

FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS: THE THOMPSON MEMORANDUM AND ITS AFTERMATH

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I. INTRODUCTION

The early years of the twenty-first century were a time of great concern for Congress as well as the American working and investing public.¹ As was revealed by the unearthing of corporate scandals and the publicity surrounding large-scale bankruptcies, such as those of Enron and WorldCom, shareholders were defrauded and misled, and the public's faith in financial mar-

1. See *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 110 (2006) [hereinafter *Hearings*] (statement of Paul J. McNulty, Deputy Att'y Gen., United States Department of Justice).

kets and in corporate America in general was deeply shaken.² The cumulative effects of these events resulted in public outcry, both by the American people and their congressional representatives, that the responsible parties be brought to justice.³

In order to restore the reputation of America's capital markets and ensure that these markets would be "honest places of enterprise" in the future, several branches of the federal government began to retaliate against the incipient culture of corruption threatening to destroy the integrity of corporate America.⁴ At the direction of President George W. Bush, the Corporate Fraud Task Force was formed in order to supervise the law enforcement response of the federal government.⁵ In addition, Congress passed the Sarbanes-Oxley Act of 2002,⁶ the Sentencing Commission issued new guidelines that increased financial fraud penalties;⁷ and new rules were announced by the Securities and Exchange Commission (SEC) "obligat[ing] attorneys to report evidence of corporate wrongdoing to the highest levels of corporate governance."⁸

This Comment sets out the response of the United States Department of Justice (DOJ) to the issues raised by this trend of corporate wrongdoing, specifically the issuance of a memorandum entitled *Federal Prosecution of Business Organizations*, more commonly known as the Thompson Memorandum. Part II of this Comment elucidates the general provisions of that memorandum and outlines the relevant divergence in policy from the predecessor guidelines contained within the Holder Memorandum. Additionally, it identifies the DOJ's particular concerns with regard to investigating a corporate entity which, by its very nature, can pose significant problems in the investigatory process. Part II also sets out the government's attempt to combat these difficulties by directing federal prosecutors to consider the cooperation of a corporation in making a charging decision, defining coop-

2. See *id.*; Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, Prepared Remarks at the Lawyers for Civil Justice Membership Conference Regarding the Department's Charging Guidelines in Corporate Fraud Prosecutions (Dec. 12, 2006) [hereinafter Paul J. McNulty, Prepared Remarks], available at http://www.usdoj.gov/archive/dag/speeches/2006/dag_speech_061212.htm.

3. See *Hearings*, *supra* note 1, at 110 (statement of Paul J. McNulty, Deputy Att'y Gen., United States Department of Justice); Paul J. McNulty, Prepared Remarks, *supra* note 2. Senator Leahy, during a hearing before the Committee on the Judiciary in July of 2002, accurately captured the majority feelings of Capitol Hill and the country when he observed that "We cannot have a system where a pick-pocket who steals 50 dollars faces more jail time than a CEO who steals 50 million dollars. The integrity of our judicial system depends on accountability." *Hearings*, *supra* note 1, at 110.

4. See Paul J. McNulty, Prepared Remarks, *supra* note 2.

5. Alan Vinegrad, *Government Likely to Go After Corporations: The Department of Justice Has Issued New Guidelines Detailing When it Will Prosecute A Business Entity for Criminal Acts*, NAT'L L.J., Mar. 10, 2003, at A27.

6. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., and other chapters). This Act "impos[ed] a host of new duties on public companies and their executives, directors and outside professional advisors and increase[ed] the penalties for a variety of white-collar crimes." Vinegrad, *supra* note 5.

7. Vinegrad, *supra* note 5.

8. *Id.*

eration to include such things as waiving the attorney-client and work product protections and promising support to certain corporate employees.

Part III of this Comment discusses the development of a culture of waiver among the corporate community as an unintended, but very real, consequence of the Thompson Memorandum policy. Understanding the development of this culture of waiver is unavoidably linked to criticisms of the Thompson Memorandum advanced by commentators—not only was this culture of waiver the most conspicuous consequence of the Thompson Memorandum, but it also served as a breeding ground for lesser included consequences. Part IV examines several significant criticisms of the Thompson Memorandum, specifically its effect on certain key components of the American legal justice system, such as the attorney-client privilege and work product protection doctrine, the constitutionally protected right against self-incrimination, and the constitutionally protected right to counsel.

This Comment also addresses certain attempts made by the DOJ to counter these criticisms by revising its relevant policy, first in issuing the McCallum Memorandum, outlined in Part V, and again more recently in issuing the McNulty Memorandum. Part VI of this Comment scrutinizes the revisions embodied in the McNulty Memorandum and offers both positive and negative commentary as to the effectiveness of the McNulty Memorandum in addressing the qualms of critics and effectively balancing both the need to protect previously sacrosanct rights and privileges and the need to effectively combat corporate corruption. Part VII provides a conclusion.

II. ENACTMENT OF THE THOMPSON MEMORANDUM

A. *General Provisions*

The DOJ, in addition to Congress, the Sentencing Commission, and the SEC, made an aggressive move in direct response to the discomforting trend of corporate scandal. It revised its corporate fraud policy in 2003 in an attempt to alleviate public misgivings directed at corporate America, as evidenced by a declining stock market, and to reinforce the integrity of the public market.⁹ This revision, a memorandum entitled *Federal Prosecution of Business Organizations* (the Thompson Memorandum), was issued on January 20, 2003, by then-U.S. Deputy Attorney General Larry D. Thompson,¹⁰ and announced a revised series of principles to serve as a roadmap for

9. See *Hearings*, *supra* note 1, at 4 (statement of Sen. Patrick Leahy, Ranking Member, S. Comm. on the Judiciary). “[O]ur democracy requires a healthy respect for the law and that criminal wrongdoing has to be punished, and wrongdoers who profit at the expense of ordinary Americans have to be held accountable. That is true for . . . corporate wrongdoers and those who violate the public’s trust.” *Id.*; see also *id.* at 110 (statement of Paul J. McNulty, Deputy Att’y Gen., United States Department of Justice) (“The integrity of our judicial system depends on accountability. . . . [and] the integrity of our public markets depends on the same accountability.”).

10. Memorandum from Larry D. Thompson, Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of

prosecutors in deciding whether to criminally charge a corporate entity.¹¹ The Thompson Memorandum advised prosecutors to consider nine factors, a list illustrative but not exhaustive, in all cases dealing with alleged corporate wrongdoing, including:

the nature and seriousness of the offense, including the risk of harm to the public[;] . . . the pervasiveness of wrongdoing within the corporation[;] . . . the corporation's history of similar conduct[;] . . . the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate[;] . . . the existence and adequacy of the corporation's compliance program[;] . . . the corporation's remedial actions[;] . . . collateral consequences[;] . . . the adequacy of the prosecution of individuals responsible[;] . . . the adequacy of remedies such as civil or regulatory enforcement actions.¹²

These factors were meant to supplement and not to supersede those already in use by prosecutors when determining whether charges should be brought against individuals.¹³

B. Predecessor to the Thompson Memorandum: The Holder Memorandum

The Thompson Memorandum acted as a revision to the previously established Holder Memorandum, issued in June of 1999 by then-U.S. Deputy Attorney General Eric Holder.¹⁴ For the most part, the Thompson Memorandum mirrored the Holder Memorandum, deviating only in that it was intended to serve as a mandatory guideline for all prosecutors.¹⁵ This neces-

Dep't Components, U.S. Attorneys, regarding Principles of Federal Prosecution of Business *Organizations* (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm [hereinafter Thompson Memorandum].

11. *Id.*

Corporations are 'legal persons,' capable of suing and being sued, and capable of committing crimes. Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents. To hold a corporation liable for these actions, the government must establish that the corporate agent's actions (i) were within the scope of his duties and (ii) were intended, at least in part, to benefit the corporation.

Id. § I.

12. *Id.* § II.

13. *Id.* "Thus, the prosecutor should weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence; the likelihood of success at trial; [sic] the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of non-criminal approaches." *Id.* (citing U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL §§ 9-27.220 to -230 (1997)).

14. Memorandum from Eric Holder, Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't. Components, U.S. Attorneys, regarding Federal Prosecution of Corporations (June 16, 1999) [hereinafter Holder Memorandum], available at <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/Chargingcorps.html>.

15. See *United States v. Stein*, 435 F. Supp. 2d 330, 338 n.12 (S.D.N.Y. 2006) ("The Thompson Memorandum sets forth nine factors that federal prosecutors *must* consider in determining whether to charge a corporation or other business organization." (emphasis added) (citation omitted)). In contrast, consideration of the various factors set forth in the Holder Memorandum was not mandatory. "Federal

sitated that, while prosecutors were granted “wide latitude” to weigh all relevant factors in order to reach a decision as to the proper treatment of the corporate entity at issue, they were required to consider the nine listed factors.¹⁶ In doing so, they were instructed to “ensure that the general purposes of the criminal law . . . [were] adequately met, taking into account the special nature of the corporate ‘person.’”¹⁷ Additionally, prosecutors were directed to treat corporations neither more leniently nor more harshly than individuals as a result of the artificial nature of the corporation and were urged to keep in mind the tangible benefits resulting from “[v]igorous enforcement of the criminal laws against corporate wrongdoers.”¹⁸ Through the Thompson Memorandum, the DOJ made clear its ambition, by appropriately indicting a corporation guilty of wrongdoing, to “address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime.”¹⁹ Through the Thompson Memorandum, the DOJ intended to give prosecutors the weapons necessary to function as an effective frontline force in heading off the culture of fraud pervasive at that time.²⁰

C. Responding to the Problems Presented in Investigating Corporate Entities

An objective of the DOJ in issuing the revisions contained within the Thompson Memorandum was to address and elucidate specific problems necessarily characteristic of investigating corporate conduct.²¹ One such problem is that of effectively ferreting out culpable agents and sources of criminal malfeasance within a large corporation—where “[l]ines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries.”²² Recognizing that a corporation’s cooperation in a complex investigation is crucial to locating relevant evi-

prosecutors were free to take [the Holder Memorandum] into account, or not, as they saw fit.” *Id.* at 337.

16. Thompson Memorandum, *supra* note 10, § II. The factors listed in the Thompson Memorandum are meant to serve as guidance to prosecutors and are not meant to mandate any particular result. *Id.* While all factors must be considered, some factors may not be relevant at all in a given case while others may be of vital importance. *Id.* In fact, a single factor might, in some cases, override all others and mandate prosecution regardless of other present or absent factors. *Id.*

17. *Id.* (expressing that general purposes driving the criminal law include: “assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities”).

18. *Id.* § I. It is very likely that when a corporation is indicted for “criminal conduct that is pervasive throughout a particular industry” it will take immediate steps to correct its conduct, and “thus an indictment often provides a unique opportunity for deterrence on a massive scale,” in addition to resulting in specific deterrence. *Id.*

19. *Id.*

20. *See id.*

21. *See id.*; *id.* § VI (explaining that because “a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself” there is a need to treat the corporate entity different than that of an individual when deciding whether or not to charge the entity with wrongdoing).

22. *Id.* § VI.

dence and necessary to ensure the accountability of those responsible,²³ the Thompson Memorandum's revisions focused on "increas[ing] emphasis on and scrutiny of the authenticity of a corporation's cooperation."²⁴ Taking into account the possibility of corporations under investigation feigning cooperation while "circl[ing] the wagons" around culpable agents,²⁵ the Thompson Memorandum expanded the DOJ's privilege waiver policy.²⁶ In a provision that would become the central point of debate in the controversy surrounding DOJ policy, prosecutors were instructed to take into account the extent to which a corporation cooperated with the government when deciding whether or not to charge the corporate entity criminally—and, "[i]n gauging the extent of . . . cooperation, the prosecutor [could] consider the corporation's willingness . . . to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection."²⁷

D. Defining Cooperation

Elaborating on this principle, the Thompson Memorandum authorized prosecutors, in making an assessment as to the sufficiency of the corporation's cooperation, to weigh "the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel."²⁸ However, as a caveat, the policy directly stated that the waiver of privileges is not an "absolute requirement" and should be weighed as just one of many factors in deciding whether or not to criminally charge the corporation.²⁹ In addition to scrutinizing waiver of attorney-client and work product protection privileges as possible indications of cooperation, prosecutors were also

23. *See id.*

24. *Id.* introductory cmt.

25. *See* E. Lawrence Barcella, Jr., Kirby D. Behre & James D. Wareham, *Cooperation with Government is a Growing Trend: As Prosecutions Intensify, Companies and Executives are Learning to Play Ball*, NAT'L L.J., July 19, 2004, at S2; Thompson Memorandum, *supra* note 10, § VI.

26. *See Hearings*, *supra* note 1, at 22–23 (statement of Karen J. Mathis, President, American Bar Association).

27. Thompson Memorandum, *supra* note 10, § VI.

28. *Id.*; *see also Hearings*, *supra* note 1, at 114–15 (statement of Paul J. McNulty, Deputy Att'y Gen., United States Department of Justice).

"The Department opens an investigation of a corporation and the company tells us it wants to fully cooperate. We ask the company to tell us the facts Often, the company has hired attorneys to conduct an internal investigation, and it has learned the facts through [this process] If the company wants to cooperate, it has to tell us the facts and identify the wrongdoers. . . . [I]f the company can't get us the facts and identify the culprits without waiving the privilege, for whatever reason, then prosecutors may ask the company . . . to waive the privilege."

Id.

29. *See* Thompson Memorandum, *supra* note 10, § VI. Although waiver of privileges is not mandatory, critics of the Thompson Memorandum argued that a culture of waiver had developed which evidenced the fact that corporations reasonably believed that failure to waive privileges would almost certainly result in negative consequences, including, but not limited to, indictment. *See infra* notes 32–48 and accompanying text.

prompted to consider “a corporation’s promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government’s investigation pursuant to a joint defense agreement.”³⁰ Regardless of the level of a corporation’s purported cooperation, no automatic exemption from prosecution resulted.³¹

III. TROUBLING CONSEQUENCE: DEVELOPMENT OF A CULTURE OF WAIVER

By 2004, a trend had emerged in the investigation of corporate crime— “[c]ooperati[on] with the government—not by choice—[was] often the only road to survival for both corporations and their executives.”³² Prosecutors began, as a matter of policy, to “leverage the important carrot of ‘cooperation’ to extract waivers of privilege . . . seriously undermin[ing] the quality of legal representation available to companies faced with allegations of wrongdoing.”³³ And, because the stigma of a criminal conviction can act as a death knell for a corporate entity, such as in the case of the accounting firm Arthur Andersen,³⁴ corporations began to routinely capitulate to the demands of prosecutors and the dictates set forth in the Thompson Memorandum—often waiving attorney-client and work product protection privileges and taking other steps to be viewed as cooperative.³⁵ While the DOJ remained steadfast in its position that the government “does not force corporations to do anything that [it] is not in their business interest to do,”³⁶ the

30. Thompson Memorandum, *supra* note 10, § VI (footnote omitted). The DOJ does make clear that a corporation should not be seen as failing to cooperate by complying with governing law, as “[s]ome states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt.” *Id.* § VI n.4.

31. *Id.* § VI.

32. Barcella, Jr. et al., *supra* note 25.

33. 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, 160 (2000); see also *The McNulty Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 53 (2007) [hereinafter *McNulty Hearings*] (statement of Karen J. Mathis, President, American Bar Association) (“[T]he Thompson Memorandum and other similar federal policies led many prosecutors and other law enforcement officials to pressure companies and other entities to waive their privileges on a regular basis as a condition for receiving cooperation credit during investigations.”).

34. Lynnley Browning, *Justice Department is Reviewing Corporate Prosecution Guidelines*, N.Y. TIMES, Sept. 13, 2006, at C3 (“Companies that do not demonstrate cooperation face a greater risk of indictment—which can be a death sentence, as it was for the accounting firm Arthur Andersen in 2002.”); see also Steve Seidenberg & Tamara Loomis, *DOJ Gets Tougher on Corporations: Revised Guidelines for Bringing a Criminal Case*, NAT’L L.J., Feb. 24, 2003, at A13 (noting that Arthur Andersen was an exception to the general culture of waiver, “taking its case to trial rather than simply rolling over” and quoting Steven Kimelman, a white-collar criminal defense lawyer in Washington, as saying, “And look what happened to [Arthur Andersen]”).

35. See Leonard Orland, *The McNulty Memorandum: Not a Real Remedy*, NAT’L L.J., Jan. 1, 2007, at 27 (explaining that corporations were “faced with the stark reality that corporate indictment could mean corporate death”).

36. Pamela A. MacLean, *Defense Bar Smells Blood: They’re Pushing Back Against DOJ Tactics on Legal and Political Fronts*, NAT’L L.J., Aug. 21, 2006, at S6 (quoting Kathleen Blomquist, United States Department of Justice Spokeswoman).

argument is really that the government made waiver of privileges in a corporation's best "business interest" by threatening to label it "uncooperative" under the Thompson Memorandum.³⁷

Being labeled uncooperative by the government was a threat that could have a detrimental effect on a corporation, "not just on charging . . . decisions, but on [a corporation]'s public image, stock price, and credit worthiness as well"—making it, as a practical matter, almost always in a corporation's best business interest to submit to any requests of the government made under the Thompson Memorandum.³⁸ Being viewed as uncooperative also greatly increased the corporation's chances of being indicted.³⁹ Further exacerbating this problem was a lack of specificity on the part of the DOJ and the directives of the Thompson Memorandum. Critics claimed that "[m]uch of the Memorandum's coercive power [was a result of] its lack of specific, concrete language" disclosing and making clear exactly how prosecutors would make a decision regarding whether to indict a corporation—including "what weight they [would] assign to the various factors."⁴⁰ As a result of this lack of specificity, companies "reasonably consider[ed] each of the Thompson Memorandum factors to be mandatory" and proceeded under the assumption that a failure to meet any one of the factors would be glaringly apparent and put the corporation at great risk of indictment.⁴¹

The label of "uncooperative" was made more stigmatizing by language added to the Federal Sentencing Guidelines by the U.S. Sentencing Commission in November of 2004.⁴² This new language, found in the Commentary to Section 8C2.5, made it clear that for a corporation to receive credit for helping the government in its investigation, and thereby qualify for a reduced sentence, the corporation could be required to waive important privileges "if 'such waiver [was] necessary in order to provide timely and thorough disclosure of all pertinent information known to the organiza-

37. See *Hearings*, *supra* note 1, at 85 (statement of Karen J. Mathis, President, American Bar Association).

38. *Id.*; see *McNulty Hearings*, *supra* note 33, at 53 (statement of Karen J. Mathis, President, American Bar Association).

39. *Hearings*, *supra* note 1, at 72 (statement of Thomas J. Donohue, President and CEO, United States Chamber of Commerce).

40. *Hearings*, *supra* note 1, at 127 (statement of Edwin Meese III, Ronald Reagan Distinguished Fellow in Public Policy and Chairman, Center for Legal & Judicial Studies, The Heritage Foundation). *But cf. id.* at 116, 114 (statement of Paul J. McNulty, Deputy Att'y Gen., United States Department of Justice) (asserting that "waiver of attorney-client privilege is 'not an absolute requirement'" and accusing critics of distorting the DOJ's position on waiver and "its importance in the overall charging decision by inaccurately describing waiver as essential or the only thing prosecutors consider").

41. *Id.* at 127 (statement of Edwin Meese III, Ronald Reagan Distinguished Fellow in Public Policy and Chairman, Center for Legal & Judicial Studies, The Heritage Foundation). "Given the Thompson Memorandum's indefiniteness about how the government will weigh its nine factors and the examples provided for each, in my judgment, corporate counsel would be irresponsible to advise their clients" that the factors were anything less than mandatory. *Id.*

42. See *id.* at 83 (statement of Karen J. Mathis, President, American Bar Association); U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 (2004). This language was later deleted. See *infra* notes 140–141 and accompanying text.

tion.”⁴³ Not only did this language lead prosecutors to request waivers of privileges in more instances than before,⁴⁴ but it also made it nearly impossible for corporations to deny such requests—due to “the harsh consequences of having to defend against criminal charges, and because, in cases where criminal charges [were] brought and sustained, corporations [now began to] depend on the leniency in sentencing that [could] result[] from providing assistance satisfactory to the prosecution.”⁴⁵ Increased penalties for white-collar crime, “greater prosecutorial zeal” in investigating and prosecuting such crimes,⁴⁶ and the inability to know the full range of repercussions that would result from a failure to be seen as cooperative created what could only be described by some as “the perfect prosecutorial storm,”⁴⁷ resulting in a culture of waiver with ubiquitous consequences for “previously sacrosanct privileges.”⁴⁸

IV. SEVERAL MAJOR CRITICISMS OF THE THOMPSON MEMORANDUM

The focus of the Thompson Memorandum on the issue of cooperation became the source of heated debate; the major point of contention was the effect of the Thompson Memorandum on several key components of the American legal justice system: the attorney-client privilege⁴⁹ and work product protection doctrine,⁵⁰ the constitutionally protected right against

43. TASK FORCE ON THE ATTORNEY-CLIENT PRIVILEGE, AM. BAR ASS'N, ABA REPORT ON ATTORNEY-CLIENT PRIVILEGE 15 (Aug. 2005) (quoting U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 (2004)), available at <http://www.abanet.org/poladv/documents/report111.pdf> [hereinafter ABA REPORT].

44. See *Hearings*, *supra* note 1, at 85 (statement of Karen J. Mathis, President, American Bar Association). In March of 2006, a survey conducted by the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, and the American Bar Association of over 1,200 corporate counsel revealed that “52% of in-house respondents and 59% of outside respondents” believed that “there ha[d] been a marked increase [of] waiver requests as a condition of cooperation in recent years.” *Id.* They also indicated that “when prosecutors gl[ave] a reason for requesting privilege waiver, the [Thompson Memorandum] and the 2004 amendment to the Sentencing Guidelines were among the reasons most frequently cited.” *Id.*

45. ABA REPORT, *supra* note 43.

46. Barcella, Jr. et al., *supra* note 25.

47. Stanley A. Twardy, Jr. & Edgardo Ramos, *Fighting on Several Fronts: Today's White-Collar Crime Defendant May Find Himself Facing Parallel Criminal and Civil Proceedings*, NAT'L L.J., July 19, 2004, at S1.

48. See Barcella, Jr. et al., *supra* note 25.

49. The attorney-client privilege has long been recognized in the common law, far longer than any of the other privileges addressing confidential communications. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); see also *Hearings*, *supra* note 1, at 72 (statement of Thomas J. Donohue, President and CEO, United States Chamber of Commerce) (“The attorney client-privilege is a cornerstone of America’s justice system—this privilege even predates the Constitution and the Bill of Rights.”) It protects the confidentiality of communications between an attorney and a client preventing disclosure of certain information given by the client to the attorney for purposes of receiving legal assistance. See *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950).

50. The work-product of an attorney “prepared in anticipation of litigation or for trial” is protected from discovery by the Federal Rules of Civil Procedure with the exception of a few circumstances, such as those where there is “a showing of substantial need and [an] inability to obtain the equivalent without undue hardship.” *Upjohn*, 449 U.S. at 398 n.7, 400 (citing FED. R. CIV. P. 26(b)(3)).

self-incrimination,⁵¹ and the constitutionally protected right to counsel.⁵² Although it is generally acknowledged that cooperation of a corporation plays a large role in the effectiveness of a government investigation,⁵³ serious questions were raised as to whether the DOJ, through the Thompson Memorandum, had gone too far in both defining and evaluating cooperation as pertaining to the conduct of corporations—“upset[ting] the constitutional balance envisioned by the framers, impermissibly intrud[ing] upon the employer/employee relationship, and in real life, result[ing] in the coerced waiver of cherished constitutional rights.”⁵⁴ While it is important that the DOJ arms prosecutors with the necessary tools to protect the welfare of the public in matters of corporate malfeasance, critics argued that the policies pertaining to cooperation contained within the Thompson Memorandum “so drastically altered the enforcement landscape that they threaten[ed] the very foundation of [the] adversarial system.”⁵⁵ And, while there is no denying that the Thompson Memorandum effectively aided prosecutors in cracking down on corporate misconduct,⁵⁶ critics pointed out that the minacious culture of waiver⁵⁷ ushered in by the Thompson Memorandum carried with it side effects which could be detrimental to the long-established legal rights of corporations and their employees.

A. *Thompson Memorandum’s Erosion of Attorney-Client Privilege and Work Product Protection Doctrine*

The consequences of corporations routinely waiving the attorney-client privilege and work-product doctrine could prove to be pervasive, creating concerns not only for individual corporations and their employees, but also “carr[ying] a significant risk for the traditional sanctity of the attorney-client relationship and endanger[ing] the benefits that relationship has historically provided to a society founded on the rule of law.”⁵⁸ While the DOJ and federal prosecutors intended the Thompson Memorandum’s directive on cooperation, and its call for waiver of privileges, to result in a steady increase of compliance with the law by facilitating “effective and thorough investigations” in the case of corporate entities, critics believed the directives on co-

51. “No person shall be . . . compelled in any criminal case to be a witness against himself . . .” U.S. CONST. amend V.

52. “In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.” *Id.* amend VI.

53. See Thompson Memorandum, *supra* note 10, § VI.

54. *Hearings, supra* note 1, at 133 (statement of Mark B. Sheppard, Esq., Partner, Sprague & Sprague).

55. *Id.* at 132.

56. See *id.* at 111 (statement of Paul J. McNulty, Deputy Att’y Gen., United States Department of Justice). “Since 2002, the Department of Justice obtained more than 1000 corporate fraud convictions and convicted more than 160 corporate presidents and executive officers. . . . These prosecutions . . . have helped to instill a climate of accountability in corporate boardrooms, and to restore investors’ confidence in the integrity of our markets.” *Id.*

57. See *supra* notes 32–48 and accompanying text.

58. George J. Terwilliger III, *Privilege in Jeopardy*, NAT’L L.J., Feb. 9, 2004, at 17.

operation would have the opposite effect for several reasons.⁵⁹ First, the waiver policies developed under the Thompson Memorandum created an unstable environment in the corporate workplace by pitting the corporate entity against its executives and employees and forcing both to make a series of Hobson's choices, both before and during an investigation. Second, critics were very concerned about the implications of the Thompson Memorandum on the relationship between attorney and client—noting that their concerns were warranted by the “chill” which had developed in attorney-client communications as a result of the DOJ's waiver policies. Finally, critics accused the DOJ's waiver policies of encroaching on corporate employees' constitutional right against self-incrimination.

Waiver policies resulting from the Thompson Memorandum were criticized as driving “a wedge between the corporate entity and the executives and employees the company relie[d] upon for the shareholders' benefit, even when these individuals ha[d] done nothing wrong.”⁶⁰ A corporation, to be labeled cooperative, had to purposefully work on behalf of the DOJ and the prosecution—“snoop[ing] around, find[ing] the culprits and turn[ing] them in”⁶¹—effectively “deputizing ‘Corporate America’ as an arm of law enforcement at the expense of principles that lie at the core of [the American] adversarial system of justice.”⁶² In addition, it necessarily forced corporate managers to think of themselves and the liability that they might face first, instead of focusing on the “broader good of the enterprise that should be—and once was—at the core of their professional lives.”⁶³ This placed not only corporate employees, but also the larger corporation, in a precarious position—often having the effect of undermining internal compliance programs.

A corporation that decided to cooperate with the government, pursuant to the Thompson Memorandum, placed its employees between a rock and a hard place, as they were often pressured by both external and internal forces to cooperate with corporate attorneys who were, in turn, cooperating with the prosecution. Critics argued that this arrangement created a situation

59. See *Hearings supra* note 1, at 72 (statement of Thomas J. Donohue, President and CEO, United States Chamber of Commerce) (testifying that “[a]n uncertain or unprotected attorney-client privilege actually diminishes compliance with the law”); see also Barcella Jr. et al., *supra* note 25, at S4. The DOJ asseverates that procedures requiring complete cooperation “address corporate fraud more efficiently. . . . [However, t]he forced waiver of privileges, denial of indemnification and accelerated job terminations may . . . make it more difficult for corporations to conduct the very types of internal investigations that the DOJ wants turned over to them.” *Id.*

60. William R. McLucas, Howard M. Shapiro & Julie J. Song, *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. CRIM. L. & CRIMINOLOGY 621, 622 (2006); see also Seidenberg & Loomis, *supra* note 34 (quoting Kirby Behre, a partner at Paul, Hastings, Janofsky & Walker's Washington, D.C. office, as stating that “[t]he [Thompson] guidelines create a ‘virtual requirement that the company drive a wedge between itself and its officers, directors and employees’”); Terwilliger III, *supra* note 58.

61. See Seidenberg & Loomis, *supra* note 34 (quoting Kirby Behre).

62. Zornow & Krakaur, *supra* note 33, at 147.

63. McLucas et al., *supra* note 60, at 622.

where employees began to fear being “thrown to the wolves.”⁶⁴ Cooperating with their employer corporation meant cooperating with the government, often at the risk of their own criminal indictment; however, the only alternative, failing to cooperate, opened them up to the risk of losing the source of payment for their legal fees, getting fired, or worse.⁶⁵ This situation, besides gravely encroaching on employees’ constitutional rights,⁶⁶ was decried by critics as having the effect of stifling open communication between employees and their corporate employer, via corporate counsel.⁶⁷ After all, the ability of a corporation to effectively solicit sensitive material from its employees often rests on the promise of confidentiality.⁶⁸ Through open lanes of confidential communication, the corporation is able to foster an environment whereby employee malfeasance is reported and controlled.⁶⁹ Critics warned that if employees, as a result of the DOJ’s waiver policies, became uncooperative in internal reviews,⁷⁰ corporations would have a difficult time staying in compliance with the law and the government would find it particularly challenging to effectively investigate once it concluded that the law may have been broken.⁷¹

Additionally, the effect of the Thompson Memorandum’s directive involving cooperation was to put the corporation in a difficult position. Upon acquiring sensitive information from an employee regarding potentially suspect conduct, the corporation was pressured to break confidentiality and waive attorney-client privilege, essentially breaking a promise to its employees.⁷² The only other option, aside from refusing to cooperate with the government, was to refuse to promise an employee confidentiality or protection in the first place and, in “[d]oing so[,] . . . forgo one of the most effective means of monitoring employee conduct, which itself would increase the risk of indictment and increased penalties.”⁷³ Critics warned that leaving corporate entities between Scylla and Charybdis could have a detrimental effect on internal compliance programs that are all too often dependent on employees and their view of the corporate workplace as an environment rewarding of honest behavior.⁷⁴ After all, “[w]hen employees view the corporate environment as one in which trustworthy behavior is rewarded and

64. See MacLean, *supra* note 36.

65. See *infra* notes 99–126 and accompanying text.

66. See *infra* notes 99–126 and accompanying text.

67. See John Hasnas, *End the Draft*, NAT’L L.J., Apr. 24, 2006, at 23.

68. See *id.* (explaining that corporations generally set up confidential employee hotlines or promise the protection of attorney-client privilege in order to get employees to confide in corporate counsel).

69. See *id.*

70. “Some corporate executives have stopped fully cooperating in internal reviews, realizing that the company is simply gathering evidence for the government to use against those employees.” Barcella, Jr. et al., *supra* note 25, at S4.

71. See *id.*

72. See Hasnas, *supra* note 67.

73. *Id.*

74. See *id.* “[C]ompanies may have difficulty conducting internal inquiries if employees do not talk because they know their statements may end up being handed over to the government.” Jonathan D. Glater, *The Squeezing of Lawyer-Client Privilege*, N.Y. TIMES, Sept. 7, 2005, at C6.

management follows through on its ethical commitments, they adhere to rules more strongly and are more willing to inform management about those who do not”—resulting in “a measurably lower incidence of rule breaking” in “firms that honor their promises, respect employees’ privacy and rigorously adhere to programs of procedural justice.”⁷⁵ For these reasons, the Thompson Memorandum’s focus on cooperation appeared to critics to undermine the ability of a corporation to internally self-regulate with the help of its employees by forcing corporations to work hand in hand with the government or face indictment.⁷⁶

Critics further warned that, not only could the practice of federal prosecutors routinely and aggressively requesting a waiver of privileges have a detrimental effect on the relationship between employer and employee, but it could potentially wreak havoc on the relationship between attorney and client as well⁷⁷—a partnership “long recognized as crucial to the ability of organizations to make informed decisions in their own best interests—and, in the case of publicly traded entities, in the interests of their shareholders.”⁷⁸ The attorney-client relationship is built on a platform of confidentiality, reflected in and protected by the attorney-client privilege, which encourages clients to fully disclose all relevant facts and concerns to the attorney.⁷⁹ The Thompson Memorandum’s waiver policy threatened to seriously weaken that platform, as demonstrated by the protestation of critics—including a telling plethora of corporate counsel—who warned that a “chill” had begun to pervade the atmosphere surrounding communications between corporate counsel and their clients.⁸⁰ This trend toward less-than-open attorney-client communication was part and parcel of the culture of waiver present at the time. Corporations, their executives and employees, were under the belief, whether correct or not,⁸¹ that a waiver request would be made in almost every scenario and acted accordingly; they were exceedingly apprehensive about disclosing information to corporate counsel which might later be used against them.⁸² This proposition threatened to result in very serious consequences, including additional corporate malfeasance.

75. Hasnas, *supra* note 67.

76. *See id.* “[T]his is precisely the type of corporate behavior that current federal law and law enforcement policy punish. Surely there is a way for the government to wage war on white-collar crime without preventing businesspeople from meeting their ethical obligations or undermining the corporate culture most effective at reducing illegal behavior.” *Id.*

77. *See* Terwilliger III, *supra* note 58.

78. *Id.*

79. *See Hearings*, *supra* note 1, at 75 (statement of Sen. Russ Feingold, Member, S. Comm. on the Judiciary).

80. *See* Glater, *supra* note 74.

81. The DOJ repeatedly asserted that prosecutors rarely formally solicited waiver of the attorney client privilege in investigations where they used the Thompson Memorandum as their guideline. *See, e.g., Hearings*, *supra* note 1, at 116 (statement of Paul J. McNulty, Deputy Att’y Gen., United States Department of Justice).

82. *See infra* notes 91–98 and accompanying text; *see also* Glater, *supra* note 74 (citing a bar association report which “note[d] that while it is difficult to determine how frequently companies are asked by regulators and prosecutors to waive the privilege, those interviewed by the committee said[,] ‘[T]hese requests, backed by an express or implied threat of harsh treatment for refusing, have become increas-

Confidentiality and the relevant privileges in a corporate context permit officers and employees of corporations to speak openly with regard to questions and concerns which often arise due to the complexity of a corporation's nature in order to make sure that the corporation remains in compliance with the law.⁸³ It is in the ability of corporate executives and employees to be fully forthcoming, facilitating complete disclosure, that "one of the most effective methods of detecting and stopping malfeasance" is rooted—that of self-investigation and internal regulation.⁸⁴ However, as a result of the Thompson Memorandum's policy on waiver, critics reasonably began to postulate that "[i]f company employees responsible for compliance with complicated statutes and regulations kn[ew] that their conversations with attorneys [were] not protected, they w[ould] simply choose not to seek legal guidance."⁸⁵ Therefore, a possible result of a vulnerable attorney-client privilege is that corporations could fail to comply with the law, not intending to do so, but due to insufficient communication between legal counsel and corporate executives and employees.⁸⁶ Likewise, this "chill" in attorney-client communication also raises problems during the investigation stage for both the government and the corporation, considering that employees who "suspect that anything they say to their attorneys can be used against them" will be disinclined from being completely forthcoming.⁸⁷ This result would substantially handicap the ability of corporations and the government "to find out what went wrong, punish the wrongdoers, and correct the company's compliance system."⁸⁸ It certainly appears, therefore, that the Thompson Memorandum's directives as to waiver, meant to increase corporate compliance with the law, were actually at risk of working against that objective by making it harder for corporations to stay in compliance with the law in the first place and then increasingly difficult for corporations and the government to correct the malfeasance and punish the culpable parties after the fact.

ingly common").

83. See *infra* notes 91–98 and accompanying text.

84. *Hearings, supra* note 1, at 75 (statement of Sen. Russ Feingold, Member, S. Comm. on the Judiciary).

85. *Id.* at 72 (statement of Thomas J. Donohue, President and CEO, United States Chamber of Commerce).

86. *Id.* at 73. Compounding this problem is the corporate employee's shaken faith as to how he will be treated by his corporate employer. The corporate employee has reason to fear that he will be sacrificed by the corporation if need be—making it even more likely that he will fail to be totally open and forthcoming with corporate counsel. See *supra* notes 64–71 and accompanying text.

87. See *Hearings, supra* note 1, at 73 (statement of Thomas J. Donohue, President and CEO, United States Chamber of Commerce).

88. See *id.*

B. Thompson Memorandum Policy: Infringement on the Right Against Self-Incrimination

The Fifth Amendment right against self-incrimination does not apply to corporations.⁸⁹ Nonetheless, criminal issues implicate the Fifth Amendment right of corporate employees during a government investigation into the possibility of corporate malfeasance.⁹⁰ Practically, during the process of internal investigations, corporate counsel will often question employees about their knowledge of the alleged malfeasance in order to determine what happened, who is responsible, and the best way to proceed.⁹¹ Any communication between the employee and corporate counsel traditionally would be protected under the attorney-client privilege—encouraging the employee to speak freely without being fearful of the adverse consequences of making a disclosure implicating him or her in the wrongdoing.⁹² However, when waiver of the attorney-client privilege is made by a corporate employer, the corporate employee is unprotected as to any statements made to corporate counsel during the internal or external investigation.⁹³ The Fifth Amendment offers no protection to a corporate employee who discloses information to corporate counsel—corporate counsel works for the corporation and is not an agent of the government.⁹⁴ However, corporate counsel can often act as an unofficial agent of the government when cooperating under the Thompson Memorandum⁹⁵—and therein the quandary lies, creating a conflict for employees⁹⁶ and raising issues as to their constitutional right against self incrimination.

Employees, faced with either speaking to corporate counsel and maintaining the façade of cooperation or protecting themselves by remaining quiet and securing outside counsel, have an almost impossible decision to make. By doing the former, employees risk their statements falling into the hands of federal prosecutors and being used against them; but, by making the latter choice, employees risk losing their employment.⁹⁷ Compounding

89. Zornow & Krakaur, *supra* note 33, at 151 (citing *Braswell v. United States*, 487 U.S. 99, 105 (1988)).

90. *See id.*

91. *See id.* at 152–53.

92. *See id.* at 153.

93. *See id.* at 157.

94. *See id.* at 151–52.

95. “Prosecutors are now empowered to expect corporate counsel to act as their deputies. Counsel is expected to encourage employees to give statements without asserting their Fifth Amendment rights and without obtaining independent counsel, despite the potential conflict of interest it poses for both the attorney and the employee.” *Hearings, supra* note 1, at 135 (statement of Mark B. Sheppard, Esq., Partner, Sprague & Sprague).

96. “Employees get squeezed between losing their jobs if they refuse to cooperate with company lawyers, or cooperating and exposing themselves to prosecution.” MacLean, *supra* note 36. And, “[w]hat greater coercive power can someone exert than to take away their job?” *Id.* (quoting Michael Monico, Monico, Pavich & Spevack, and President-Elect, Am. Board of Criminal Lawyers).

97. *See Hearings, supra* note 1, at 75 (statement of Sen. Russ Feingold, Member, S. Comm. on the Judiciary). “If a corporation has no attorney-client confidentiality protection, an employee speaking to corporate counsel . . . has no guarantee that statements made . . . will not later be turned over to federal

this is also the risk that the corporate employer will refuse to pay the employee's legal fees in an attempt to "maintain its eligibility for cooperation consideration."⁹⁸ Practically, there is no safe answer for the corporate employee. (This raises considerable issues as to the inherent unfairness in making an employee choose between invoking a constitutional right on the one hand and not only keeping his employment but also preserving his ability to hire adequate counsel on the other.)⁹⁹ This only adds strain to the relationship between the corporate employer and the corporate employee, further threatening to hinder compliance with the law in addition to encroaching on employees' Fifth Amendment right.

C. Thompson Memorandum's Policy on Consideration of Corporations' Payment or Advancement of Legal Fees: Infringing on Employees' Constitutional Right to Counsel

Not only did critics attack the Thompson Memorandum's directive encouraging prosecutors to consider waiver of privileges as a valid indicator of the level of a corporation's cooperation, but they also issued caustic commentary directed at that part of the Thompson Memorandum which authorized similar consideration of whether a corporation had advanced, or planned on advancing, attorney's fees to its employees. The most noteworthy disparagement to date of the methods employed by prosecutors focused on this issue and was delivered by Judge Lewis A. Kaplan of the United States District Court in Manhattan in June and July of 2006.¹⁰⁰ In two rulings sending "shudders through the Justice Department," Judge Kaplan issued "a scathing criticism of the prosecution's tactics" in the investigation of the accounting firm KPMG.¹⁰¹ The case, involving sixteen former employees of the firm, among others, and some thirty-nine counts of tax evasion, raised considerable questions about the effect of the Thompson Memorandum, and the way it was "wielded by federal prosecutors," on the constitutional right to counsel.¹⁰² Judge Kaplan was specifically concerned with

prosecutors. This forces employees to decide whether to cooperate . . . and give up their legal rights or face firing." *Id.* He goes on to say that "[t]his is a situation no employee should be forced to contemplate." *Id.*

98. Twardy & Ramos, *supra* note 47.

99. See *Hearings*, *supra* note 1, at 135-36 (statement of Mark B. Sheppard, Esq., Partner, Sprague & Sprague).

100. See *United States v. Stein*, 440 F. Supp. 2d 315 (S.D.N.Y. 2006); *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006); Lynnley Browning, *U.S. Tactic on KPMG Questioned*, N.Y. TIMES, June 28, 2006, at C1.

101. Lynnley Browning, *Judge's Rebuke Prompts New Rules for Prosecutors*, N.Y. TIMES, Dec. 16, 2006, at C4. The court "found that prosecutors had invoked the Thompson Memorandum at the very outset of its investigation to pressure KPMG to break its long-standing tradition of paying its employees' legal fees [that] KPMG's payment of legal fees was at the top of the prosecutors' agenda from their very first discussions with KPMG, and . . . that the prosecutors had indicated that the government would not look favorably on the voluntary advancement of legal fees." *Hearings*, *supra* note 1, at 146 (statement of Andrew Weissmann, Esq., Partner, Jenner & Block LLP).

102. *Hearings*, *supra* note 1, at 146 (statement of Andrew Weissmann, Esq., Partner, Jenner & Block LLP).

that part which advised prosecutors “to grant more lenient treatment to firms facing indictment if they forgo paying the legal fees of potentially culpable employees.”¹⁰³ KPMG barely avoided indictment as a corporation, instead entering into a deferred-prosecution agreement.¹⁰⁴ However, “aware that some of its employees were about to be indicted, [it] ended its longstanding practice of advancing legal fees” to its employees.¹⁰⁵ Judge Kaplan attributed this abrupt change in policy to the pressure placed on the firm by prosecutors using the Thompson Memorandum and concluded that “KPMG refused to pay because the government held the proverbial gun to its head” and, “[h]ad that pressure not been brought to bear, KMPG would have paid [the] defendants’ legal expenses.”¹⁰⁶ The government, according to Judge Kaplan, “let its zeal get in the way of its judgment . . . [and] violated the Constitution it is sworn to defend.”¹⁰⁷ At present, KPMG is considered “a textbook example of how firms can avoid indictment by cooperating with prosecutors, in part by firing employees suspected of wrongdoing—even before they are found guilty—and by cutting off legal fees.”¹⁰⁸

This general shift in policy¹⁰⁹—from the customary payment of legal costs,¹¹⁰ codified not only in the bylaws of many corporations, but also in the laws of many states, to cessation in payment of these expenses—proved an alarming trend among corporations after issuance of the Thompson Memorandum in 2003.¹¹¹ While prosecutors, including those who were involved in the indictment of KPMG employees, “vigorously den[ie]d that they use[d] the Thompson memorandum as a club to bludgeon companies to

103. Lynnley Browning, *Judge Questions Clarity of Prosecution’s Tax-Shelter Case*, N.Y. TIMES, Mar. 31, 2006, at C4.

104. *Id.*

105. *Id.* KPMG long had paid for the legal defense of its personnel, regardless of the cost and regardless of whether its personnel were charged with crimes. *Id.* However, KMPG officials, shortly after meeting with prosecutors, limited the advancement of legal fees, stating that:

KMPG would pay an individual’s legal fees and expenses, up to a maximum of \$400,000, on the condition that the individual “cooperate with the government and . . . be prompt, complete, and truthful.” Importantly, however, it went even further. It made clear that “payment of . . . legal fees and expenses will cease immediately if . . . [the recipient] is charged by the government with criminal wrongdoing.”

United States v. Stein, 435 F. Supp. 2d 330, 345–46 (S.D.N.Y. 2006) (footnote omitted).

106. *Stein*, 435 F. Supp. 2d at 336.

107. *Id.* Judge Kaplan accused the government of acting “with the purpose of minimizing [the] 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.

108. Browning, *supra* note 100.

109. KPMG is not the only corporation to shift its policy as a result of the Thompson Memorandum and prosecutorial pressure resulting from it. In March of 2006, executives of Enterasys Networks were granted a short reprieve in their trial by a New Hampshire federal judge after a question arose as to whether the cessation of their legal payments was the result of undue influence. Lynnley Browning, *Judges Press Companies that Cut Off Legal Fees*, N.Y. TIMES, Apr. 17, 2006, at C1. Other corporations, for example Symbol Technologies and HealthSouth, have similarly shifted their policies and ceased paying ex-executives legal bills. *Id.*

110. Historically, “corporations paid the legal fees [of employees] because of a widely held assumption that employees whose jobs were part of a company’s business merited financial support if that business came under scrutiny.” *Id.*

111. *Id.*

cut off legal fees,”¹¹² critics argue that many corporations felt as if they had no choice but to do so as a way to show cooperation in order to avoid indictment.¹¹³ Some might suggest that the KPMG case serves only as an example of prosecutorial misconduct in a specific instance—not as evidence that the Thompson Memorandum itself was somehow defective. However, surveys taken by corporate attorneys¹¹⁴ suggest that, while the actions of prosecutors under the guidance of the Thompson Memorandum may not be what was intended by the DOJ, there is a general consensus among business counsel, both in-house and out, “that methods and tactics similar to those engaged in by the prosecutors in the KPMG tax-shelter investigation are frequently part of the [DOJ]’s standard procedures and practices in white-collar criminal investigations.”¹¹⁵ Illustrative of this understanding is strong evidence that the primary motivation behind the aforementioned shift in policy can be attributed to the need corporations felt “to be in full compliance with the Thompson Memorandum factors so that [they could] avoid being indicted.”¹¹⁶

The Thompson Memorandum’s directive to prosecutors to consider a corporation’s “willingness to take certain punitive actions against its own employees and agents during investigations”¹¹⁷ threatened to have the concomitant effect of denying corporations the autonomy to make an independent decision regarding their corporate practices¹¹⁸ and placing the interests of the corporation against the interests of its employees.¹¹⁹ Additionally, by “discourag[ing] and, as a practical matter, often prevent[ing] companies from providing employees and former employees with [legal fees],” the government effectively acts to attenuate individuals’ access to the resources necessary “to exercise their constitutional rights to defend themselves.”¹²⁰ And, having limited resources to pay legal fees can have “a notable impact, particularly in complex cases that turn on an arcane tax code.”¹²¹ It often means lawyers must find ways to cut corners, ways that, while cost-effective, might not be the most helpful to the client’s case.¹²² It can also keep a defendant from being able to hire an attorney who is skilled and ex-

112. *Id.* (noting that a KPMG spokesman made a statement to the effect that “the firm had not bowed to any government pressure”).

113. *See id.*

114. *See* statistics cited *supra* note 44.

115. *Hearings, supra* note 1, at 128–29 (statement of Edwin Meese III, Ronald Reagan Distinguished Fellow in Public Policy and Chairman, Center for Legal and Judicial Studies, The Heritage Foundation).

116. *See id.* at 147 (statement of Andrew Weissmann, Esq., Partner, Jenner & Block LLP).

117. *Id.* at 92 (statement of Karen J. Mathis, President, American Bar Association).

118. *See id.* at 94 (“The fiduciary duties of the directors in making such decisions are clear, and they are in the best position to decide what is in the best interest of the shareholders.”).

119. *United States v. Stein*, 435 F. Supp. 2d 330, 345 n.54 (S.D.N.Y. 2006) (“Cooperation may have been the best way for KPMG to proceed, but it was not necessarily best for its employees.”).

120. *Id.* at 364.

121. *Browning, supra* note 109.

122. Results of less money for legal fees can be seen in the corners that attorneys’ are forced to cut in an attempt to be cost-effective, such as “sifting through fewer papers in search of evidence, doing less case research, filing fewer motions, hiring fewer expert witnesses, doing fewer background checks and not hiring trial consultants.” *Id.*

perienced in handling complex cases, both initially and for an appeal.¹²³ While CEOs and other top officials of a corporation may be able to cover their defenses through high salaries and personal wealth, most white-collar defendants lack the revenue necessary to bankroll a defense—effective white-collar defenses can easily cost an individual millions of dollars.¹²⁴ It follows that the failure of corporations to advance legal fees to their employees can have a crippling effect on the ability of these defendants to mount an effective defense in complex legal cases.¹²⁵ Furthermore, the Thompson Memorandum has been denounced as “stand[ing] the presumption of innocence principle on its head”—prosecutors, in carrying out the Thompson directives, have often been accused of pressuring companies to fire employees and refuse to pay their legal expenses, among other things, long before the employee has actually been found culpable of wrongdoing.¹²⁶ The cumulative effect of these consequences of the Thompson Memorandum, intended or not, was practices and procedures which “‘fl[ew] in the face’ of . . . the constitutional right to representation and a fair trial.”¹²⁷

V. A SUB-PAR RESPONSE: THE MCCALLUM MEMORANDUM

The totality of the above-mentioned consequences of the Thompson Memorandum’s directive on cooperation led critics to believe that, at a minimum, the Thompson Memorandum “eroded [the] traditional adversarial process and skewed the balance of power between government investigators and their corporate targets.”¹²⁸ They subsequently cried out for a change in policy, attempting to convince the DOJ that the Thompson Memorandum “undermine[d] rather than enhance[d] compliance with the law, as well as the many other societal benefits that are advanced by the confidential attorney-client relationship.”¹²⁹ In 2005, responding to heightened criticism aimed at the Thompson Memorandum policy by members of the legal profession and the business community, the DOJ issued a memorandum from

123. *See id.*

124. *Id.* As a matter of fact, at least one defendant involved in the KPMG case was at risk of going bankrupt as a result of funding her defense. *Id.*; *see also Hearings, supra* note 1, at 136 (statement of Mark B. Sheppard, Esq., Partner, Sprague & Sprague) (noting that “[r]epresentation by experienced counsel in corporate fraud cases could bankrupt an individual,” and that “[f]or some individuals [he has] represented, advancement of fees was essential to having any representation, let alone effective representation of counsel”).

125. *See* Browning, *supra* note 109 (quoting Dan Cogdell, a defense attorney in Houston who represented a defendant in the Enron case, as saying, “[y]ou get what you pay for in this business, and it can certainly cripple a person without the financial means”).

126. *See Hearings, supra* note 1, at 93 (statement of Karen J. Mathis, President, American Bar Association); MacLean, *supra* note 36 (quoting Susan Hackett, Senior Vice President and corporate counsel, Association of Corporate Counsel) (“By waiving privilege, companies ‘are basically throwing employees under the bus before a determination of guilt is made.’”).

127. Browning, *supra* note 109.

128. McLucas, Shapiro & Song, *supra* note 60, at 622.

129. *Hearings, supra* note 1, at 87 (statement of Karen J. Mathis, President, American Bar Association).

then-acting Assistant Attorney General Robert McCallum specifically entitled *Waiver of Corporate Attorney-Client and Work Product Protections*, commonly known as the McCallum Memorandum.¹³⁰ Unfortunately, this laudable attempt to alleviate the misgivings of critics failed. The McCallum Memorandum, intending to provide “greater uniformity, predictability, and transparency to the process that federal prosecutors use when requesting a waiver of a business organization’s attorney-client privilege,”¹³¹ mandated that all United States attorneys would be required to obtain approval from supervising prosecutors before seeking privilege waivers in any given case.¹³² In addition, it encouraged U.S. Attorneys’ offices to put the memorandum into effect by adopting their own local policies as to when to seek waiver.¹³³ While the DOJ believed that it was adequately addressing the qualms of its critics by reigning in overly aggressive prosecutors, such as those involved in the KPMG investigation,¹³⁴ it only invited new hostility. Doubting the motives of the DOJ, many opined that the new directive was issued purely to “silence critics who ha[d] complained about the truly offensive waiver requests” without really intending to amend the system.¹³⁵ Substantively, commentators quipped that the McCallum Memorandum was “seriously flawed, providing no standards, no real guidance and no meaningful oversight,” and doubted that it would accomplish anything at all with respect to addressing and eradicating the aggressive policies used by federal prosecutors in requesting waivers of privileges.¹³⁶ It was proposed that, instead of attempting to reign in aggressive prosecutors by requiring them to seek permission before first making a request, it may have been “far better if the DOJ had [developed] guidelines limiting when requests could be made.”¹³⁷

130. Memorandum from Robert D. McCallum, Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components, U.S. Attorneys, regarding Waiver of Corporate Attorney-Client and Work Product Protection (Oct. 21, 2005), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/AttorneyClientWaiverMemo.pdf [hereinafter McCallum Memorandum]. Paul McNulty testified before the Senate Judiciary Committee that the DOJ had “worked diligently with corporate counsel and attorneys in private practice and met with them at their request numerous times to consider their views.” *Hearings, supra* note 1, at 118 (statement of Paul J. McNulty, Deputy Att’y Gen., United States Department of Justice). According to McNulty, “[i]t was these discussions, together with substantial input from [DOJ] field offices, which led the Department to issue the *McCallum* Memo . . . [which] provides that prosecutors seeking waivers must first obtain supervisory approval before making such a request.” *Id.*

131. *Hearings, supra* note 1, at 130 (statement of Edwin Meese III, Ronald Reagan Distinguished Fellow in Public Policy and Chairman, Center for Legal and Judicial Studies, The Heritage Foundation).

132. *Id.* at 118 (statement of Paul J. McNulty, Deputy Att’y Gen., United States Department of Justice).

133. *See id.*

134. *See* Browning, *supra* note 100; *see also* *Hearings, supra* note 1, at 118–19 (statement of Paul J. McNulty, Deputy Att’y Gen., United States Department of Justice) (testifying before the Senate Judiciary Committee, Paul McNulty claimed that the McCallum Memorandum was “a strong and fair response to corporate counsel’s complaints that individual [prosecutors] had too much autonomy in making waiver requests during an investigation” under the Thompson Memorandum).

135. *See, e.g.*, Stephen W. Grafman & Jeffrey L. Bornstein, *New Memo Won’t Help*, NAT’L. L.J., Nov. 14, 2005, at 31.

136. *See id.*

137. Jeremy D. Frey, Commentary, *Privilege Still on Losing End in Corporate-Waiver Dispute: New*

The McCallum Memorandum was not only accused of effectively ignoring the significant waiver issues surrounding implementation of Thompson Memorandum directives on cooperation,¹³⁸ but it was also viewed by some as making matters worse.¹³⁹ Nonetheless, it did appear that change was in the air, as criticism became stronger and the DOJ and other governmental entities began to respond. It was in 2006 that the Sentencing Commission unanimously voted to reverse the 2004 amendment to the Sentencing Guidelines, which contained language that encouraged corporate defendants to waive the attorney-client privilege and work product protections in order to gain leniency at sentencing.¹⁴⁰ The Sentencing Commission's decision to do so was influenced in great part by the "extensive written comments and testimony from the ABA, the coalition,¹⁴¹ numerous former senior Justice Department officials—including three former attorneys general—and other organizations."¹⁴² While this was acknowledged by critics to be an extremely positive development, debate over "the proper balance between effective law enforcement and the preservation of essential attorney-client [and] work product . . . protections"¹⁴³ continued, with critics demanding the DOJ directly address pertinent concerns by substantively altering its prosecutorial policies as to business organizations.¹⁴⁴

VI. POLICY OVERHAUL: THE McNULTY MEMORANDUM

On December 12, 2006, Deputy Attorney General Paul J. McNulty announced the DOJ's intent to alleviate the continued animadversions of critics by adjusting certain aspects of its corporate fraud prosecution policy to place increased restraints on federal prosecutors investigating potential cor-

U.S. Memo on Review Process Doesn't Go Far Enough, 182 N.J.L.J. 731 (2005).

138. "[B]ecause the McCallum Memorandum [did] not require the written waiver processes established by each U.S. Attorney to be made public[] . . . companies ha[d] no better understanding . . . than they did before October 2005 as to whether and when they must waive privilege in order to satisfy prosecutors' expectations." *Hearings, supra* note 1, at 130 (statement of Edwin Meese III, Ronald Reagan Distinguished Fellow in Public Policy and Chairman, Center for Legal and Judicial Studies, The Heritage Foundation).

139. Due to the fact that the McCallum Memorandum "fails to require any uniformity in the waiver request process among the 93 U.S. Attorneys Offices," it compounds the problem by making it even harder for a corporation to guess when it will be asked to waive privileges. *Id.*

140. U.S. SENTENCING GUIDELINES MANUAL app. C (2007) (containing Amendment 695). This deletion became effective November 1, 2006. *Id.*

141. The coalition includes the Association of Corporate Counsels, the American Civil Liberties Union, the Business Roundtable, the National Association of Manufacturers, and the United States Chamber of Commerce. Browning, *supra* note 100.

142. *Federal Government Coerced Waiver of Attorney-Client Privilege and Work Product Protections*, AM. BAR ASS'N BACKGROUNDER (ABA), May 2006, at 2, available at <http://www.abanet.org/buslaw/attorneyclient/materials/stateandlocalbar/20060421000001.pdf>

143. *Hearings, supra* note 1, at 96 (statement of Karen J. Mathis, President, American Bar Association).

144. See AM. BAR ASS'N BACKGROUNDER, *supra* note 142; see also *Former Justice Officials Blast 'Thompson' Memo*, NAT'L L.J., Sept. 11, 2006, at 3 ("A bipartisan group of [eleven] former senior Justice Department (DOJ) officials has written to Attorney General Alberto Gonzales to protest the government's tactics in investigating corporate wrongdoing, tactics that they see as 'seriously eroding' attorney-client privilege.") (emphasis removed).

porate misconduct.¹⁴⁵ The resulting memorandum, aptly entitled *Principles of Federal Prosecution of Business Organizations* (the McNulty Memorandum), explicitly supersedes and replaces the directives set forth in both the Thompson and the McCallum Memoranda¹⁴⁶ and “expands upon the [DOJ’s] long-standing policies concerning how [it] evaluate[s] the authenticity of a corporation’s cooperation with a government investigation.”¹⁴⁷ At the Lawyers for Civil Justice Membership Conference held on the release date of the McNulty Memorandum, Deputy Attorney General McNulty voiced his support for the valuable role played by the attorney-client privilege and work product protection doctrine in the American legal justice system and, more specifically, the benefits of these privileges in the corporate context.¹⁴⁸ However, while admitting the legitimacy of the concerns of critics regarding the erosion of these privileges by the Thompson Memorandum, McNulty was particularly careful to point out that in no way was the Thompson Memorandum intended by the DOJ to encourage such practices or promote such consequences.¹⁴⁹ Nonetheless, McNulty proclaimed that the revised policy would not only address these consequences by “amplif[y]ing the limited circumstances under which prosecutors may ask for waivers of privilege,”¹⁵⁰ but it would also “further promote public confidence in the [DOJ], encourage corporate fraud prevention efforts, and clarify [the DOJ’s] goals without sacrificing [its] ability to prosecute these important cases effectively.”¹⁵¹

A. *The Policy*

The McNulty Memorandum addresses the more egregious features of the Thompson Memorandum; nevertheless, it contains no provision forbidding prosecutors from requesting waiver of attorney-client and work product protection as a general matter.¹⁵² It does, however, make substantial

145. See Paul J. McNulty, Prepared Remarks, *supra* note 2.

146. Memorandum from Paul J. McNulty, Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components, U.S. Attorneys, regarding Principles of Federal Prosecution of Business Organizations, available at http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf [hereinafter McNulty Memorandum].

147. *Id.* at 2.

148. Paul J. McNulty, Prepared Remarks, *supra* note 2. McNulty acknowledged that corporate attorneys had told him that, in order for them to do their job effectively “they need full and frank communication between attorney and employee if they are expected to steer conduct away from law-breaking or uncover criminal wrongdoing.” *Id.* McNulty followed by stating that “[t]he attorney-client privilege is an important part of the legal framework supporting . . . compliance and accountability” among businesses. *Id.*

149. See *id.* However, a senior Justice Department official was quoted as admitting that, although the Thompson Memorandum had “been misunderstood by critics to mean that prosecutors could and should routinely ask for the disclosure of legal secrets . . . the guidelines had been revised because ‘perception is reality.’” Lynnley Browning, *U.S. Moves to Restrain Prosecutors*, N.Y. TIMES, Dec. 13, 2006, at C1.

150. Paul J. McNulty, Prepared Remarks, *supra* note 2.

151. McNulty Memorandum, *supra* note 146, at 2.

152. See *id.* § VII.B.2; see also Kristin Graham Koehler & Ronald Machen, *Message from the Co-Chairs*, THE CRIMINAL LITIGATION NEWSLETTER (Criminal Litigation Committee, ABA), Winter 2007, at 2.

changes to the procedures that federal prosecutors must follow in order to make such requests of corporations being investigated.¹⁵³ Specifically, it sets up a two-tiered system, differentiating between “purely factual information, which may or may not be privileged, relating to the underlying misconduct (‘Category I’)” and “attorney-client communications or non-factual attorney work product (‘Category II’).”¹⁵⁴ Before seeking a waiver of attorney-client or work product protections, prosecutors must establish that they are in legitimate need of the information to effectively carry out their obligations as to law enforcement.¹⁵⁵ The existence of a legitimate need is established by balancing the purposes served by the privileges, and the interest of society in protecting them, with the needs of the government investigation and the social good which comes from effective law enforcement.¹⁵⁶ Specifically, whether there exists a legitimate need is contingent upon:

- (1) the likelihood and degree to which the privileged information will benefit the government’s investigation;
- (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;
- (3) the completeness of the voluntary disclosure already provided; and
- (4) the collateral consequences to a corporation of a waiver.¹⁵⁷

According to the DOJ, this “legitimate need” test “ensures that evaluating the need for waiver is a thoughtful process and that prosecutors are not requesting it without examining the quantum of evidence already in their possession and determining whether there is a real need to request privileged information.”¹⁵⁸

If a federal prosecutor believes there is a legitimate need for privileged information based upon the above considerations, he or she must follow a two-step process before actually making a request for a corporation to produce information that is privileged.¹⁵⁹ First, a federal prosecutor should procure a written authorization for such a request as to Category I information; in doing so, he or she must communicate the need for the request and the breadth of the request sought.¹⁶⁰ Written authorization should be obtained “from the United States Attorney who must provide a copy of the

153. See McNulty Memorandum, *supra* note 146, § VII.B.2.

154. *Id.*

155. *Id.*

156. *Id.* “A legitimate need for the information is not established by concluding it is merely desirable or convenient to obtain privileged information.” *Id.*

157. *Id.* § VII.B.2 (line breaks removed).

158. McNulty Hearings, *supra* note 33, at 20 (statement of Barry M. Sabin, Deputy Assistant Att’y Gen., United States Department of Justice).

159. See McNulty Memorandum, *supra* note 147, § VII.B.2.

160. *Id.* (“Examples of Category I information could include, without limitation, copies of key documents, witness statements, or purely factual interview memoranda regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel.”).

request to, and consult with, the Assistant Attorney General for the Criminal Division before granting or denying the request.”¹⁶¹ If given authorization, the federal prosecutor must inform a corporation in writing that a request for waiver of privileges is being made.¹⁶² The second step in this two-part process is reserved for use exclusively in situations where Category I information is not enough to complete a thorough investigation and Category II information is therefore legitimately needed.¹⁶³ In order to serve the corporation with a written request for Category II information, written authorization must first be obtained from the Deputy Attorney General following much the same procedure as outlined above for Category I information.¹⁶⁴

If a corporation, upon receipt of a written request for Category I information, denies this request and refuses to waive privileges associated with the requested factual information, these actions can be given consideration by prosecutors in determining whether the corporation has adequately cooperated for purposes of making a charging decision.¹⁶⁵ However, the opposite is true when the subject of the written request falls into Category II—in this case, a declination by the corporation may not be used against it by the prosecution when considering whether to charge.¹⁶⁶ According to the DOJ, “[t]his is to ensure that where a valid privilege is asserted for legal advice or strategy, that the corporation and its lawyers are not penalized for deciding that they want to preserve the confidentiality of their communications.”¹⁶⁷ Note, nevertheless, that it is always the case that “[p]rosecutors may . . . favorably consider a corporation’s acquiescence to the government’s waiver request in determining whether a corporation has cooperated in the government’s investigation.”¹⁶⁸ In addition to limiting the ability of prosecutors to hold a corporation’s declination to waive privileges against it, the McNulty Memorandum also drastically limits their ability to take into account “whether a corporation is advancing attorneys’ fees to employees or agents

161. *Id.*

162. *Id.*

163. *Id.* Category II information includes “legal advice given to the corporation before, during, and after the underlying misconduct occurred” and “might include the production of attorney notes, memoranda or reports (or portions thereof) containing counsel’s mental impressions and conclusions, legal determinations reached as a result of an internal investigation, or legal advice given to the corporation.” *Id.*

164. *Id.* The McNulty Memorandum specifically states that a request for certain information, which would generally be classified Category II, does not need the approval of the Deputy Attorney General, but must only be authorized in the manner of Category I information. *Id.* This information includes: “legal advice contemporaneous to the underlying misconduct when the corporation or one of its employees is relying upon an advice-of-counsel defense; and . . . legal advice or communications in furtherance of a crime or fraud, coming within the crime-fraud exception to the attorney-client privilege.” *Id.*

165. *Id.*

166. *See id.*

167. *See McNulty Hearings, supra* note 33, at 20 (statement of Barry M. Sabin, Deputy Assistant Att’y Gen., United States Department of Justice).

168. McNulty Memorandum, *supra* note 6, § VII.B.2.; *see McNulty Hearings, supra* note 33, at 20 (statement of Barry M. Sabin, Deputy Assistant Att’y Gen., United States Department of Justice) (“If the corporation decides to give us the information, we will consider it favorably. The government wants to encourage cooperation and the production of information where requested, and certainly a corporation would want to receive a benefit for production if the decision is made to waive the privilege.”).

under investigation and indictment”—going so far as to tell prosecutors to generally disregard this information.¹⁶⁹ An exception to this general rule does exist—such that “[i]n extremely rare cases” this fact can be taken into consideration “when the totality of the circumstances show that it was intended to impede a criminal investigation.”¹⁷⁰ In order to proceed under this exception, a federal prosecutor must follow the authorization procedures set out for Category II information in order to obtain approval from the Deputy Attorney General.¹⁷¹ It is important to note, however, that the McNulty Memorandum remains the same as its predecessor in other aspects which garnered severe criticism; for example, prosecutors are still permitted to weigh whether the corporation is taking punitive actions against suspect employees.¹⁷²

B. The Public Responds: McNulty Memorandum—Satisfactory Response or Too Little, Too Late?

The McNulty Memorandum is the DOJ’s conciliatory attempt to rectify several points of contention as to Thompson Memorandum policy while maintaining the key components of that policy which it feels are necessary to continued success in the prosecution of corporate malfeasance.¹⁷³ More specifically, the DOJ took what it saw to be “reasoned and measured steps to address the perceived problems” by making revisions which it felt would preserve the consistency and transparency of the process “while addressing and dispelling the perceptions of [DOJ] critics in very significant ways.”¹⁷⁴ However, whether the revised policy will truly prove to be a satisfactory response to the issues raised by critics has yet to be seen and early response has been of varied disposition.¹⁷⁵

The DOJ trumpeted the arrival of the McNulty Memorandum with lofty words of praise for the new provisions, claiming that, not only are the provi-

169. See McNulty Memorandum, *supra* note 6, § VII.B.3.

170. *Id.* § VII.B.3 n.3 (“In these cases, fee advancement is considered with many other telling facts to make a determination that the corporation is acting improperly to shield itself and its culpable employees from government scrutiny.”).

171. *Id.* § VII.B.2.

172. *Id.* § VII.B.3.

173. Deputy Attorney General McNulty expressed this intent upon release of the new directives when saying, “[The DOJ] will safeguard every tool prosecutors need to fight fraud and continue our aggressive efforts in rooting out corruption The Department supports the sanctity of attorney-client privilege [The DOJ] encourage[s] full and frank communication between corporate employees and their lawyers.” Press Release, U.S. Dep’t of Justice, U.S. Deputy Attorney General Paul J. McNulty Revises Charging Guidelines for Prosecuting Corporate Fraud: New Guidance Further Encourages Corporate Compliance (Dec. 12, 2006), www.usdoj.gov/opa/pr/2006/December/06_odag_828.html (internal quotation marks omitted).

174. See *McNulty Hearings*, *supra* note 33, at 19 (statement of Barry M. Sabin, Deputy Assistant Att’y Gen., United States Department of Justice).

175. See, e.g., Marcia Coyle, *The ‘McNulty Memo’: Real Change, or Retreat? Lawyers Find Several Flaws in New Guidelines for Corporate Probes*, NAT’L L.J., Dec. 18, 2006, at 25 (“[T]he key question, according to white-collar criminal defense lawyers, is: Are the guidelines meaningful change or strategic retreat?”).

sions therein “prudent, necessary and time-tested,” but the revisions addressing waiver of privileges “are reasonable and will protect privileged materials.”¹⁷⁶ Several groups and individuals adamant in their contempt for the relevant provisions of the Thompson Memorandum generally agree and have spoken out in favor of the revisions, hopeful that they will lead to a decrease in abusive prosecutions¹⁷⁷ and an increased ability on the part of a corporation to effectively defend both the corporation as a body and the individual employees within the corporation.¹⁷⁸ Some claim that, if anything, the McNulty Memorandum places new hurdles in the paths of eager federal prosecutors pursuing waiver of privileges and advancement demands.¹⁷⁹ Many practicing white-collar criminal defense attorneys agree, viewing the McNulty Memorandum as a welcome relief.¹⁸⁰

Yet, not all critics of the Thompson Memorandum are satisfied by the introduction of the new policy, expressing that, “[a]lthough the Justice Department reluctantly issued new cooperation standards . . . in the form of the ‘McNulty Memorandum,’ the new policy falls far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product, and employee legal protections.”¹⁸¹ First, as a general matter, many strongly criticize the McNulty Memorandum for its failure to “eliminat[e] the improper practice of requiring or encouraging companies and other organizations to waive their attorney-client privilege and work product protec-

176. See *McNulty Hearings*, *supra* note 33, at 23 (statement of Barry M. Sabin, Deputy Assistant Att’y Gen., United States Department of Justice).

177. See e.g., Browning, *supra* note 149 (quoting Stephen J. Bronis, Executive Director, White-Collar Crime Committee, Am. Bar Ass’n, who stated, “I don’t know if there are going to be more or less prosecutions, . . . but there are hopefully going to be less abusive ones.”).

178. See *id.* (quoting Andrew Weissmann, a partner at Jenner & Block LLP in New York, as saying that he believed the new guidelines would be helpful to corporations in defending themselves by “making it easier for corporations to say no, and not having to worry about that decision being held against them”).

179. See *id.* In fact, soon after issuance of the McNulty Memorandum, the American Bar Association, pointing out that “[o]btaining prior supervisory approval, particularly from Main Justice, is often a difficult and time-consuming process,” expressed hope that the authorization procedures within the McNulty Memorandum would act as a “check that should provide a meaningful balance to local prosecutorial discretion.” Koehler & Machen, *supra* note 152, at 2.

180. See, e.g., David Z. Seide, *Department of Justice McNulty Memo Curtails Controversial Portions of Thompson Memo—Legislation Introduced in the Senate*, Dec. 13, 2006, WILMERHALE.COM, <http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=3507> (agreeing that requiring prosecutors to get authorization prior to requesting waiver is a hurdle that “provides a sensible check on local prosecutorial discretion while assuring nationwide consistency in the application of waiver demands”). *But see* William M. Sullivan, Jr., *The McNulty Memorandum: New DOJ Policies on Attorney-Client Privilege and Work Product Protections*, METROPOLITAN CORP. COUNS., Feb. 2007, at 34, available at http://www.winston.com/siteFiles/publications/SullivanMCC_Feb2007.PDF (expressing the opinion that the McNulty Memorandum “appears to be a limited response calculated to do just enough to appease critics and forestall further judicial and congressional action”).

181. Letter from Karen J. Mathis, President, Am. Bar Ass’n, to Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary, (June 4, 2007), available at

http://www.abanet.org/poladv/letters/attyclient/2007june04_leahy_1.pdf [hereinafter Letter from Karen J. Mathis]; see also *McNulty Hearings*, *supra* note 33, at 83 (statement of Richard T. White, Chairman of the Board of Directors, Association of Corporate Counsel) (“Clearly, DOJ has repackaged its policy in the McNulty Memorandum and made some superficial changes. Upon review, however, these changes have no substantive impact on the culture of waiver that has eroded attorney client privilege, work product protections, and individual rights in the corporate context.”).

tions in return for cooperation credit,” and instead “merely requir[ing] high level Department approval before formal waiver requests can be made.”¹⁸² Second, the fact that the McNulty Memorandum places “modest procedural limits on *formal* government requests for waiver” does nothing to combat instances of voluntary waiver of privileges used by corporations as a reactionary measure against the pressure to cooperate that had developed as a result of the Thompson Memorandum and other similar policies.¹⁸³ These problems combined reveal that, not only is it likely that the McNulty Memorandum will fail to meaningfully counter the culture of waiver that had developed under the Thompson Memorandum, but it will likely continue greasing the wheels of improper conduct in the same way the Thompson Memorandum did before it. Finally, critics argue that the McNulty Memorandum still compromises the constitutional rights of corporate employees.¹⁸⁴

The fact that the McNulty Memorandum still allows federal prosecutors to seek privilege waivers during an investigation serves as a crux for the contention of critics that it will deliver no substantial relief from problems cultivated by Thompson Memorandum policy.¹⁸⁵ In developing this argument, critics quickly point out what they view as a crack in the foundation of DOJ rationale: that, while the DOJ purports to be efficaciously balancing effective prosecution of corporate malfeasance with a reverence for time-honored privileges,¹⁸⁶ it has sacrificed the latter for something far less than the former. A policy of waiver is certainly not necessary to effective prosecution.¹⁸⁷ After all, “[f]or decades, prosecutors have been able to do their jobs by a variety of means, including subpoenas and interviews, without violating the confidential attorney-client relationship.”¹⁸⁸ In fact, there is no

182. See *McNulty Hearings*, *supra* note 33, at 51 (statement of Karen J. Mathis, President, American Bar Association).

183. See *id.* at 53.

184. *Id.* at 48.

185. The American Bar Association, for example, has repeatedly voiced its profound disappointment that the McNulty Memorandum still continues to allow prosecutors to seek waiver. See *id.* at 53 (statement of Karen J. Mathis, President, American Bar Association) (evidencing the Association’s disappointment in McNulty Memorandum procedure by explaining that, although it does mandate high level departmental approval before a prosecutor can demand certain waiver of privileges, the McNulty Memorandum fails to address the key point: Any demands for waiver of privilege are unjustified, “as prosecutors only need the relevant facts to enforce the law, not the opinions and mental observations of corporate counsel”).

186. See *id.* at 17 (statement of Barry M. Sabin, Deputy Assistant Att’y Gen., United States Department of Justice) (“The tone of the *McNulty Memorandum* is critical to an understanding of the Department’s approach to corporate criminal charging policies. It is a tone of respect for the importance and long-standing nature of the attorney-client privilege.”).

187. See Letter from Karen J. Mathis, *supra* note 181 (“Whether direct or indirect, these waiver demands are unjustified, as prosecutors only need the relevant facts to enforce the law, not the opinions and mental impressions of corporate counsel.”). *But cf.* *McNulty Hearings*, *supra* note 33, at 23 (statement of Barry M. Sabin, Deputy Assistant Att’y Gen., United States Department of Justice) (“Taking away the Department’s ability to request a waiver and our ability to make the right charging decisions by severely restricting what we can consider in determining whether a corporation is cooperating, not only hamstring federal prosecutors, it will ultimately discourage corporate self-policing.”).

188. Dan Lungren & William Delahunt, *The Importance of Keeping Attorney-Client Privilege*, THEHILL.COM, Sept. 7, 2006, [http://thehill.com/op-eds/the-importance-of-keeping-attorney-client-](http://thehill.com/op-eds/the-importance-of-keeping-attorney-client-privilege)

substantial evidence that prosecutors could not continue to effectively do their jobs absent waiver demands, as pointed out by former Attorney General Dick Thornburgh in a hearing before the House of Representatives Subcommittee on Crime, Terrorism and Homeland Security.¹⁸⁹ This leaves many critics adamant that prosecutors' continued ability to make waiver requests is wholly unnecessary.

Further, the McNulty Memorandum's amended procedures requiring prosecutors to show a legitimate need for information protected by privilege, and then gain high level approval before requesting waiver of certain privileges, has failed to placate staunch critics. Aside from attacking the legitimacy of this double-barreled, pre-waiver request process,¹⁹⁰ critics' complaints continue to take aim at the central contentious feature of the McNulty Memorandum—the continued existence of waiver as a measure of cooperation. Although willing to admit that the McNulty Memo does more to protect unabated waiver demands made by prosecutors than did the Thompson Memorandum and its progeny, critics persistently object that the DOJ continues to miss the most crucial detail: that the government should not, and does not, get to decide when to waive privileges granted to another

privilege-2006-09-07.html; see also *McNulty Hearings*, *supra* note 33, at 82 (statement of Richard T. White, Chairman of the Board of Directors, Association of Corporate Counsel) (citing Letter from Griffin B. Bell, former U.S. Att'y Gen., et al., to Alberto Gonzales, U.S. Att'y Gen., Dep't of Justice (Sept. 5, 2006)) ("One must question, how did prosecutors do their work prior to 1999 and the issuance of these memos? According to a high-level group of former senior DOJ officials, the answer is 'very well, thank you!'").

189. See Lungren & Delahunt, *supra* note 188 ("In fact, former Attorney General Dick Thornburgh testified before us that, in his nine years at the Department of Justice, he could not remember a single case where the government felt it was necessary to obtain attorney-client privilege-protected material in order to prosecute a case successfully.").

190. The meaningfulness of both the required showing of legitimate need and the approval process has been questioned. Critics have argued that the bar for a showing of legitimate need is so low that "it would be easy for a prosecutor to determine that there is a legitimate need in virtually any and every case." See N. Richard Janis, *The McNulty Memorandum: Much Ado About Nothing*, 21 THE WASHINGTON LAWYER 38 (Feb. 2007), available at

http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/february_2007/stand.cfm. In addition, critics remain skeptical as to whether requests for authorization to seek waiver will be critically evaluated once made, especially where authorization will be sought from another prosecutor in the same department. "[L]ike the proverbial fox guarding the hen house, it is unrealistic to expect prosecutors' colleagues to be able to effectively police requests made by other lawyers in the same office with their assurances that waiver is necessary to ensure a successful prosecution." *McNulty Hearings*, *supra* note 33, at 85 (statement of Richard T. White, Chairman of the Board of Directors, Association of Corporate Counsel). "This is not intended to suggest any ethical infirmities at DOJ, but rather a recognition of human nature – colleagues within the same organization are poor candidates to be objective decision-makers about the validity of their peers' shared working practices." *Id.* It is also important to note the claims of some critics that the McNulty Memorandum's authorization procedures are a sham, adding nothing in the way of meaningful review, because similar procedures may have been in place long before the McNulty Memorandum was released:

I would also note that DOJ previously assured ACC and its coalition partners (in offline meetings at the time of the issuance of the McCallum Memorandum) that most U.S. attorneys were required to get permission from a supervising prosecutor before they demand privilege waivers even *prior* to the issuance of the McNulty Memorandum. If so, this suggests that the post-McNulty procedures represent even less of a policy change than has been suggested. It also suggests, further, that prosecutors who were likely to ignore these requirements before, will likely continue to find ways around them now.

Id.

entity.¹⁹¹ Because these privileges are vested in the corporation, and not the government, the decision of whether to waive them should rest with the corporation.¹⁹² As such, “it is inappropriate to continue to allow Department demands for waiver, with or without centralized approval” or a showing of legitimate need.¹⁹³ The U.S. Chamber of Commerce,¹⁹⁴ concurring with this idea in a statement issued soon after the release of the McNulty Memorandum, made clear its feelings that the new directives fall short of sufficiently guarding sacrosanct protections such as the attorney-client privilege.¹⁹⁵ According to this organization, the restrictions placed on federal prosecutors are just “not good enough. As long as the Deputy Attorney General’s Office can decide whether or not to demand waiver, the privilege is uncertain. An uncertain privilege is no privilege at all.”¹⁹⁶

Additionally, the DOJ’s attempts to appease critics by strongly asserting that waiver of privileges is never mandatory,¹⁹⁷ and that failure to waive will not be held against the corporation, have proven to be less than successful. As a practical matter, the McNulty Memorandum, by awarding credit to organizations that decide to waive privileges, penalizes those organizations that choose not to waive.¹⁹⁸ And, while it may be true that “[c]ompanies should be rewarded for providing full disclosure of the facts,”¹⁹⁹ they should

191. See *What Does the DOJ’s Issuance of the “McNulty Memorandum” Mean for You and Your Client*, Talking Points (Ass’n of Corporate Counsel), Dec. 13, 2006, <http://acc.com/public/attyclientpriv/mcnulty-tp.pdf> [hereinafter ACC, *McNulty Memo*].

For centuries, it has been for the courts to decide the scope and applicability of attorney-client privilege and work-product protections—and waiver of these protections is the decision of the client. The government does not have any right to manipulate the corporate client’s exercise of its rights to confidential counsel. Therefore, waiver should *not* be a factor in DOJ’s consideration of a critical decision whether to charge a company with a crime.

Id.

192. See *id.*; see also *McNulty Hearings*, *supra* note 33, at 79 (statement of Richard T. White, Chairman of the Board of Directors, Association of Corporate Counsel) (“[E]stablishing a clearer policy on how privilege waivers should be sought by prosecutors requires one to buy into the basic premise that the DOJ, as opposed to the Courts, have a right to determine when a corporate client’s privilege rights deserve protection and when they don’t. The privilege belongs to the client, not the prosecutor who believes it might be convenient if it were waived.”).

193. ACC, *McNulty Memo*, *supra* note 191.

194. The U.S. Chamber of Commerce is the world’s largest business federation representing more than three million businesses and organizations of every size, sector, and region. U.S. Chamber of Commerce, About the U.S. Chamber of Commerce, <http://www.uschamber.com/about/default> (last visited Oct. 30, 2007).

195. Press Release, U.S. Chamber of Commerce, New DOJ Policy Does Not Adequately Protect Attorney-Client Privilege (Dec. 12, 2006), <http://www.uschamber.com/press/releases/2006/december/06-190.htm>.

196. *Id.* (internal quotation marks omitted).

197. See *McNulty Hearings*, *supra* note 33, at 19 (statement of Barry M. Sabin, Deputy Assistant Att’y Gen., United States Department of Justice) (“To make it clear that waiver of the attorney-client privilege is never mandatory, the *McNulty Memorandum* expressly provides that waiver of the privilege is not a pre-requisite to a finding that a company has cooperated.”).

198. A corporation that chooses not to waive may not be overtly punished for failing to cooperate, but it is certainly at a disadvantage in comparison to a corporation that chooses to waive. The disparity between receiving no cooperation credit and receiving some cooperation credit still exists under the McNulty Memorandum. Functionally, this is no different than what existed under Thompson.

199. ACC, *McNulty Memo*, *supra* note 191.

not be rewarded for waiving time-honored protections.²⁰⁰ This system, prohibiting overt penalization for failure to waive, while at the same time rewarding waiver, “creates an inherently coercive environment in which companies and directors will feel no choice but to waive.”²⁰¹ This environment, coupled with the culture of waiver fostered by the Thompson Memorandum, leads not only to more corporations complying with a request for waiver of privileges, based on the knowledge that “when assessing who will get credit and who will not, [the DOJ] will certainly give more credit to a company that waives than to a company that doesn’t,”²⁰² but also to more corporations “voluntarily” waiving privileges. After all, corporations are not waiting to be asked anymore. They believe it is necessary, to keep their heads above the water, to volunteer waiver in return for a life jacket. Therefore, what is actually an involuntary waiver is categorized as voluntary and goes unprotected under the policy.

Left seemingly unaddressed by the McNulty Memorandum is the problem of voluntary waivers. Critics aver that the “DOJ’s focus on standardizing formal, on-the-record waiver demands misses the point.”²⁰³ Because “many federal enforcement officials rely almost exclusively on informal demands to coerce corporations to waive their [privileges],”²⁰⁴ review in the form of high level approval is circumvented. The consequences of the McNulty Memorandum’s failure to address voluntary waiver are especially dire given the corruption of the process complained of by critics of former DOJ policy and the ease with which a corporation can be forced to “volunteer” waiver.²⁰⁵ Due to the culture of waiver that developed under Thompson Memorandum policy, an informal demand is all it really takes to assure

200. Browning, *supra* note 149 (quoting Stephanie Martz, Director, White Collar Crime Project, National Association of Criminal Defense Lawyers, as saying companies “should get credit for fully disclosing whatever is fully relevant, but . . . shouldn’t get bonus points for disclosing privileged stuff.”). *But see McNulty Hearings*, *supra* note 33, at 20 (statement of Barry M. Sabin, Deputy Assistant Att’y Gen., United States Department of Justice) (“It would not make sense for the corporation to voluntarily provide information to the government and not receive some credit for it. There would be no incentive to cooperate if that were the case, and cooperation of corporate entities is often a crucial part in early identification of a corporate fraud.”).

201. Janis, *supra* note 190, at 39; *see also* ASS’N OF CORPORATE COUNSEL, REPORT OF THE ASSOCIATION OF CORPORATE COUNSEL: ATTORNEY-CLIENT PRIVILEGE: EROSION AND YET, PROGRESS (Jan. 2007), <http://www.acc.com/public/reference/acpriv/adcom2006privilegeassessmt.pdf> (“[I]t is not feasible for companies acting on their own once in the crosshairs to meaningfully protest privilege waiver demands . . .”).

202. Janis, *supra* note 190.

203. *McNulty Hearings*, *supra* note 33, at 78 (statement of Richard T. White, Chairman of the Board of Directors, Association of Corporate Counsel) (emphasis omitted).

204. *Id.* at 78–79.

205. *See id.* at 78.

The in-house legal community knows from extensive experience that some prosecutors often couch a their (sic) demand for waiver as a “choice” that the company chooses to exercise or not (*as in.*, (sic) “it’s your choice: you can waive or we’ll indict”). Other prosecutors may toss a copy of the DOJ policy on the table with the privilege waiver section highlighted as a factor in determining corporate cooperation, and make a statement such as “you’d like to qualify for the benefits of cooperation in this investigation, correct?”

Id. at 84.

a corporation will succumb to the will of investigatory officials.²⁰⁶ This is especially true given that the McNulty Memorandum “continues to encourage routine waiver by rewarding companies for their ‘unsolicited’ offers to waive [certain] protections.”²⁰⁷ Since corporations face the risk of failing to receive full credit for cooperation if they choose not to waive privileges under the McNulty Memorandum,²⁰⁸ there continues to be an implicit request present regardless of whether a formal request of waiver is made or not.²⁰⁹ Therefore, while it appears that the McNulty Memorandum makes waiver requests more formal, resulting in requests being less often sought, it might actually result in more instances of informal, and therefore unregulated, requests.

The gap left in the McNulty Memorandum allowing informal waiver requests to remain unaddressed and unregulated only fuels the skepticism of critics. In professing that the climate which developed under the Thompson Memorandum will not be overcome by the new initiatives of the McNulty Memorandum, critics allege that companies under investigation will suspiciously conclude, whether correct or not, that the Thompson Memorandum policy as to cooperation is still tacitly at play, no matter the content of the McNulty Memorandum.²¹⁰ After all, “[d]uring the four years it was in effect, the Thompson Memorandum . . . led many prosecutors and other law enforcement officials to pressure companies and other entities to waive their privileges on a regular basis as a condition for receiving cooperation credit during investigations.”²¹¹ This led to the development of a culture of waiver in which the DOJ’s policy played a prominent role of contribution.²¹² As

206. See *id.* at 78–79.

207. Letter from Karen J. Mathis, *supra* note 181 (“After the McNulty Memorandum was issued in December 2006, prosecutor demands for waiver have continued unabated, though most are now *informal*, so as not to trigger the procedural requirements of the new memorandum.”).

208. See *McNulty Hearings*, *supra* note 33, at 53 (statement of Karen J. Mathis, President, American Bar Association).

209. See ACC, *McNulty Memo*, *supra* note 191. Further pressure exists in the implications of being labeled uncooperative and the effect of being labeled such, as previously discussed. See COALITION TO PRESERVE THE ATTORNEY-CLIENT PRIVILEGE, THE DECLINE OF THE ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE CONTEXT: SURVEY RESULTS 14–21 (2006), <http://www.acc.com/Surveys/attyclient2.pdf>.

210. See Browning, *supra* note 149. “The way the world really works is you have a prosecutor who says ‘I can’t ask you to waive privilege or not pay fees’ . . . But the message to you, the company, might be ‘Well, if we do that, we might just score some brownie points.’” *Id.* (quoting Robert S. Bennett, a New York white-collar defense lawyer who represented KPMG).

211. *McNulty Hearings*, *supra* note 33, at 53 (statement of Karen J. Mathis, President, American Bar Association).

212. *Id.* The DOJ, upon release of the McNulty Memorandum, acknowledged that the “perception” that DOJ policy actively facilitated a culture of waiver did exist, although incorrectly so. See Janis, *supra* note 190. Specifically, a senior department official believed to be U.S. Deputy Attorney General Paul McNulty, said the following:

Now we, I think, have some dispute and don’t concede that our practices have been accurately described, but we certainly recognize that folks maintain that that is the *perception* . . . while we don’t agree with the characterization of our practices previously to the degree there has been some *perception* however that prosecutors have sort of routinely and informally and very early on in investigations made it a regular practice to seek this kind of material.

Id.

such, the DOJ, through the McNulty Memorandum, would have to over-compensate in order to counteract the dangerous trend which developed under the Thompson Memorandum,²¹³ an undertaking the DOJ appears unwilling to facilitate. After all, when considering the ability of prosecutors to favorably acknowledge a corporation's response to a request of waiver as to Category I information, in addition to the very important dictate that "[f]ederal prosecutors are not required to obtain authorization if the company voluntarily offers privileged documents without a request by the government," the allegations made by critics that "we are right back where we started under the Thompson Memorandum" appear on point.²¹⁴

Critics of the McNulty Memorandum not only recognize its potential failure to adequately protect fundamental privileges and counteract a dangerous culture of waiver, but also note that the McNulty Memorandum, just as its predecessor, "leaves completely intact the government's ability to penalize a company that does not take punitive action against employees for asserting a constitutional right to remain silent, and reward those companies that do take such action."²¹⁵ The DOJ did eliminate from consideration a corporation's payment or reimbursement of employees' legal fees, thereby alleviating some of the pressure that had been placed on corporate employees by Thompson Memorandum policy.²¹⁶ However, some critics remain unconvinced of the propriety of even this omission—believing that the exception, which allows for consideration of this factor when there is suspicion that payment or reimbursement of legal fees was done as a way to hinder the government's investigation, is "a standard that may be too easy to meet."²¹⁷ If these concerns, coupled with the fact that the McNulty Memorandum does "nothing to protect the constitutional rights of employees by prohibiting prosecutors from goading companies to fire employees who assert their Constitutional rights,"²¹⁸ prove to be accurate in practice, corpo-

213. Browning, *supra* note 149 (quoting Stephanie Martz, Director, White Collar Crime Project, National Association of Criminal Defense Lawyers, as suggesting that "we're at the point where waiver requests are routine, . . . the only way [the DOJ] can try to put that genie back in the bottle is by not allowing corporations to get credit for granting it.") (internal quotation marks omitted).

214. Janis, *supra* note 190, at 38 (internal citations and quotation marks omitted). These concerns, among others, prompted the American Bar Association to officially criticize the McNulty Memorandum, declaring that it will only "continue to cause a number of profoundly negative, if unintended, consequences." See *McNulty Hearings*, *supra* note 33, at 52 (statement of Karen J. Mathis, President, American Bar Association).

215. *McNulty Hearings*, *supra* note 33, at 26 (statement of Andrew Weissmann, Partner, Jenner & Block LLP). Under McNulty Memorandum policy, "companies may be deemed by the [DOJ] as uncooperative simply because they do not fire employees who refuse to speak with the government based on the Fifth Amendment." *Id.* at 26–27.

216. See Press Release, U.S. Chamber of Commerce, New DOJ Policy Does Not Adequately Protect Attorney-Client Privilege (Dec. 12, 2006), <http://www.uschamber.com/press/releases/2006/december/06-190.htm>.

217. Coyle, *supra* note 175.

218. *McNulty Hearings*, *supra* note 33, at 27–28 (statement of Andrew Weissmann, Partner, Jenner & Block LLP).

rate employees could find conditions under the McNulty Memorandum just as inhospitable as those under the Thompson Memorandum.²¹⁹

While some have taken an early stance on the acceptability of the McNulty Memorandum, many are willing to admit that whether it will be effective in combating the harms of the Thompson Memorandum will depend on how it is enforced in practice²²⁰—something that cannot be foreseen.²²¹ It does appear that if the McNulty Memorandum fails to quiet the majority of criticism stemming from the Thompson Memorandum it will suffer the same fate as its predecessor—sooner rather than later.²²² While it is true that the directives are internal policy, unenforceable at law and open to certain prosecutorial discretion,²²³ as a practical matter, “[i]f the guidelines are not implemented according to their terms and the department simply becomes a rubber stamp for prosecutors’ waiver requests . . . there will be a hue and cry out of corporate America” and Congress will take action.²²⁴

Waiting in the wings, in the event that this comes to pass, is the Attorney-Client Privilege Protection Act of 2007, a bill proposed on December 7, 2006, and reintroduced on January 4, 2007, by Senate Judiciary Chairman Arlen Specter.²²⁵ This bill would strictly prohibit the most egregious aspects of the Thompson Memorandum, including flat prohibition of waiver requests by federal prosecutors²²⁶ and consideration of the payment or advancement of employees’ legal fees in charging decisions.²²⁷ The Attorney-

219. This is especially the case given the irony behind the McNulty Memorandum’s omission of the ability of prosecutors to acknowledge an employer’s decision to advance employees’ legal fees, but its continued practice of allowing prosecutors to reward corporations that fire employees who assert the Fifth Amendment. As a result, under these McNulty Memorandum mandates, “the government can encourage employers to take the more Draconian corporate measure against its employees, but not the lesser.” See *McNulty Hearings*, *supra* note 33, at 29 (statement of Andrew Weissmann, Partner, Jenner & Block LLP).

220. See *id.* at 36 (statement of William M. Sullivan, Jr., Partner, Winston & Strawn, LLP) (“[I]t remains to be seen whether [the McNulty Memorandum] constitutes a real departure from existing practice. I am gravely concerned that the Memorandum’s non-binding guidelines may only serve to entrench and expand an internal deliberative process pre-disposed to request attorney-client privileged information and attorney work product.”).

221. See Coyle, *supra* note 175. For example, the requirement that there be serious legitimate need for information in order to gain authorization to request waiver could go either way. If enforced leniently, prosecutors can almost always pass this hurdle. If enforced strictly, “it can be useful in curbing whatever abuses there have been.” *Id.* (quoting Ronald C. Minkoff, litigation partner and ethics specialist, Frankfurt Kurmit Klein & Selz); see also Koehler & Machen, *supra* note 152, at 2 (advising that “[t]he effects of the McNulty Memorandum will be seen in the upcoming year”).

222. Senator Patrick Leahy and Senator Arlen Specter, at the Senate Judiciary Committee hearing held on September 12, 2006, both pronouncing extreme skepticism over DOJ policy in investigating corporations, “urged Mr. McNulty in the strongest terms to reverse those policies or face possible legislative action.” See Letter from Karen J. Mathis, *supra* note 181.

223. Coyle, *supra* note 175.

224. *Id.* (quoting Craig D. Margolis, Partner, Vinson & Elkins, who opined that the DOJ is on a sort of probation).

225. Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007); Attorney-Client Privilege Protection Act of 2006, S. 186, 109th Cong. (2006). As this Comment goes to Press, the 2007 Act has been passed in the House of Representatives but still remains under consideration in the Senate. See H.R. 3013, 110th Cong. (2007).

226. Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. § 3(a) (2007).

227. *Id.*

Client Privilege Protection Act of 2007 can be likened to the antithesis of DOJ policy, current and past, which has become “shorthand for prosecutorial abuse,”²²⁸ in its “recognition that the issue raised by current DOJ policy is not about how ‘Big Business’ behaves; it is about how the government does.”²²⁹ Many critics of the McNulty Memorandum support this legislative action and view it as the only way to correct the extensive harm done by the Thompson Memorandum, professing that, while they are appreciative of the DOJ’s willingness to adjust its policy, the changes “fall far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product and employee protections during government investigations.”²³⁰

The DOJ implores the public to “allow the [McNulty Memorandum] a chance to work before considering any legislation.”²³¹ The question that therefore remains is how long the new policy should be given before counteraction is taken. Although it may be true that, while it has been theoretically criticized since its introduction, the McNulty Memorandum could prove practically successful dependent on the way it is utilized in the field, it does not appear likely that the McNulty Memorandum will prove to be a true success.²³² In addition, previous DOJ policy, as embodied in the Thompson Memorandum and its progeny, not only failed to achieve success, but clearly metastasized with time into a problem far more injurious than it initially appeared to present. This leaves critics wary of providing the DOJ more time, especially “[g]iven DOJ’s intransigence, and the fact that the McNulty Memo does not address [critics’] concern[s]” as to the DOJ’s “belief that they have any right to unilaterally require waivers of the attor-

228. See Peter Lattman, *The Holder Memo and Its Progeny*, WALL ST. J. ONLINE, Dec. 13, 2006, <http://blogs.wsj.com/law/2006/12/13/the-holder-memo>.

229. *McNulty Hearings*, *supra* note 33, at 27 (statement of Andrew Weissmann, Partner, Jenner & Block LLP); *id.* at 78 (statement of Richard T. White, Chairman of the Board of Directors, Association of Corporate Counsel) (“[The] focus is on preventing the government from furthering the damage to innocent companies, employees, shareholders, and other stakeholders who’ve already been harmed enough by rogue executives who may be targeted by the government for prosecution.”).

230. Martha Neil, *Thompson Memo Changes Not Enough, ABA Says*, A.B.A.J. E-REPORT, Dec. 15, 2006, <http://www.abanet.org/journal/ereport/d15specter.html> (quoting Karen J. Mathis, President, American Bar Association); see also *McNulty Hearings*, *supra* note 33, at 36 (statement of William M. Sullivan, Jr., Partner, Winston & Strawn, LLP) (suggesting that a legislative response is needed “not only [to] restore balance, but to continue to foster an environment in which corporations can properly rely on counsel in order to follow the rule of law”).

231. See *McNulty Hearings*, *supra* note 33, at 22 (statement of Barry M. Sabin, Deputy Assistant Att’y Gen., United States Department of Justice).

232. Unfortunately, information gathered by the Association of Corporate Counsel appears to show that nothing has changed under the McNulty Memorandum thus far: “In the months since the DOJ issued the McNulty Memorandum, ACC has heard from in-house and outside counsel that they have not noticed any substantive differences in the way prosecutors interact with corporations regarding these issues.” *Id.* at 85 (statement of Richard T. White, Chairman of the Board of Directors, Association of Corporate Counsel). In fact, some of the reports put together by the ACC suggest that the McNulty Memorandum may be making things worse. For example, evidence suggests “that some prosecutors have become even more abusive in their requests, threatening that companies that ask them to take a formal waiver request up the ladder will be more harshly treated than if they simply comply.” See *id.* at 85–86.

ney-client privilege of their potential targets.”²³³ The fact that the McNulty Memorandum seems to leave in place some of the more troubling aspects of Thompson Memorandum policy²³⁴ certainly bodes trouble for the DOJ, especially in light of accusations that the McNulty Memorandum only does lip service to the notion of a change in policy.²³⁵ If these accusations are true, then the policy behind the McNulty Memorandum has had time to work, under the name Thompson, and has failed. “In short, although DOJ has acted to remedy certain problems in its corporate charging policy, many remain. There is no reason to believe those problems will disappear with the passage of time since they are still embedded in the McNulty Memorandum.”²³⁶

VII. CONCLUSION

Since the promulgation of the Thompson Memorandum, federal prosecutors have dealt with instances of corporate excess through effectively requiring corporate entities and their executives and employees under investigation to cooperate with the government. While Thompson Memorandum policy proved to be an undeniably successful strategy on its face, a closer look raised serious concerns and revealed consequences critics refused to accept. Although few can deny that the attempt of the DOJ to combat problems with corporate fraud, large scale bankruptcies, and a general lack of dependency on the part of corporate America was made in good faith, most could acknowledge that the Thompson Memorandum in its practical application failed to live up to the DOJ’s lofty ambitions. What began as an attempt to counteract the toll corporate corruption was taking on the public’s confidence in the stability of corporate America quickly proved to be a policy fraught with misguided might, working to undermine the ambitions of the DOJ. This led to the enactment of the McNulty Memorandum.

The McNulty Memorandum, while initially garnering sighs of relief from those grateful for any change in policy, quickly became the target of controversy; the debate surrounding the McNulty Memorandum policy is eerily similar to that which inundated the Thompson Memorandum. It is certainly true that the similarity between the two policies is a cause for con-

233. *Id.* at 79-80.

234. *See* Janis, *supra* note 190 (“Perhaps most striking when comparing the McNulty Memorandum . . . is the fact that the Thompson Memorandum has been adopted virtually verbatim in the McNulty Memorandum.”).

235.

[T]he “new” [DOJ] policy is simply a dressed-up version of the “old” [DOJ] policy, and little more than a public relations ploy. By announcing with great fanfare a “revision” of its policy, which implements a superficial (but virtually meaningless) system of checks and balances, the department is purposely doing as little as possible to revise its policies while creating the perception that something meaningful has been undertaken

Janis, *supra* note 189, at 40.

236. *McNulty Hearings*, *supra* note 33, at 32 (statement of Andrew Weissmann, Partner, Jenner & Block LLP).

cern, leaving many to question the DOJ's motives. The majority of critics continue to recalcitrate against the DOJ's implicit refusal to acknowledge the need for a complete prohibition on requests for privilege waivers in light of the culture of waiver that developed under the Thompson Memorandum. And, most contend that the McNulty Memorandum's failure to correct what can be viewed as the violation of employees' constitutional rights is an unforgivable oversight. As the discourse surrounding the new memorandum grows increasingly accusatory in tone, whether the DOJ has saved itself from legislative response is yet to be seen. Although the Attorney-Client Privilege Protection Act goes further to protect the attorney-client and work product protection privileges than does the McNulty Memorandum, it might do so at the cost of being able to deal with the specific problems raised by investigating a corporation, a concern that prompted the cacophonous directives of the Thompson Memorandum. While the Thompson Memorandum tipped the scales in favor of the government, greasing the wheels of investigation with arguably coercive directives on cooperation, the Attorney-Client Privilege Protection Act may do very much the opposite, allowing corporations to revert back to sweeping internal corporate wrongdoing under the rug of privilege. However, it may be necessary to aggressively treat the ills caused by the Thompson Memorandum through legislative response; the DOJ, in issuing the McNulty Memorandum, may have done too little, too late.

Much was left damaged in the wake of the Thompson Memorandum, and the McNulty Memorandum has been offered as a remedy. Standing alone, outside of the shadow of its predecessor, the policy embodied by this memorandum may have proven successful. On its face, the McNulty Memorandum could be the best compromise for a difficult problem—allowing the government to reach information when it is proven necessary, while still offering protection to corporations in most circumstances. However, it would be a mistake to isolate the provisions of the McNulty Memorandum from the culture of waiver that existed under the Thompson Memorandum. The McNulty Memorandum does not exist in a vacuum; and, therefore, its success as a policy will be largely dependent on its ability to extricate itself from the shadow of its predecessor.