge theory of corporate criminal liability, it is irrelevant whether the right hand knew what the left was doing.<sup>35</sup> Rather, the acts of all employees acting within the scope of employment constitute acts of the corporation.<sup>36</sup>

Finally, some instances of corporate vicarious criminal liability do not require a finding of intent for liability to attach. These strict liability infractions typically are not “in the nature of positive aggressions or invasions . . . but are in the nature of neglect where the law requires care, or inaction where it imposes a duty.”<sup>37</sup> While the accused corporation may not have intended a violation, it is usually in a position to prevent the occurrence by the exercise of ordinary care, and public safety interests warrant corporate punishment.<sup>38</sup>

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

<sup>32</sup> *United States v. Basic Const. Co.*, 711 F.2d 570, 573 (4th Cir. 1983) (rejecting the argument that the government must prove “that the corporation, presumably as represented by its upper level officers and managers, had an intent separate from that of its lower level employees to violate the . . . laws”). *See also* *Standard Oil Co. v. United States*, 307 F.2d 120, 127 (5th Cir. 1962) (noting that the corporation may be criminally bound by even “menial” employees).

<sup>33</sup> *United States v. A & P Trucking Co.*, 358 U.S. 121, 126 (1958) (“The business entity cannot be left free to break the law merely because its owners . . . do not personally participate in the infraction.”).

<sup>34</sup> *Hilton Hotels*, 467 F.2d at 1007. The court in *Hilton Hotels* reasoned that liability for the corporation was appropriate under these circumstances because the particular agents are often difficult to identify and their individual conviction is “particularly ineffective” as a deterrent to others within the organization, while punishment of the organization as a whole is “likely to be both appropriate and effective.” *Id.* at 1006.

<sup>35</sup> *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987).

<sup>36</sup> *Id.* (“Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation’s knowledge of a particular operation.”).

<sup>37</sup> *Morissette v. United States*, 342 U.S. 246, 255 (1952); *see also* *United States v. White Fuel Corp.*, 498 F.2d 619, 622 (1st Cir. 1974) (holding that mere fact that oil leaked from a deposit tank into navigable waters was enough to sustain a conviction under the Refuse Act).

<sup>38</sup> *Morissette*, 342 U.S. at 256.



#### 4. *Corporate Vicarious Criminal Liability—Is It a Good Thing?*

Perhaps the most compelling argument for the imposition of vicarious criminal liability upon corporations is the idea that, because of the nature of the corporate structure and the number of employees, officers, and directors acting on the corporation's behalf, it is often difficult to locate the culpable individuals within the corporation.<sup>39</sup> Thus, the criminal act may go unpunished if prosecutors cannot prove individual culpability. Beyond this, commentators provide a number of other arguments to support the idea of vicarious criminal liability for corporations:

1. Corporations should not be allowed to merely terminate the guilty individual and avoid responsibility.
2. Effective deterrence requires sanctions aimed at the corporation as a whole.
3. Foregoing corporate liability might result in harsher forms of individual punishment.
4. Proper corporate reformation or rehabilitation requires collective responsibility.
5. Foreign corporations acting in the United States, whose officers or employees commit criminal acts outside American jurisdiction, should not be allowed to escape punishment.
6. The public has a right to know when its business organizations are involved in illegal activity, and the corporate indictment is the best way to accomplish this goal.
7. Corporate fines provide a “rough method of achieving just recoupment.”<sup>40</sup>

Additional reasons given for corporate indictments include arguments that the corporate whole is greater than the sum of its parts and the theory that the corporate ethos may compel individuals to commit criminal acts that they might otherwise not have contemplated.<sup>41</sup>

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<sup>39</sup> See Brent Fisse, *Consumer Protection and Corporate Criminal Responsibility: A Critique of Tesco Supermarkets v. Nattrass*, 4 ADEL. L. REV. 113, 116 (1971).

<sup>40</sup> Fisse, *supra* note 39, at 116–18.

<sup>41</sup> Geis, *supra* note 25, at 345.

On the other hand, the primary reason for antipathy to corporate vicarious liability in criminal cases is the notion that the state should punish the people committing the crime rather than the artificial entity for which they work. Indeed, in addressing a joint session of Congress about the issue of trusts and monopolies, President Woodrow Wilson adopted this position when he declared:

Every act of business is done at the command or upon the initiative of some ascertainable person or group of persons. These should be held individually responsible and the punishment should fall upon them, not upon the business organization of which they make illegal use. It should be one of the main objects of our legislation to divest such persons of their corporate cloak and deal with them as with those who do not represent their corporations, but merely by deliberate intention break the law. Business men the country through would, I am sure, applaud us if we were to take effectual steps to see that the officers and directors of great business bodies were prevented from bringing them and the business of the country into disrepute and danger.<sup>42</sup>

Additional rationales espoused in support of decriminalizing vicarious liability include:

1. Judges unnecessarily strain the traditional theories of criminal law in an attempt to marry them to the economic realities of the corporate marketplace.
2. More deterrence is generated by punishing the individual rather than the corporation.
3. A group of men does not become one person merely because they associate themselves together for one end.
4. Discarding the corporate fiction does not result in more justice than retaining the fiction.
5. Imposing criminal liability on an artificial entity that can possess no state of mind is questionable absent some other theory ascribing fault to the corporation itself.<sup>43</sup>

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<sup>42</sup> President Woodrow Wilson, Address to a Joint Session of Congress on Trusts and Monopolies (Jan. 20, 1914), *available at* <http://www.presidency.ucsb.edu/ws/print.php?pid=65374> (last visited Sept. 1, 2008).

<sup>43</sup> Geis, *supra* note 25, at 344.

As explained in the sections that follow, despite the arguments against corporate vicarious criminal liability, the theory almost certainly is here to stay—and an even more aggressive approach appears to have taken hold.<sup>44</sup>

### III. A MORE AGGRESSIVE APPROACH TO CORPORATE CRIMINAL LIABILITY

#### A. *The 1991 Changes to the United States Sentencing Guidelines*

In 1991, the Department of Justice signaled a shift towards a more aggressive approach to prosecuting corporations by introducing a chapter entitled *Sentencing of Organizations* to the United States Sentencing Guidelines Manual.<sup>45</sup> A precursor to the language used in subsequent DOJ memoranda dealing with whether to charge a corporation, the Sentencing Guidelines set forth a list of factors that should be considered in determining the ultimate punishment of a corporation.<sup>46</sup> The factors that lean towards increasing the ultimate punishment of the corporation are: (1) the involvement in or tolerance of criminal activity; (2) the prior history of the corporation; (3) whether the corporation violated an order; and (4) whether the corporation obstructed justice.<sup>47</sup> Two factors tend to mitigate corporate punishment: (1) the existence of an effective compliance and ethics program; and (2) self-reporting, cooperation, or acceptance of responsibility.<sup>48</sup>

Ultimately, the Sentencing Guidelines were intended merely to create an incentive for corporations to create effective compliance and self-policing programs to reduce or eliminate criminal activity within the corporation.<sup>49</sup> However, at least one initially benign rationale underlying the Sentencing Guidelines—the need for corporate “cooperation” with the government—set the stage for later abuse by federal prosecutors.<sup>50</sup>

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<sup>44</sup> See *infra* Part III.

<sup>45</sup> United States Sentencing Commission, Guidelines Manual, Chp. 8, intro. cmt. (Nov. 1991). See also United States Sentencing Commission, Supplementary Report on Sentencing Guidelines for Organizations, available at <http://www.ussc.gov/corp/OrgGL83091.PDF> (noting that “[a] careful review of the literature on organizational sanctions and the public comment to the Commission made clear that there was no consensus as to a single theory of organizational sentencing”) (last visited Sept. 1, 2008). The Sentencing Commission amended Chapter Eight in November 2004 to provide new guidelines for effective ethics and compliance programs in response to the Sarbanes-Oxley Act, Pub. L. 107-204. United States Sentencing Commission, Guidelines Manual, App. C, amend. 673 (Nov. 2004).

<sup>46</sup> United States Sentencing Commission, Guidelines Manual, Chp. 8, intro. cmt. (Nov. 1991).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See *id.*

## B. *The 1999 Holder Memorandum*

On June 16, 1999, recognizing that “[m]ore and more often, federal prosecutors are faced with criminal conduct committed by or on behalf of corporations,” then-Deputy Attorney General Eric Holder issued a memorandum to all Component Heads and United States Attorneys entitled *Bringing Criminal Charges Against Corporations*.<sup>51</sup> Although not binding on prosecutors, Holder intended that the memo serve as a guide for prosecutors to consider in deciding whether to charge a corporation in a criminal case.<sup>52</sup> However, the memo cautioned that prosecutors *should* consider the factors in *all cases* involving a decision whether to charge a corporation, and that a corporation should not be treated leniently merely because of its artificial nature.<sup>53</sup>

### 1. *The Holder Factors*

Although prosecutors should generally apply the same factors in determining whether to charge a corporation as they would an individual, because of the nature of the artificial corporate “person,” the Holder memo called for consideration of eight *additional* factors in deciding whether to charge a corporation.<sup>54</sup>

#### *The Nature and Seriousness of the Offense*

One of the primary factors in determining whether to charge a corporation is the “nature and seriousness of the crime, including the risk of harm to the public from the criminal conduct.”<sup>55</sup> Because corporate conduct necessarily intersects with other federal economic, taxation, and law enforcement agencies, prosecutors should take into account specific goals and incentives of the respective agencies affected in considering whether to charge the corporation.<sup>56</sup>

#### *Pervasiveness of Wrongdoing within the Corporation*

Corporations may be charged for even minor misconduct where the wrongdoing was “pervasive and was undertaken by a large number of employees

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<sup>51</sup> Holder memo, *supra* note 3, at Intro.

<sup>52</sup> *Id.* (“These factors are . . . not outcome-determinative and are only guidelines. Federal prosecutors are not required to reference these factors in a particular case, nor are they required to document the weight they accorded specific factors in reaching their decision.”).

<sup>53</sup> *Id.* at I.A.–I.B.

<sup>54</sup> *Id.* at II.A.

<sup>55</sup> *Id.* at III.A.

<sup>56</sup> Holder memo, *supra* note 3, at III.A.–B.

. . . or was condoned by upper management.”<sup>57</sup> The role of management is the most important consideration for this factor because management directs the corporation and management is responsible for the corporation’s culture.<sup>58</sup>

### *The Corporation’s Past History*

The prosecutor should consider the corporation’s history of similar misconduct, including prior criminal, civil, or regulatory actions, in determining whether to charge the corporation with a crime.<sup>59</sup> Where a corporation has not learned from past mistakes, a history of similar conduct may be probative of “a corporate culture that encouraged, or at least condoned, such conduct, regardless of any compliance programs.”<sup>60</sup>

### *Cooperation and Voluntary Disclosure*

Perhaps the most controversial and troubling of the Holder factors encouraged the prosecutor to consider the corporation’s willingness to “identify culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges.”<sup>61</sup> Because the prosecutor is likely to encounter obstacles when investigating corporate criminal wrongdoing, the corporation’s cooperation may be critical in identifying the individual wrongdoers and locating probative evidence.<sup>62</sup> As such, the prosecutor should consider granting immunity or amnesty to the corporation in exchange for its cooperation with the government.<sup>63</sup> Of course, a corporation’s cooperation with the government is no guarantee of immunity or amnesty, and specific policies may still warrant prosecution regardless of the corporation’s willingness to cooperate.<sup>64</sup>

The most discussed provisions of the Holder memo are the comments to Section VI, which specifically called for the prosecutor to consider corporate waivers of the attorney-client and work product privileges in the determination

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<sup>57</sup> *Id.* at IV.A. (“[I]t may not be appropriate to impose liability upon a corporation, particularly one with a compliance program in place, under a strict respondeat superior theory for the single isolated act of a rogue employee.”) (emphasis in original).

<sup>58</sup> *Id.* at IV.B.

<sup>59</sup> *Id.* at V.A.

<sup>60</sup> *Id.* at V.B.

<sup>61</sup> Holder memo, *supra* note 3, at VI.A.

<sup>62</sup> *See id.* at VI.B.

<sup>63</sup> *See id.*

<sup>64</sup> *See id.*

of whether the corporation has cooperated for purposes of this factor.<sup>65</sup> Although the memo made clear that waiver of privileges is not an absolute requirement to a finding of cooperation, the corporate defense bar insists that, post-Holder, requests (or even demands) for waiver occurred on a routine basis.<sup>66</sup>

### *Corporate Compliance Programs*

Self-policing corporate compliance programs are encouraged but are not in themselves enough to avoid prosecution under a theory of respondeat superior.<sup>67</sup> Indeed, when crime is committed in spite of an existing compliance program, it may suggest the presence of a mere “paper program,” and prosecution still may be appropriate.<sup>68</sup> The critical factor in evaluating a compliance program is “whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives.”<sup>69</sup>

### *Restitution and Remediation*

How a corporation responds to discovered misconduct is important in assessing its resolve to ensure that such misconduct is not repeated.<sup>70</sup> Although the corporation cannot avoid prosecution merely by paying restitution, the prosecutor may consider this in determining whether to charge the corporation,

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<sup>65</sup> See Cole, *supra* note 23, at 152–53 (discussing the two fundamental flaws of the Holder memo); David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 147 (2000); Letter from Maud Mater, Chair, Bd. of Dirs., American Corporate Counsel Ass’n (May 12, 2000), *available at* <http://www.acca.com/public/accapolicy/holder.html> (last visited Sept. 1, 2008).

<sup>66</sup> See 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, 1177 (2006); Letter from Maud, Chair, Bd. of Dirs., American Corporate Counsel Ass’n, *supra* note 65 (“ACCA members indicate that it is the regular practice of US Attorneys to require corporations to waive their attorney-client privileges and divulge confidential conversations and documents in order to prove cooperation with a prosecutor’s investigation.”).

<sup>67</sup> See Holder memo, *supra* note 3, at VII.A.

<sup>68</sup> See *id.* at VII.A.–B. See also *Basic Constr. Co.*, 711 F.2d at 573 (holding corporation responsible for antitrust violations committed by employees, even where the violations were against express corporate policy or instructions); *Hilton Hotels*, 467 F.2d at 1007 (concluding that the general rule for antitrust violations is that the corporation may be held liable for the acts of its employee if the acts were within the scope of employment, even if contrary to general corporate policy or express instructions); *United States v. Beusch*, 596 F.2d 871 (9th Cir. 1979) (holding that the existence of express instructions and corporate policies may be considered in whether the employee acted to benefit the corporation, but a corporation may still be liable for acts done contrary to corporate policy if the actions were in fact intended to benefit the corporation).

<sup>69</sup> Holder memo, *supra* note 3, at VII.B.

<sup>70</sup> See *id.* at VIII.B.

particularly when the corporation pays restitution in advance of a court order to do so.<sup>71</sup>

### *Collateral Consequences*

Almost any criminal conviction of a corporation will adversely affect innocent third parties, including the corporation's employees, officers, directors, and shareholders.<sup>72</sup> Because of this, the prosecutor may take into account the collateral consequences of a corporate criminal indictment.<sup>73</sup> However, when wrongdoing runs deep within the corporation, and the shareholders have substantially profited from widespread criminal activity, "the balance may tip in favor of prosecuting" the corporation.<sup>74</sup>

### *Non-Criminal Alternatives*

Prosecutors should consider whether non-criminal sanctions would adequately "deter, punish, and rehabilitate" a corporation accused of wrongful conduct.<sup>75</sup> The factors relevant in making this determination are: (1) the sanctions available under the alternative, non-criminal means of disposition; (2) the likelihood that effective sanctions will be imposed; and (3) the effect of a non-criminal disposition on federal law enforcement interests.<sup>76</sup>

## *2. Reaction to the Holder Memorandum—Criticism Abounds*

Critics of the aggressive tactics encouraged by the Holder memo pointed out two fundamental problems, both of which flowed from the memo's focus on obtaining privilege waivers under the guise of merely seeking "cooperation": (1) the tactics pressured corporations to conduct investigatory work that the government should be conducting on its own; and (2) the tactics drove a wedge between senior management and other employees, and between corporate counsel and all employees.<sup>77</sup> This "deputizing" of the corporation takes place at the expense

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<sup>71</sup> *Id.* at VIII.A.–B.

<sup>72</sup> *Id.* at IX.B.

<sup>73</sup> *Id.* at IX.A.

<sup>74</sup> Holder memo, *supra* note 3, at IX.B. ("In such cases, the possible unfairness of visiting punishment for the corporation's crimes upon shareholders may be of much less concern where those shareholders have substantially profited, even unknowingly, from widespread or pervasive criminal activity.").

<sup>75</sup> *Id.* at X.A.

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

<sup>77</sup> See Cole, *supra* note 23, at 152–53; Zornow, *supra* note 65, at 147 ("The sound you hear coming from the corridors of the Department of Justice is a requiem marking the death of privilege in corporate criminal investigations.").

of important privilege principles that “lie at the core of our adversarial system of justice.”<sup>78</sup>

There is a strong argument that corporations that abandon otherwise-sacred attorney-client and work product privileges in a desperate attempt to “cooperate” with the government, and thus avoid indictment, may actually undercut efforts aimed at corporate compliance rather than strengthen them.<sup>79</sup> Indeed, the purpose of the attorney-client privilege, for example, is to “encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”<sup>80</sup> But when the client believes that this bedrock privilege will not be honored, he has no incentive to be fully honest with his attorney—whose “sound legal advice . . . depends upon . . . being fully informed by the client.”<sup>81</sup> This reluctance, then, may in fact hamper the corporation’s efforts to comply with the law.<sup>82</sup> In addition, knowing that the longstanding privilege may be of little value, corporate clients may exclude lawyers from “critical meetings,” because the lawyer’s presence will be seen as “adding little value (at best) and as untrustworthy (at worst).”<sup>83</sup>

Holder-memo critics also pointed out that a footnote in the memo, authorizing waiver requests under “unusual circumstances” for attorney-client and work product communications related to advice about an ongoing criminal investigation, raised “a significant issue of potential abuse of government power.”<sup>84</sup> Beyond a mere abuse of power, such actions may effectively deny a client the assistance-of-counsel and constitute a Sixth Amendment violation.<sup>85</sup> Absent an exception to the attorney-client and work product privileges—such as where the corporation has raised the assistance of counsel defense or the government claims that the crime-fraud exception applies—most critics argue that the prosecutor does not have a compelling need for such privileged communications.<sup>86</sup>

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<sup>78</sup> Zornow, *supra* note 65, at 147.

<sup>79</sup> See Letter from Maud Mater, Chair, Bd. of Dirs., American Corporate Counsel Ass’n, *supra* note 65.

<sup>80</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

<sup>81</sup> *Id.*

<sup>82</sup> See Letter from Maud Mater, Chair, Bd. of Dirs., American Corporate Counsel Ass’n, *supra* note 65 (“Knowing that sensitive and confidential conversations with their lawyers will be used as bargaining chips by the government, clients may be reluctant to create such chips for the government’s use. They’ll simply stop talking with their lawyers.”).

<sup>83</sup> *Id.*

<sup>84</sup> Cole, *supra* note 23, at 152.

<sup>85</sup> See *id.*

<sup>86</sup> See *id.*



Finally, in addition to the implications in a pending criminal case, a waiver of the attorney-client or work product privilege may have dire financial consequences for the corporation in subsequent civil litigation.<sup>87</sup> Because waiver for one purpose is generally waiver for all purposes, corporations that waive privileges in an ongoing criminal investigation will likely lose those privileges for all litigation and regulatory proceedings that arise out of or relate to the criminal case.<sup>88</sup>

### C. *Establishment of the Corporate Fraud Taskforce*

In response to the Enron debacle and the other corporate scandals from the late 1990s and early part of the twenty-first century,<sup>89</sup> President George W. Bush issued Executive Order 13271, authorizing the Attorney General to establish a Corporate Fraud Taskforce within the Department of Justice.<sup>90</sup> President Bush charged the Taskforce with providing direction for the investigation of cases of various types of fraud and other related financial crimes committed by corporations and their directors, officers, and employees.<sup>91</sup>

### D. *The 2003 Thompson Memorandum*

In light of President Bush's new Corporate Fraud Taskforce, then-Deputy Attorney General Larry D. Thompson released a January 20, 2003 memo entitled *Principles of Federal Prosecution of Business Organizations*, attempting to revise the Holder memo and create "an increased emphasis on and scrutiny of the *authenticity* of a corporation's cooperation."<sup>92</sup> Clearly adopting a more hostile posture than its predecessor did, the Thompson memo from the beginning noted that "too often" corporations seek to impede government investigations while claiming

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<sup>87</sup> *See id.*

<sup>88</sup> *Id.* *See* United States v. Bergonzi, 216 F.R.D. 487, 494 (N.D. Cal. 2003) (finding that corporation waived the attorney-client and work product privileges for all purposes when it turned over a report prepared by outside counsel to the government).

<sup>89</sup> *See* KURT EICHENWALD, CONSPIRACY OF FOOLS 10 (2005) (documenting the financial and accounting scandals that led to the collapse of Enron Corporation, setting off a "cascading collapse in public confidence, . . . the first symptom of a disease that had somehow swept undetected through corporate America, felling giants in its wake from WorldCom to Tyco, from Adelphia to Global Crossing . . . all seemingly interlinked in some mindless spree of corporate greed").

<sup>90</sup> Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/07/20020709-2.html> (last visited Sept. 1, 2008). The Sarbanes-Oxley Act ("SOX") also arose out of the ashes of the aforementioned corporate scandals, creating new corporate governance and accounting rules for public companies and audit firms. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002). A discussion of the various and controversial provisions of SOX is beyond the scope of this Article.

<sup>91</sup> *Id.*

<sup>92</sup> Thompson memo, *supra* note 3, at Intro (emphasis added).

to cooperate, and that such conduct should “weigh in favor” of prosecuting the corporation.<sup>93</sup>

### 1. *The Thompson Factors*

The Thompson memo incorporated much of the same language (and all of the abuse-inviting problems) from the Holder memo, and in most respects, the two memoranda are virtually identical. However, at least three significant changes increased pressure on corporations under suspicion to cooperate or face crippling indictments.<sup>94</sup>

First, the Thompson memo, unlike the Holder memo, was made binding on all federal prosecutors.<sup>95</sup> As a result, all prosecutors were *required* to consider a corporation’s response to a request for privilege waivers and its advancement of legal fees to its own employees as factors in deciding whether the corporation was cooperating with the government and therefore likely to receive favorable treatment in the decision whether to charge.<sup>96</sup>

Second, in the comments to Section II, which listed the factors to be considered in determining whether to charge a corporation, new language indicated that “[t]he nature and seriousness of the offense may be such as to warrant prosecution regardless of the other factors.”<sup>97</sup> While this may have been intuitive, it did represent an emphasis that was not present in the Holder memo.

Third, the comments to the Cooperation and Voluntary Disclosure factor included a new paragraph discussing sub-factors the prosecutor should consider in determining whether the corporation has cooperated.<sup>98</sup> The following conduct,

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<sup>93</sup> *Id.* (“The revisions . . . address the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective rather than mere paper programs.”).

<sup>94</sup> One change from the Holder memo, the addition of a ninth factor to consider, may actually weigh against corporate indictment. The new factor calls for the prosecutor to consider “the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance.” *Id.* at II.A.8. Although this factor was not explained, the General Comments seemed to imply that culpable individuals should usually be charged in addition to the corporation, but when responsible individuals have been or are being prosecuted successfully, it may be appropriate—after consideration of all other factors—to withhold charging the corporation. *See id.* at I.B.

<sup>95</sup> *See* United States Attorney’s Manual, Criminal Resource Manual § 162 (2006), *available at* [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00162.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00162.htm) (last visited Sept. 1, 2008).

<sup>96</sup> *See id.*

<sup>97</sup> Thompson memo, *supra* note 3, at II.B.

<sup>98</sup> *See id.* at VI.B.

Thompson noted, may cause the prosecutor to conclude that the corporation, “while purporting to cooperate,” is really impeding the investigation (even if not rising to the level of criminal obstruction):

1. overly broad assertions of corporate representation of employees or former employees;
2. inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation, including, for example, the direction to decline to be interviewed;
3. making presentations or submissions that contain misleading assertions or omissions; incomplete or delayed production of records; and
4. failure to promptly disclose illegal conduct known to the corporation.<sup>99</sup>

Thus, the Thompson memo did far more than carry over the fundamental flaws inherent in the Holder memo—it greatly intensified them.

## 2. *Reaction to the Thompson Memorandum—More Criticism*

The Thompson memo, in addition to having carried over the fundamental flaws from the Holder memo, created a number of new problems for corporations. Defense lawyers found particularly troubling the new factors focusing on a corporation’s alleged efforts to impede the government investigation.<sup>100</sup> A major concern growing out of the government’s aggressive prosecutorial tactics was that corporations would no longer be able to do anything other than raise a white flag—voluntarily self-report evidence and fully cooperate (in the strictest sense of the word)—then hope that the prosecutor chose not to charge the corporation itself.<sup>101</sup> To do otherwise would be to proceed “at great peril.”<sup>102</sup> Furthermore, critics argued, the government had reduced corporate counsel to nothing more than a deputy prosecutor—internally investigating his own employer and reporting any findings to the authorities (and sometimes forfeiting core privileges along the way)—while the corporation faced the looming threat of indictment.<sup>103</sup>

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

<sup>100</sup> See John Gibeaut, *Junior G-Men*, 89 A.B.A. J. 46, 51 (June 2003).

<sup>101</sup> Cole, *supra* note 23, at 169.

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

<sup>103</sup> See Gibeaut, *supra* note 100, at 47–48 (“Simply put, companies are expected to do the work, suffer any consequences, and enable the government to take credit for striking at white-collar crime.”).

The Thompson memo's heightened focus on conduct that impedes investigation significantly concerned many commentators because the list of vague and intimidating factors effectively ceded to the government a considerable advantage against its corporate opponent in our adversarial criminal system.<sup>104</sup> Because it was difficult to know, in advance, what the government would consider "overly broad assertions of corporate representation of employees," or what amounts to "inappropriate directions to employees or their counsel," corporations felt pressured to avoid taking positions that in the past had been standard practice in defending a corporation against criminal charges.<sup>105</sup> These practices included, among other things, payment of employees' legal fees and controlling access to witnesses and important documentary evidence (including the assertion of legal privileges).<sup>106</sup>

After the Department of Justice released the Thompson memo, corporate counsel complained vehemently that the government was trying to drive a wedge between the corporation and its employees in an effort to make its own job easier.<sup>107</sup> The likely result of such tactics, they argued, would be that employees would clam up, knowing that anything they say would be turned over to the government and possibly used against them.<sup>108</sup> Although some in the Department of Justice expressed sympathy for the predicament corporate employees faced,<sup>109</sup> Larry Thompson himself expressed a contrary (and rather extreme) opinion: "[T]hey don't need fancy legal representation if they believe that they did not act with criminal intent."<sup>110</sup>

The new "cooperation" requirements in the Thompson memo, taken together with the prior waiver provisions carried over from the Holder memo, essentially changed the rules of the game for corporations dealing with white-collar criminal investigations.<sup>111</sup> Because a corporation facing criminal indictment lacks any advantage in its relationship with the prosecutor, prosecutors were able to force corporations to waive privileges, assist the government in building its case against the corporation's employees, and cut off routine payment of legal fees for those

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<sup>104</sup> See Cole, *supra* note 23, at 153–54.

<sup>105</sup> *Id.* at 154.

<sup>106</sup> See *id.*

<sup>107</sup> See Gibeaut, *supra* note 100, at 51.

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

<sup>109</sup> *Id.* at 71 (quoting then-Assistant Attorney General Michael Chertoff as expressing the opinion that he "think[s] it's a little less rigid than it may appear at first," and that "[i]n an odd way, if you cut off indemnification, then you may cut off cooperation").

<sup>110</sup> Laurie P. Cohen, *In the Crossfire: Prosecutors' Tough New Tactics Turn Firms Against Employees*, WALL ST. J., June 4, 2004, at A1 (quoting then-Deputy Attorney General Larry Thompson).

<sup>111</sup> See Cole, *supra* note 23, at 169.

employees.<sup>112</sup> Thus, under authority of the Thompson memo, federal prosecutors were able to force corporations to hand over privileged information and do the government's investigatory work, all in hopes that the government hammer would not swing the way of the corporation itself.

#### IV. HOLDER AND THOMPSON IN ACTION: GOVERNMENT PROSECUTORIAL ABUSE AGAINST ARTHUR ANDERSEN AND KPMG

In the case of Arthur Andersen, the hammer did swing the corporation's way, crushing a company that once employed twenty-eight thousand people.<sup>113</sup> In retrospect, the Andersen indictment and conviction may represent the apogee of government power in its campaign to aggressively pressure companies to cooperate or be killed. In 2005, the Supreme Court reversed Andersen's conviction, holding that the jury instructions were invalid because (1) they did not require that the jury find any consciousness of wrongdoing on the part of Andersen employees, and (2) they did not require that the jury find a nexus between the corrupt persuasion to destroy documents related to Andersen's Enron representation and any particular government proceeding.<sup>114</sup>

Then, in 2006, in a tax fraud prosecution against employees of KPMG, Judge Lewis Kaplan of the Southern District of New York ruled, in an opinion that was later affirmed by the Second Circuit, that the government's actions in pressuring KPMG to cut off its employees' and former employees' legal fees was an unconstitutional interference with the defendants' right to counsel.<sup>115</sup> Subsequently, in December 2006, then-Deputy Attorney General Paul J. McNulty issued a memorandum purporting to change the way prosecutors handle the charging decision when investigating corporate malfeasance.<sup>116</sup>

##### A. *Arthur Andersen: Death By Indictment*

The case against Arthur Andersen arose out of the collapse of Houston energy giant Enron.<sup>117</sup> As the Enron saga unfolded in late 2001, Andersen—Enron's auditor—created an Enron crisis-response team to deal with a looming Securities & Exchange Commission ("SEC") investigation into Enron's suspect

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<sup>112</sup> *See id.*

<sup>113</sup> *See* Charles Lane, *Justices Overturn Andersen Conviction: Advice to Enron Jury on Accountants' Fraud is Faulted*, WASH. POST, June 1, 2005, at A1.

<sup>114</sup> *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706–08 (2005).

<sup>115</sup> *United States v. Stein*, 541 F.3d 130, 135–36 (2d Cir. 2008).

<sup>116</sup> *See* Press Release, Department of Justice, U.S. Deputy Attorney General Paul J. McNulty Revises Charging Guidelines for Prosecuting Corporate Fraud (Dec. 12, 2006), *available at* [http://www.usdoj.gov/opa/pr/2006/December/06\\_odag\\_828.html](http://www.usdoj.gov/opa/pr/2006/December/06_odag_828.html) (last visited Sept. 1, 2008).

<sup>117</sup> *Arthur Andersen*, 544 U.S. at 698–99; Lane, *supra* note 113, at A1.

financial practices.<sup>118</sup> Throughout the fall of 2001, in-house counsel, and senior partners in the Houston office, repeatedly urged Andersen employees to follow the company's document "retention" policy and to shred documents related to Andersen's representation of Enron.<sup>119</sup> In fact, Michael Odom, Andersen's risk-management practice director for the Houston office, advised his employees that, if they shredded documents in compliance with their policy and "litigation is filed the next day, that's great. . . . [W]e've followed our own policy, and whatever there was that might have been of interest to somebody is gone and irretrievable."<sup>120</sup>

In all, before a November 9, 2001 order to stop shredding was issued in response to the SEC's formal notice of investigation, Andersen destroyed approximately two tons of Enron-related documents.<sup>121</sup> David Duncan, the head of Andersen's Enron Engagement team, who was later fired and pled guilty to witness tampering, agreed to cooperate as a witness against his former employer.<sup>122</sup> Andersen itself was charged in March of 2002 with one count of knowingly and corruptly persuading another person with intent to cause or induce any person to withhold documents from or alter, destroy, or mutilate documents for use in an official proceeding.<sup>123</sup>

For Andersen, however, cooperation with the government was not enough to stave off indictment.<sup>124</sup> Andersen tried to settle with the government but refused prosecutors' demands for an admission of criminal liability.<sup>125</sup> Furthermore, because Andersen's legal department was so involved in the document destruction, prosecutors felt that they had "little choice but to push this case into the criminal realm."<sup>126</sup> Thus, long before the criminal case even reached a courtroom, Andersen clients fled in droves at the prospect of allowing an accounting firm charged with a crime to "serve as their financial watchdog."<sup>127</sup>

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<sup>118</sup> *Arthur Andersen*, 544 U.S. at 699.

<sup>119</sup> *See id.* at 699–700.

<sup>120</sup> *Id.* at 700 (quoting *United States v. Arthur Andersen LLP*, 374 F.3d 281, 286 (5th Cir. 2004)) (internal quotations omitted).

<sup>121</sup> *See id.* at 702; Lane, *supra* note 113, at A1.

<sup>122</sup> *Arthur Andersen*, 544 U.S. at 702. *See also* EICHENWALD, *supra* note 89, at 666. Duncan's was the only individual conviction the government secured out of the entire Andersen affair. Gibeaut, *supra* note 100, at 71.

<sup>123</sup> *Arthur Andersen*, 544 U.S. at 696, 698; 18 U.S.C. § 1512(b)(2)(A)–(B) (2000).

<sup>124</sup> Gibeaut, *supra* note 100, at 71.

<sup>125</sup> EICHENWALD, *supra* note 89, at 666.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 667; *see also* Gibeaut *supra* note 100, at 71.

Andersen ultimately was convicted of one count of violating 18 U.S.C. § 1512(b)(2)(A) and (B), and the Court of Appeals for the Fifth Circuit affirmed.<sup>128</sup> The Supreme Court, however, reversed and remanded the case, holding that the jury instructions proffered by the government, and agreed to by District Court Judge Melinda Harmon, were faulty in two respects.<sup>129</sup> First, because the jury was told that, “even if [Andersen] honestly and sincerely believed that its conduct was lawful, you may find [Andersen] guilty,” the jury was not properly instructed that it needed to find consciousness of wrongdoing in order to convict Andersen under § 1512(b)(2)(A) and (B).<sup>130</sup> Second, the instructions led the jury to believe that they were not required to find any nexus between the corrupt persuasion to alter or destroy documents and any particular government proceeding.<sup>131</sup> The Court concluded that one cannot knowingly and corruptly persuade others to shred documents when one does not “have in contemplation any particular official proceeding in which those documents might be material.”<sup>132</sup>

While the Court’s reversal of the Arthur Andersen conviction was not an endorsement of the accounting firm’s actions in the underlying case—the government could have retried the case, and many think the government did present evidence of intent during the initial trial<sup>133</sup>—the case itself serves as an example of the coercive power federal prosecutors wielded under the authority of the Holder and Thompson memoranda. Andersen’s attempts to cooperate with the government actually backfired against the company. By waiving its attorney-client and work product privileges in hopes to receive more lenient treatment, Andersen turned over an e-mail from its own in-house counsel that “ended up center stage for jurors who ignored reams of shredded Enron documents and used [the lawyer’s] words to convict the 89-year-old firm.”<sup>134</sup> The Andersen case also made painfully obvious, if it was not already clear, that an indictment itself can

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<sup>128</sup> *Arthur Andersen*, 544 U.S. at 696.

<sup>129</sup> *Id.* at 707–08.

<sup>130</sup> *Id.* at 706 (internal quotations omitted) (“Indeed, it is striking how little culpability the instructions required.”).

<sup>131</sup> *Id.* at 707.

<sup>132</sup> *Id.* at 708.

<sup>133</sup> See Kurt Eichenwald, *The Andersen Decision: The Legal Fallout; A Reversal That Was Not a Declaration of Innocence*, N.Y. TIMES, June 1, 2005, at C6 (“While the reversal makes a retrial legally feasible . . . in truth the Supreme Court’s judgment simply underscores the significance of a rule in white-collar cases: a jury cannot properly convict without first being required to conclude that a defendant had intended to engage in wrongdoing.”). In an ironic twist of fate, the government later allowed David Duncan, the only *individual* convicted in the case, to withdraw his guilty plea after the Department of Justice made the decision not to retry Andersen. See John Roper, *Legal Accountability: Government Won’t Retry Andersen Criminal Case*, HOUSTON CHRONICLE (Dec. 21 2005), available at <http://www.chron.com/disp/story.mpl/front/3479506.html>.

<sup>134</sup> Gibeaut, *supra* note 100, at 71.

kill the company. Thus, companies instantly became acutely aware of the need to avoid indictment, whatever the costs.<sup>135</sup>

*B. Lesson Learned: Deferred Prosecution Agreements*

No major corporation has been driven out of business by a government indictment since the Arthur Andersen case.<sup>136</sup> Instead, federal prosecutors and potential corporate defendants, both aware of the power prosecutors wield, have reached an “entente cordiale” wherein corporations under suspicion enter into deferred-prosecution agreements (“DPAs”),<sup>137</sup> pay enormous penalties, and undertake massive internal reforms.<sup>138</sup> All of this to avoid indictment, but with no guarantee that the axe will not drop if the prosecutor believes the corporation is not living up to the agreement.<sup>139</sup> DPAs have become such effective tools for prosecutors due to the two key obstacles corporations face when attempting to navigate the dangerous waters of a criminal investigation: (1) the concept of vicarious criminal liability and the fact that those involved in the alleged wrongdoing may in fact cooperate in the case against their employer; and (2) the collateral consequences of the indictment itself.<sup>140</sup> Indeed, particularly abusive DPAs can have the effect of “turning the prosecutor into judge and jury, thus undermining our principles of separation of powers.”<sup>141</sup>

*C. KPMG: Avoiding Indictment at All Costs*

An example of a particularly abusive DPA arose out of an Internal Revenue Service investigation into allegedly illegal tax shelters, in what turned out to be probably the largest tax fraud case in United States history.<sup>142</sup> KPMG International,

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<sup>135</sup> See *id.* (noting that neither the maximum \$500,000 fine nor the five years of probation for obstruction was what killed Andersen; rather, it was the indictment itself that drove Andersen’s client base away in droves).

<sup>136</sup> Joseph A. Grundfest, *Over Before It Started*, N.Y. TIMES, June 14, 2005, at A23.

<sup>137</sup> See Richard A. Epstein, Op-Ed., *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, at A14 (“A DPA is a provisional settlement of a criminal lawsuit whereby the prosecutor agrees to suspend—but not dismiss—any prosecution in exchange for the corporation’s promise to reform its internal operations in specified ways.”).

<sup>138</sup> Grundfest, *supra* note 136, at A23.

<sup>139</sup> See *id.*

<sup>140</sup> Epstein, *supra* note 137, at A14.

<sup>141</sup> *Id.* For example, Bristol-Myers Squibb, suspected of channel stuffing in an attempt to overstate quarterly earnings reports, was recently forced into a DPA that was noteworthy for personal touches the prosecutor added, including the requirement that the company endow a chair at Seton Hall University—the prosecutor’s alma mater—for teaching business ethics, and the requirement that all of the corporation’s activities be overseen by the prosecutor’s independent advisor, who was given power to review all corporate documents and attend all meetings. *Id.*

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



the firm under suspicion, avoided destruction by entering into a DPA with the government in which the company agreed to a number of onerous conditions.<sup>143</sup> These included KPMG's agreement to: (1) waive indictment; (2) be charged in a one-count information; (3) pay a \$456 million fine; (4) accept restrictions on its practice; and, most importantly for purposes of this discussion, (5) cooperate extensively with the government, both in general and in the government's prosecution of the current and former KPMG employees under indictment.<sup>144</sup>

Because of the pressures created by the Holder and Thompson memoranda, and after a number of discussions with government attorneys, KPMG clearly got the message that its duty to "cooperate" with the government required it to change longstanding company policy, capping and ultimately cutting off its payment of legal fees for employees and partners under indictment.<sup>145</sup> Beyond just pressuring KPMG to cut off payment of legal fees, government attorneys pressured KPMG to change the wording of an internal memorandum distributed to employees, to include language to the effect that employees were under no requirement to use company-provided counsel and could in fact meet with government investigators without the assistance of counsel.<sup>146</sup> As KPMG was signing off on the DPA, of course, the government began indicting current and former KPMG partners and employees.<sup>147</sup> True to its word, KPMG began to cut off all payments to the defendants under indictment.<sup>148</sup>

In January 2006, the KPMG defendants moved to dismiss the charges against them, or for other relief, because, they argued, the government had unconstitutionally interfered with their right to counsel (*i.e.*, KPMG's advancement of their attorney fees).<sup>149</sup> Judge Lewis Kaplan of the Southern District of New York agreed. In an opinion issued on June 26, 2006, Judge Kaplan found that: (1) the Thompson memo caused KPMG to reconsider its legal fees policy even before government attorneys began to apply pressure; (2) the government reinforced the Thompson memo's threats and actively pressured KPMG to cut off attorney fees for its agents under indictment; (3) the government sought to interfere with the defendants' Sixth Amendment right to counsel; and (4) KPMG's decision to

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<sup>143</sup> *Id.* at 137–40.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* Prior to the pressure applied by the government attorneys, it had been a longstanding practice of KPMG to advance and pay legal fees, "without a preset cap or condition of cooperation with the government," for counsel for partners, principals, and employees of the firm in situations where separate counsel was appropriate to represent the individual in any scope of the individual's duties and responsibilities. *Id.* at 143–44.

<sup>146</sup> *Id.* at 153.

<sup>147</sup> *Stein*, 541 F.3d at 139–40.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 140.

cut off all payments to the defendants was a direct result of the Thompson memo and the pressure applied by the government attorneys.<sup>150</sup>

In light of these findings, Judge Kaplan held that the government violated the defendants' Fifth Amendment right to due process by interfering with their ability to afford competent counsel.<sup>151</sup> Additionally, the government violated the defendants' Sixth Amendment right to counsel without adequate justification when it interfered with the defendants' right to "obtain resources lawfully available to them in order to defend themselves."<sup>152</sup> According to Judge Kaplan, the Thompson memo is unconstitutional to the extent that it allows prosecutors to take into account, in deciding whether to indict a company, whether the company would advance attorney's fees to present or former employees in the event they were indicted for activities undertaken in the course of their employment.<sup>153</sup> Thus, he ultimately dismissed the indictments against all of the defendants.<sup>154</sup>

The Second Circuit recently upheld the decision and agreed with the district court's finding that the defendants were stripped of their constitutional right to counsel.<sup>155</sup> Although the court carefully cabined its holding to the facts of the case, it agreed that the Thompson memo, coupled with the actions of federal prosecutors bound by the memo at the time, unfairly interfered with the defendants' right to counsel by pressuring KPMG to cap and ultimately cut off its promised payment of their legal fees.<sup>156</sup> The decision strongly suggests that prosecutors who follow the directives of the Thompson memo in the future do so at the risk of having their cases dismissed.<sup>157</sup>

## V. REVERSING COURSE: REAL CHANGE OR MORE OF THE SAME?

### A. *The Attorney-Client Privilege Protection Act of 2006*

On December 8, 2006, Senator Arlen Specter introduced a bill "designed to preserve the attorney-client privilege and work product protections available

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<sup>150</sup> *Id.* at 141.

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

<sup>152</sup> *Id.*

<sup>153</sup> *Stein*, 541 F.3d 141.

<sup>154</sup> *Id.* at 141–42. Judge Kaplan initially did not dismiss the indictments against the KPMG defendants. Instead, he took the rare step of ordering the Clerk of Court, pursuant to the court's ancillary jurisdiction, to open a civil docket to allow the KPMG defendants to pursue a claim against KPMG for their legal fees while the criminal case was still pending. *Id.* The government appealed to the Second Circuit, arguing that the court lacked jurisdiction over such a claim, and won. *See id.* In response, Judge Kaplan dismissed the indictments. *See id.*

<sup>155</sup> *See generally id.*

<sup>156</sup> *See id.*

<sup>157</sup> *See id.*

to an organization and preserve the constitutional rights and other protections available to employees of such an organization.”<sup>158</sup> Senator Specter’s bill would have imposed a flat prohibition on government agents or attorneys “demand[ing], request[ing], or condition[ing] treatment on the disclosure by an organization, or person affiliated with that organization, of any communication protected by the attorney-client privilege or any attorney work product.”<sup>159</sup> Similarly, the Specter bill would have prohibited the government from using the following factors in determining whether a corporation is “cooperating” with the government:

1. valid assertion of the attorney-client privilege or work product privilege;
2. payment of legal fees or expenses, or the provision of counsel, for an employee of the organization;
3. entering into a joint defense agreement with an employee of the organization;
4. sharing relevant information with an employee of the organization; or
5. failure to terminate or sanction an employee of the organization because of a decision by the employee to stand on his constitutional rights.<sup>160</sup>

As its text demonstrates, the proposed bill no doubt attempted to address the Thompson memo’s most controversial provisions.<sup>161</sup> Unfortunately, the bill never made it out of committee.<sup>162</sup>

### *B. The 2006 McNulty Memo*

On December 12, 2006, in light of Senator Specter’s proposed bill and increasing criticism from judges, lawyers, and academics leveled at the aggressive government tactics condoned by the Thomson memo, then-Deputy Attorney General Paul J. McNulty issued a memorandum providing new guidance to

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<sup>158</sup> Attorney-Client Privilege Protection Act of 2006, S. 30, 109th Cong. (2006). The bill was reintroduced in identical form on January 4, 2007 as the Attorney-Client Privilege Protection Act of 2007, S. 86, 110th Cong. (2007). The bill never made it out of the Committee on the Judiciary. See GovTrack.us, *available at* <http://www.govtrack.us/congress/bill.xpd?bill=s110-186> (last visited Sept. 1, 2008).

<sup>159</sup> Attorney-Client Privilege Protection Act of 2006, S. 30.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> See GovTrack.us, *supra* note 158.

prosecutors considering privilege waivers and the advancement of legal fees in connection with their determination of whether a corporation is “cooperating.”<sup>163</sup> Although claiming that the government’s “efforts to investigate and prosecute corporate fraud in the past five years . . . have been tremendously successful,” the new memo restricted prosecutorial power in the two areas in which the Thompson memo was so heavily criticized.<sup>164</sup>

Recognizing that the Department of Justice had come under heavy criticism for its recent aggressive tactics aimed at corporations, the McNulty memo sought to promote public confidence in the Department and encourage fraud prevention, without sacrificing the ability to prosecute corporate fraud.<sup>165</sup> Addressing the criticism originating in the “corporate legal community,” the memo pointed out that, to the extent that government practices were “discouraging full and candid communications between corporate employees and legal counsel,” it was “never the intention of the Department for our corporate charging principles to cause such a result.”<sup>166</sup>

Under the McNulty memo, prosecutors had to demonstrate a “legitimate need” when requesting a waiver of the attorney-client or work product privilege.<sup>167</sup> If the prosecutor could satisfy a number of factors to establish such need, the prosecutor was then required to secure written authorization from a United States Attorney, who then had to give the request to, and consult with, the Assistant Attorney General for the Criminal Division.<sup>168</sup> If the request was approved, the United States Attorney had to communicate the request to the corporation and seek the least intrusive waiver possible, beginning with purely factual information (Category I information).<sup>169</sup> The prosecutor could consider a corporation’s refusal to waive privileges for Category I information in the determination whether the corporation was “cooperating” with the government.<sup>170</sup>

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<sup>163</sup> See McNulty memo, *supra* note 3, at VI–VII; Press Release, Department of Justice, U.S. Deputy Attorney General Paul J. McNulty Revises Charging Guidelines for Prosecuting Corporate Fraud (Dec. 12, 2006), *available at* [http://www.usdoj.gov/opa/pr/December/06\\_odag\\_828.html](http://www.usdoj.gov/opa/pr/December/06_odag_828.html) (last visited Sept. 1, 2008); Lynnley Browning, *U.S. Moves to Restrain Prosecutors*, N.Y. TIMES, Dec. 13, 2006, at C1.

<sup>164</sup> Press Release, Department of Justice, U.S. Deputy Attorney General Paul J. McNulty Revises Charging Guidelines for Prosecuting Corporate Fraud (Dec. 12, 2006), *available at* [http://www.usdoj.gov/opa/pr/2006/December/06\\_odag\\_828.html](http://www.usdoj.gov/opa/pr/2006/December/06_odag_828.html) (quoting Deputy Attorney General Paul J. McNulty) (internal quotations omitted) (last visited Sept. 1, 2008).

<sup>165</sup> See McNulty memo, *supra* note 3, at Intro.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at VII.B.2.

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

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

If the “purely factual information” did not provide the prosecutor with sufficient information to conduct a thorough investigation, the government could request a waiver of attorney-client and work product privileged information, including legal advice given to the corporation “before, during, and after the underlying misconduct occurred” (Category II information).<sup>171</sup> A prosecutor could not, however, consider a corporation’s declination of waiver of Category II information in his charging decision.<sup>172</sup>

Finally, in “extremely rare cases,” a prosecutor could consider, as part of a charging decision, whether a corporation was advancing legal fees to its agents or employees.<sup>173</sup> In cases where the totality of the circumstances showed that advancement of legal fees was intended to impede the criminal investigation, prosecutors could consider the issue, along with other “telling facts,” to determine whether the corporation was “acting improperly to shield itself and its culpable employees from government scrutiny.”<sup>174</sup>

The immediate reaction to the McNulty memo was a mixture of both cheers and boos.<sup>175</sup> Despite reigning in prosecutorial discretion to request a formal privilege waiver or consider a corporation’s payment of legal fees to its employees, the concern remained that corporations under investigation could “decide that the spirit of the new guidelines still tacitly encourag[ed] ‘cooperation’ with prosecutors”—the kind of back-breaking “cooperation” encouraged by the Holder and Thomson memoranda.<sup>176</sup> Moreover, because the McNulty memo forced prosecutors to jump through hoops to secure certain privilege waivers, it may have simply driven abusive prosecutorial tactics underground.<sup>177</sup>

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<sup>171</sup> See McNulty memo, *supra* note 3, at VII.B.2 (noting prosecutors are “cautioned” that only the rare case justifies a request for Category II information).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at VII.B.3.

<sup>174</sup> *Id.* at n.3.

<sup>175</sup> See Browning, *supra* note 163, at C1 (noting that critics of the old guidelines were not all excited about the new ones and that defense lawyers would still lobby Congress to pass legislation barring all disclosure of privileged information and any credit to corporations that do disclose); Pamela A. MacLean, *McNulty Memo on Attorney-Client Privilege Blasted for Lack of Change*, THE NATIONAL LAW JOURNAL, January 26, 2007, available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1169719351771> (last visited Sept. 1, 2008) (discussing concerns that the new memo will create a culture of “don’t ask, don’t tell” that will merely drive prosecution waiver demands underground); Evan Perez and Kara Scannell, *U.S. Imposes Limits in Fighting Corporate Crime*, WALL ST. J., Dec. 13, 2006, at A6 (quoting a former Department of Justice official and member of the Enron Task Force as saying that the “fundamental problem that still remains to be tackled is the scope of criminal corporate liability and the government’s ability to charge and ultimately ruin a corporation based on the allegedly illegal acts of one or a few employees”).

<sup>176</sup> Browning, *supra* note 163, at C1.

<sup>177</sup> See MacLean, *supra* note 175.

Even after the McNulty memo, the issue of whether a prosecutor could consider a corporation's denial of a request for a privilege waiver or its advancement of legal fees to its employees and agents remained one of great concern.<sup>178</sup> After all, even though the McNulty memo eliminated the consideration of declination of requests for waivers for Category II information, prosecutors still could consider a declination of a request for waiver of Category I information.<sup>179</sup> In addition, while prosecutors generally were barred from considering a corporation's advancement of legal fees in the charging decision, "extreme case[s]" could warrant a different course.<sup>180</sup>

### C. *The Attorney-Client Privilege Protection Act of 2008*

Senator Specter apparently has heard enough debate, and is convinced that the McNulty memo fell short of adequately protecting corporations and corporate constituents from government abuse.<sup>181</sup> Despite the McNulty memo's purported shift away from at least some of the Department of Justice's most abusive tactics, Specter reintroduced his 2006 protectionary bill aimed at correcting the shortcomings of the Holder and Thompson memoranda.<sup>182</sup> The new bill, entitled the Attorney-Client Privilege Protection Act of 2008, is armed to the teeth with provisions protecting corporations' core privileges and corporate constituents' right to counsel.<sup>183</sup> The bill attacks head-on every criticism courts, commentators, and the bar raised in response to government tactics permitted (or encouraged) by the Holder and Thompson memoranda.<sup>184</sup>

First, like the old bill, the proposed bill would put the force of law behind prohibitions on requests or demands for the waiver of the attorney-client privilege or work product immunity.<sup>185</sup> And second, it would strictly prohibit the government from basing any part of its decision whether to indict—specifically within the context of its "cooperation" analysis—on whether attorney-client privilege or work product immunity have been waived.<sup>186</sup> Likewise, the new bill would make it illegal for the government to base any part of its decision to indict on whether the corporation has provided counsel to or paid some or all of the legal fees for its targeted constituents.<sup>187</sup>

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<sup>178</sup> *See id.*

<sup>179</sup> McNulty memo, *supra* note 3, at VII.B.2.

<sup>180</sup> *Id.* at VII.B.3 n.3.

<sup>181</sup> *See infra* notes 182–191 and accompanying text.

<sup>182</sup> *See* Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Cong. (2008).

<sup>183</sup> *See id.* § 3.

<sup>184</sup> *See id.*

<sup>185</sup> *Id.* § 3(b).

<sup>186</sup> *Id.* § 3(b)(2).

<sup>187</sup> *Id.*

But Senator Specter's new bill goes even further, attempting to resolve additional, less talked about (but perhaps equally important) issues. To start, the bill would apply broadly to all government agencies—both criminal and civil.<sup>188</sup> Thus, the government could not, for example, shift its dirty work from the DOJ to the SEC and thereby avoid the bill's reach.<sup>189</sup> Additionally, the provisions would apply to more than just "charging decisions"—they would apply to all "enforcement decisions."<sup>190</sup> This broadened applicability likely would not be a distinction without a difference. Indeed, it would prevent government agencies from adhering to the prohibitions as they relate to charging decisions, while nevertheless considering whether privileges were waived or legal fees were provided in making other enforcement decisions.<sup>191</sup>

#### *D. DOJ Response: New Prosecutorial Guidelines*

Government agencies, not surprisingly, say that Specter's proposed legislation is unnecessary.<sup>192</sup> They insist that they understand the severity of their past abuses and that they can and will avoid them on their own.<sup>193</sup> In an attempt to evidence its willingness to change course, and possibly to moot the call for legislation, the Department of Justice recently issued new Guidelines for prosecutors investigating and considering whether to prosecute corporations and their constituents.<sup>194</sup>

The Guidelines still list "cooperation" as a factor in determining whether to indict.<sup>195</sup> But they bar prosecutors from: (1) requesting privilege waivers;<sup>196</sup> (2) requesting that corporations refuse to provide counsel to or pay legal fees for their constituents;<sup>197</sup> (3) considering whether privileges were waived in determining whether to charge;<sup>198</sup> and (4) considering whether counsel was provided or legal

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<sup>188</sup> Attorney-Client Privilege Protection Act of 2008, S. 3217 § 3(b).

<sup>189</sup> *See id.*

<sup>190</sup> *Id.*

<sup>191</sup> *See id.*

<sup>192</sup> *See* Lynnley Browning, *Bill to Protect Companies in Inquiries Adds Support*, N.Y. TIMES (June 23, 2008), available at [http://www.nytimes.com/2008/06/23/business/23law.html?\\_r=1&ref=business&coref=slogin](http://www.nytimes.com/2008/06/23/business/23law.html?_r=1&ref=business&coref=slogin) (last visited Sept. 1, 2008).

<sup>193</sup> *See id.*

<sup>194</sup> *See* Principles of Federal Prosecution of Business Organizations (hereinafter the Guidelines), issued Aug. 28, 2008, available at <http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf> (last visited Sept. 1, 2008). The new Guidelines are often referred to as the "Filip Memorandum," but this article uses the term Guidelines to more easily distinguish them as the focus of the current discussion.

<sup>195</sup> *Id.* § 9-28.300(A)(4).

<sup>196</sup> *Id.* § 9-28.710.

<sup>197</sup> *Id.* § 9-28.730.

<sup>198</sup> *Id.* § 9-28.720(b).

fees were paid to corporate constituents in determining whether to charge.<sup>199</sup> The Guidelines also specify that counsel who believe a prosecutor is violating these rules should raise their concerns with the United States Attorney or Assistant Attorney General.<sup>200</sup>

Of course, the Guidelines come with one huge loophole—they do not carry the force of law, as explained explicitly in this DOJ caveat:

These Principles provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in a matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.<sup>201</sup>

Thus, the Guidelines are not truly binding.<sup>202</sup>

## VI. THE NEED FOR DEFINITIVE LEGISLATIVE ACTION

So where do we stand? The Holder and Thompson memoranda are no longer official policy.<sup>203</sup> And though some questions remain whether many of the tactics implemented under the authority of those memoranda still are utilized, the Second Circuit's decision in *Stein* dealt a serious blow to the use of at least one such tactic—government interference with corporate constituents' right to counsel via payment of legal fees.<sup>204</sup> That is certainly a start, but nowhere near a comprehensive solution.

The Attorney-Client Privilege Protection Act of 2008 addresses more than its name implies, and attacks the problems rooted in the Holder, Thompson, and McNulty memoranda on all fronts.<sup>205</sup> Unlike *Stein*, the proposed bill addresses not only government interference with the right to counsel, but also addresses interference with core privileges.<sup>206</sup> The problem, however, is that Senator Specter's bill has been introduced in various forms three times, but has yet to be signed into law.<sup>207</sup>

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<sup>199</sup> *Id.* § 9-28.730.

<sup>200</sup> See the Guidelines, *supra* note 194, § 9-28.760.

<sup>201</sup> *Id.* § 9-28.1300.B

<sup>202</sup> See *id.*

<sup>203</sup> *Supra* Part V.B.

<sup>204</sup> *Supra* Part IV.C.

<sup>205</sup> *Supra* Part V.C.–D.

<sup>206</sup> *Id.*

<sup>207</sup> *Supra* notes 158–162 and accompanying text.



The Department of Justice also has paid attention to criticism of its past policies.<sup>208</sup> And its new Guidelines address most, if not all, of the issues raised by the proposed legislation.<sup>209</sup> For many reasons, however, the Guidelines cannot possibly afford the same level of protection as legislation.

First, guidelines are just that, guidelines—not law.<sup>210</sup> As such, they can be disregarded with little or no explanation, and are subject to selective application by the government.<sup>211</sup> Second, guidelines are extremely susceptible to change.<sup>212</sup> Although law too is subject to change, it is not as susceptible to frequent shifts in policy such as the ones we have seen by the Department of Justice on corporate prosecutorial tactics—from the Holder memo, to the Thompson memo, to the McNulty memo, to the new Guidelines.<sup>213</sup> Finally, and perhaps most importantly, the Guidelines are insufficient because their reach is too narrow. Because they were issued by the Department of Justice, the Guidelines necessarily only apply in the criminal context to agencies under the Department of Justice’s umbrella.<sup>214</sup> Notably outside the reach of the Guidelines are civil actions, and thus dozens of extremely active civil enforcement agencies, such as the Securities & Exchange Commission and the Federal Trade Commission.<sup>215</sup> Guidelines have no meaning when they purposefully can be ignored before the Department of Justice’s involvement. Thus, guidelines, without more, are insufficient.

## VII. CONCLUSION

The history of corporate vicarious criminal liability has been one of steady accretion of power at the hands of the prosecutor, with corporate counsel forced into the status of quasi-deputy, turning over the corporation’s privileged material, cutting off payment of legal fees, and actively assisting the government in building its case against the corporation’s own employees. There is no dispute that corporate, white-collar crime was and still is a serious problem. But federal prosecutors should not resort to the destruction of longstanding privileges or warp the adversarial system of justice such that a corporate employee charged with a complex criminal offense cannot secure competent counsel.

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<sup>208</sup> *Supra* Parts V.B., D.

<sup>209</sup> *Supra* Part V.D.

<sup>210</sup> *Supra* notes 201–202 and accompanying text.

<sup>211</sup> See Edward Iwata, *Justice: Prosecutors Can't Ask Firms to Waive Legal Privileges*, USA TODAY (Aug. 29, 2008) available at [http://www.usatoday.com/money/companies/regulation/2008-08-28-corporate-crime\\_N.htm](http://www.usatoday.com/money/companies/regulation/2008-08-28-corporate-crime_N.htm) (last visited Sept. 1, 2008) (noting that “[t]he proof will be in the pudding as to how [the Guidelines] are applied”).

<sup>212</sup> *See id.*

<sup>213</sup> *Supra* note 3 and accompanying text.

<sup>214</sup> *Supra* notes 188–191.

<sup>215</sup> *Id.*

In order to restore balance to our system of criminal justice, the Department of Justice should abide by its new Guidelines and should not encourage a culture of underground privilege waivers and pressure on corporations to cut off employees' legal fees. Additionally, due to the shortcomings inherent in "guidelines" and the limited reach of *Stein*, Congress should pass, and the President should sign, the Attorney-Client Privilege Protection Act of 2008.