Restoring Access to the Advancement of Defense Costs for White-Collar Defendants: The Inadequacies of the McNulty Memo

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RESTORING ACCESS TO THE ADVANCEMENT OF DEFENSE COSTS FOR WHITE-COLLAR DEFENDANTS: THE INADEQUACIES OF THE MCVULTY MEMO

I. WHITE-COLLAR CRIME, ADVANCEMENT OF DEFENSE COSTS, DOJ POLICY, AND PROPOSED LEGISLATION—THE FRAMEWORK FOR THE CONTROVERSY

Recently, in what has been described as the "largest tax fraud case in United States history,"¹ seventeen partners from the global accounting giant KPMG and two other individuals affiliated with the firm were indicted on charges relating to the creation of illegal tax shelters.² During the investigation and in pretrial proceedings, the nineteen defendants and the company confronted the full force of the federal government's prosecutorial powers.

Specifically, before ever reaching trial, the government had taken 335 depositions, examined 195 federal tax returns,³ and produced over 22 million pages of electronic and tangible documents for discovery.⁴ Additionally, a prosecution team that included personnel from numerous government agencies, including the United States Attorney's Office, the Federal Bureau of Investigation, the United States Postal Inspection Service, and the government’s forensic accounting experts, overwhelmed the individual defendants and their representatives.⁵ Moreover, just as in any case of such magnitude, the costs of raising an individual defense became enormous; in fact, each defendant expended

⁵. Paul Davies & David Reilly, In KPMG Case, the Thorny Issue of Legal Fees, WALL ST. J., June 12, 2007, at C5 (describing one defendant's counsel as being from a small, three-lawyer firm); see also United States v. Stein (Stein III), 461 F. Supp. 2d 201, 203 (S.D.N.Y. 2006) (quoting another defendant's attorney as saying, "I don't have anything. . . I have no staff. I'm basically by myself. The case has gotten longer and longer and more and more complex and more and more and more documents. And without relief in the fee case, I really don't know that I'll even be able to stay in this case, although I can tell you that I've tried everything humanly possible to do that and not to make an application like that [i.e., to be relieved], for many obvious reasons.") (insertion in original).
an average of $1.7 million in pretrial defense costs.\textsuperscript{6}

While the practical and financial landscapes confronted by the defendants in this case were quite daunting, such factual scenarios have, unfortunately, become increasingly common for individuals facing investigation or indictment for highly complex, white-collar criminal activity.\textsuperscript{7} Generally, however, the disadvantages with which individual defendants contend during prosecution of white-collar crimes have traditionally been mitigated by their organization’s provision of legal defense costs through indemnification and advancement policies found in the organization’s charter or bylaws and in various state statutory schemes.\textsuperscript{8}

In particular, advancing defense costs to individuals facing criminal indictment or investigation for matters relating to their employment ensures them the financial means necessary to raise an adequate defense in a case that is likely to cost at least $100,000.\textsuperscript{9} Without such assistance, defendants must expend huge sums of personal assets, sometimes depleting their entire net worth,\textsuperscript{10} defending highly complex, sometimes

\textsuperscript{6} See infra note 10.

\textsuperscript{7} See, e.g., Greg Burns, Top Dollar Defense Is Often No Bargain: Black Latest to Lose Case Despite Having a Legal Dream Team, CHI. TRIB., July 15, 2007, at C1 (quoting a Chicago corporate defense attorney, Ronald Safer, as saying that “[t]here are hundreds of millions of pages of documents” and that the sheer number of documents produced is the most daunting aspect of a modern corporate criminal defense); Steve Fry, Lake’s Attorneys Are Owed Millions, THE TOPEKA CAP.-J. (Topeka, Kan.), May 30, 2007, at A1 (stating that Douglas Lake, a former senior executive for Westar Energy, spent $15 million on his white-collar defense and had over $4 million in outstanding bills); Jennifer Levitz, Kozlowski Seeks Reimbursement, WALL ST. J., June 5, 2006, at C3 (recognizing that Tyco’s former CEO, Dennis Kozlowski, was seeking a total reimbursement of $17.8 million from an insurer for his first white-collar criminal defense).

\textsuperscript{8} See, e.g., DEL. CODE ANN. tit. 8, § 145 (2001 & Supp. 2006); MODEL BUS. CORP. ACT §§ 8.50–56 (2005); Stein II, 435 F. Supp. 2d, at 354–55. Indemnification pertains to when the organization compensates an individual defendant for costs expended in a successful criminal defense arising out of the defendant’s employment, whereas, advancement pertains to when the organization provides funds to an individual defendant for the defense costs as they arise and requires repayment only if the defendant is found guilty of the crime. See Stein II, 435 F. Supp. 2d at 354–55; see also tit. 8, § 145; MODEL BUS. CORP. ACT §§ 8.50–56 (2005).

\textsuperscript{9} See Nathan Koppel, U.S. Pressures Firms Not to Pay Staff Legal Fees, WALL ST. J., Mar. 28, 2006, at B1.

\textsuperscript{10} For example, in Stein II, the court made an early estimate that the cost of having a privately retained lawyer simply attend the trial proceedings would cost more than $375,000 for each defendant. Stein II, 435 F. Supp. 2d at 362 n.163. Later, the court explained the defendants’ financial positions as the following:

The Court, in ruling on another motion, has found that Mr. Hasting is insolvent. Mr. Watson has assets of approximately $80,000, owes his lawyers approximately $1 million, and has no regular source of income.
ambiguous charges arising from their employment before culpability is ever established. Consequently, advancing defense costs to management-level employees has become standard practice in modern-day corporate America.

However, in the wake of several high-profile corporate scandals that took place during the first few years of this decade, the Department of Justice (DOJ) shifted its organizational charging policy and began to exert significant pressure upon organizations that advanced defense costs to indicted employees for white-collar crimes. Under the revised policy, if organizations advanced defense costs to indicted employees, then the DOJ would label the organization as uncooperative and an indictment against the company would likely follow. As a result, because an indictment is so detrimental to the continued viability of an organization, most organizations acquiesced to the DOJ’s demands and left their former employees to defend themselves, with only their personal resources available to cover the defense costs.

Following the revision, the DOJ came under fire from the courts, the

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Mr. Bickham has remaining assets of less than $300,000, owes his lawyers over $600,000, and is threatened by his attorneys with a motion for leave to withdraw. None of them can afford to defend this case at any meaningful level.

The other ten defendants . . . are in better financial circumstances. Their net assets range from something less than $1 million to something more than $5 million, with most being in the $1 to $3 million range. . . .

. . . [T]he fees and expenses, paid and unpaid, that they have incurred to date . . . range from a low of around $500,000 to a high of $3.6 million. They average roughly $1,700,000 per defendant so far. And the most expensive part of the case—a six to eight month trial—lies ahead.


11. See infra note 55 (recognizing that the boundaries of white-collar criminal actions are not always clearly established).

12. See infra text accompanying note 87.


14. See infra note 36.


17. See infra text accompanying notes 31–32, 61.

18. See infra Part II.C.2.a–b.
media, and the business community, all of whom argued that the revised advancement policy was unfair to individual defendants because it altered the landscape too drastically in the government's favor. In particular, United States District Court Judge Lewis Kaplan recently issued a decision finding the DOJ's application of its advancement policy to be an unconstitutional infringement upon the defendants' right to a fair trial and their right to representation of their choosing, free of unreasonable government interference. In addition, Senator Arlen Specter introduced the Attorney-Client Privilege Act of 2006—resubmitted by Specter and introduced in the House as the Attorney-Client Privilege Act of 2007—which eliminates the consideration of advancement payments from the government's charging decision altogether.

In light of such criticism, the DOJ reluctantly revised its advancement policy again, but it did not completely remove advancement from the prosecutors' considerations when determining whether to indict an organization. Instead, at any point in any investigation, the prosecution can properly elicit information pertaining to the source of an individual's defense funds, and in limited circumstances, advancement remains a legitimate prosecutorial consideration in the charging determination. As a result, traditional organizational advancement policies and the benefits they provide individuals charged with white-collar crimes continue to be threatened and unjustly infringed upon by the DOJ's organizational charging policy regarding advancement.

Consequently, it is time for Congress to act and restore full protections to the advancement of defense costs for employees who have been indicted for white-collar criminal violations. The Attorney-Client Privilege Act of 2007 provides these necessary protections for advancement by removing the issue completely from prosecutorial

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19. See generally infra Part III.A.
20. See generally infra Part II.C.2.
21. See United States v. Stein (Stein II), 435 F. Supp. 2d 330, 360-69, 382 (S.D.N.Y. 2006); see also infra Part II.C.2.e.
23. S. 30, 109th Cong. § 3 (2006); see also infra Part IV.A.
25. See McNulty Memo, supra note 24, at pt. VII.B.3; see also infra Part III.B.3.
consideration when determining whether to indict an organization.\textsuperscript{26} Furthermore, enacting the legislation will create a stable and reliable policy in regards to advancement that can be changed only with further legislative action.\textsuperscript{27} Finally, the legislation applies to all federal agents, as opposed to DOJ personnel alone, thereby providing broader protections for white-collar defendants and their organizations.\textsuperscript{28} Therefore, because the proposed legislation makes several significant improvements to the DOJ's current advancement policy without sacrificing the ability of prosecutors to discover and punish criminal actions,\textsuperscript{29} the advancement provisions of the Attorney-Client Privilege Protection Act of 2007 should be enacted in the current legislative session.

This Comment argues that the current DOJ advancement policy, although recently modified, continues to be problematic for individual defendants and organizations. It also provides justification for why the recently proposed advancement provisions in the Attorney-Client Privilege Act of 2007 should be enacted to restore traditional rights of access to advancement payments for employees.

Specifically, Part II begins with a brief run-up to the DOJ's creation of its first organizational charging policy in 1999, the Holder Memo (Part II.A). Part II continues by examining (Part II.B) and critiquing (Part II.C) the DOJ's revised advancement policy as set forth by the Thompson Memo in 2003. Additionally, Part II contains a summary of the recently dismissed KPMG tax case, which provides a superb case study for how the DOJ's advancement policy was applied in practice under the Thompson Memo and the problems the policy created (Part II.C.2.e.i).

Next, Part III examines the motivations for (Part III.A) and explores the substance of (Part III.B) the DOJ's most recent revision to its advancement policy found in the McNulty Memo. In particular, Part III.C shows why the McNulty Memo revisions are inadequate and how they fail to protect traditional employee rights and access to advancement payments.

Then, Part IV discusses the advancement provisions proposed in the Attorney-Client Privilege Protection Act of 2007 and how removing advancement from prosecutorial consideration in the organizational.

\textsuperscript{26} S. 186, 110th Cong. § 3(b)(2)(B) (2007); H.R. 3013, 110th Cong. § 3(b)(2)(B) (2007).

\textsuperscript{27} See infra Part IV.B.1–2.

\textsuperscript{28} See infra Part IV.B.3.

\textsuperscript{29} See infra Part IV.B.
charging decision is an improvement for both employees and organizations faced with a federal indictment or investigation.

Finally, Part V provides a brief summary and conclusion for why the advancement provisions in the Attorney-Client Privilege Protection Act of 2007 should be enacted.

II. THE THOMPSON MEMO: BEGINNING THE CONTROVERSY

This Part summarizes the lead-up to the promulgation of the Thompson Memo and its advancement policy. After describing the policy, several criticisms are presented. The criticisms are illustrated by the recently dismissed KPMG tax-shelter case, where the Thompson Memo was utilized by the DOJ to force the company to cut off advancement payments, despite the company's tradition of providing such payments.

A. The Lead-up to the Thompson Memo

Before 1999, the DOJ did not have a uniform charging policy for prosecutors to reference when determining whether to indict an organization.30 The lack of a uniform policy was a significant shortcoming for the DOJ and for companies faced with the possibility of indictment because a company's indictment usually carries with it a "virtual death sentence"31 for the business.32 Therefore, in June 1999,

30. Christopher A. Wray & Robert K. Hur, Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice, 43 AM. CRIM. L. REV. 1095, 1099 (2006). The DOJ did have its "Principles of Federal Prosecution" to aid in its determination of whether to pursue an entity's indictment, but these principles apply to all prosecutions and do not account for special considerations involved with indicting an organization. Id. at 1099 n.18. Mr. Christopher Wray was Deputy Attorney General Thompson's Associate Deputy Attorney General at the DOJ when the Thompson Memo was promulgated. See Thompson Memo, supra note 15, at Preface. In fact, Mr. Wray appears to have been heavily involved with the creation of the Memo, as evidenced by its explicit statement that any comments regarding the substance of the Memo should be forwarded to him. Id.

31. Wray & Hur, supra note 30, at 1097.

32. For example, the ninety-year-old accounting giant Arthur Andersen L.L.P. "implode[d]" after its 2002 company indictment concerning obstruction of justice charges related to Andersen's role in the Enron debacle. George Ellard, Making the Silent Speak and the Informed Wary, 42 AM. CRIM. L. REV. 985, 987 (2005). In fact, "[b]y the time the company was convicted [a conviction that was later overturned], it had, essentially, ceased to exist." Earl J. Silbert & Demme Doufekias Joannou, Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System, 43 AM. CRIM. L. REV. 1225, 1229 (2006). In addition, it is worth noting that financial services firms, accounting firms, and other firms that rely on their public reputation and perceived trustworthiness are impacted disproportionately by an indictment. With such firms, "[t]rial is unnecessary; the damage is done with the indictment." Dale A. Oesterle, Early Observations on the
Eric H. Holder, then the U.S. Deputy Attorney General, issued a policy memorandum (Holder Memo) identifying eight factors for prosecutors to consider when making a decision on whether to indict a company.33

Stated broadly, the eight factors of consideration in the Holder Memo included matters relating to the company’s immediate actions, the company’s propensity to commit such actions, the company’s remedial and cooperation efforts, and the company’s collateral consequences that may arise from a prosecution.34 Practically, the Holder Memo was simply an effort by the DOJ to promulgate more uniform criteria for prosecutors to consider when determining whether to indict an organization; conceivably, this guidance allowed business managers to organize their operations with greater certainty of avoiding possible criminal liability against the organization.35

However, following the wave of unprecedented corporate scandals in 2002, the DOJ decided that the Holder Memo was in need of a tactical adjustment.36 The adjustment came on January 20, 2003, by way of a memorandum from then Deputy Attorney General Larry D.
Thompson (Thompson Memo).\textsuperscript{37} The Thompson Memo was basically a recitation of the provisions in the Holder Memo\textsuperscript{38} with only a few slight changes.\textsuperscript{39} However, the Thompson Memo highlighted the changes made to the DOJ policy by explaining that “[t]he main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation’s cooperation.”\textsuperscript{40}

B. Cooperation (and Capitulation) Under the Thompson Memo

1. The Thompson Memo’s Cooperation Demands

The Thompson Memo outlined three general issues for prosecutors to consider when determining whether a particular organization was cooperating with an investigation.\textsuperscript{41} First, the company’s disclosures had to be complete, including if necessary, waiving the attorney-client and work product privileges.\textsuperscript{42} Second, the organization could not “appear[] to be protecting its culpable employees and agents” by advancing them attorney fees, by providing them with information from the government about the investigation, or by retaining their services without sanction.\textsuperscript{43} Finally, the company could not engage in actions that impeded an investigation, while at the same time purporting to be cooperative.\textsuperscript{44} For example, an organization could not make overly broad or incomplete assertions that would likely mislead the investigation.\textsuperscript{45}

More specifically, the determination of whether a company was cooperating in an investigation would vary in each case depending on

\textsuperscript{37} Thompson Memo, supra note 15.
\textsuperscript{38} Carmen Couden, Note, The Thompson Memorandum: A Revised Solution or Just a Problem?, 30 J. CORP. L. 405, 413 (2005).
\textsuperscript{39} The Thompson Memo changed the policy in the following ways: (1) by stating explicitly that “[t]he nature and seriousness of the offense may be such as to warrant prosecution regardless of the other factors”; (2) by giving closer scrutiny to corporate compliance programs; (3) by instructing prosecutors to assess the company’s cooperation more closely; and (4) by adding a ninth factor for prosecutors to consider—“the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance.” See Thompson Memo, supra note 15, at pts. II.A.8, II.B, VI, VII; see also Couden, supra note 38, at 413–14 (citing the differences in the Holder Memo and the Thompson Memo).
\textsuperscript{40} Thompson Memo, supra note 15, at Preface.
\textsuperscript{41} See id. at pt. VI.B.
\textsuperscript{42} Id. The government argued that the waiver of privileges is “often critical in enabling the government to evaluate the completeness of a corporation’s voluntary disclosure and cooperation.” Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
the facts relevant to the Thompson Memo provisions and on the interplay amongst the Thompson Memo's nine factors. Some examples of actions taken by organizations acting cooperatively under the Thompson Memo guidelines include the following: making employees available to testify as witnesses without subpoenas, terminating employees who were accountable for the underlying conduct and employees who refused to cooperate with the investigation, sharing records and data gathered during the company's internal investigations with the prosecution, despite claims of privilege, and agreeing to use outside professionals, such as accountants and lawyers, who were recommended by the government to evaluate the company's current operations.

2. The DOJ's Defense of Its Reinvigorated Cooperation Policy

Due to the difficulties that usually accompany the investigation of an organization, the DOJ deems an organization's cooperation to be an important factor in determining whether to pursue an indictment. The DOJ defends this policy by arguing that the government has finite resources to spend on any given investigation, so it makes sense for it to incentivize companies to cooperate by giving them benefits in the charging decision for doing so. By using organizations' formidable resources to supplement what the government has available, the efficiency and effectiveness of government investigations increases.

Additionally, the DOJ argues that a company's cooperation in a particular investigation is a voluntary decision and that the Thompson Memo did not require organizations "to do anything [that was] not in their business interest to do." Furthermore, Mr. Thompson, and

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46. The nine factors included the eight factors carried forward from the Holder Memo, see Holder Memo, supra note 33; see also supra note 34, and the addition of the ninth factor considering the "adequacy of the prosecution of individuals responsible" for the organization's actions, see Thompson Memo, supra note 15; see also Holder Memo, supra note 33; supra note 39.
47. Wray & Hur, supra note 30, at 1135–36.
48. Id. at 1136.
49. Because a company is an artificial entity, it is often difficult to identify the responsible party for the criminal actions imputed to an organization, and because companies are not generally situated in only one location, the gathering and compiling of witnesses, documents, and other records may be difficult due to their geographic dispersion. McNulty Memo, supra note 24, at pt. VII.B; Thompson Memo, supra note 15, at pt. VI.B; see also Couden, supra note 38, at 411.
50. Wray & Hur, supra note 30, at 1170.
51. Id. at 1170–71.
52. Stephanie Kirchgaessner, Hardline Justice Department Starts to Feel the Heat: A
presumptively others at the DOJ, has previously proclaimed, "[I]t is always in the corporation's interest to cooperate fully with the government so that matters under investigation can be resolved as quickly and fairly as possible."\(^5\)

Therefore, the DOJ defended its cooperation policy under the Thompson Memo by arguing that it was not compelling organizations to do anything, but rather, it was providing them an opportunity to avoid the detriments of an indictment through voluntary cooperation.\(^4\)

3. Complaints Regarding Thompson-Style Cooperation

Despite the DOJ's rationale, the Thompson Memo's increased focus on cooperation was highly controversial. From the business community's perspective, cooperation is a significant risk because it may subject the company and its employees\(^5\) to additional criminal liability.\(^6\) Therefore, in order for that risk to be worth the reward of possibly avoiding an indictment, organizations must perceive the government to be fair and consistent in its determination of what constitutes cooperation;\(^7\) in other words, organizations must not feel like the government has become too demanding or over-aggressive in its pursuit of cooperation.\(^8\) Otherwise, organizations may begin to see fewer

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Recent Ruling That It Violated the Constitution Has Added to Pressure on the DOJ to Soften Its Tactics, FIN. TIMES (London), Aug. 2, 2006, at 2.

53. Larry D. Thompson, “Zero Tolerance” for Corporate Fraud, WALL ST. J., July 21, 2003, at A10. The assumption is that, all else equal, a quick investigation and resolution is better for the company, regardless of the outcome, because responding to an investigation diverts company resources and focus away from operating the business. See id.

54. Couden, supra note 38, at 410; Wray & Hur, supra note 30, at 1171.

55. Sometimes it is argued that only witnesses who have committed crimes should be reluctant to cooperate with investigators. For example, in an interview with the Wall Street Journal, Thompson said, “[I]f employees really don’t believe they acted with criminal intent, ‘they don’t need fancy legal representation’ to defend themselves.” N. Richard Janis, Is Justice at Risk? Company Counsel as Federal Agents, 15 N.J. LAW., Feb. 20, 2006, at A3. However, this line of reasoning overlooks the important fact that the boundaries of white-collar criminal liability are not always so clear as to what practices are illegal. In addition, white-collar indictments “often represent developments in criminal law,” so defendants could unknowingly be subjected to criminal liability while abiding by their normal employment practices and procedures. Ellard, supra note 32, at 989.

56. Wray & Hur, supra note 30, at 1171. In addition to possible criminal liability, the costs associated with cooperating are significant and may include civil liability stemming from the organization’s cooperation efforts, such as terminating employees, disclosing confidential documents, and waiving certain privileges. Michael A. Simons, Vicarious Snitching: Crime, Cooperation, and “Good Corporate Citizenship,” 76 ST. JOHN’S L. REV. 979, 981 (2002).

57. Wray & Hur, supra note 30, at 1171.

58. Id.
advantages in their strategies of cooperation and choose to stonewall when interacting with the investigative authorities.

However, the major criticism of the government's increased emphasis on cooperation under the Thompson Memo was that it gave prosecutors too much discretionary power, which in fact did enable them to be overly demanding and aggressive in their cooperation demands. The argument was that when a prosecutor threatened to indict a company, she was threatening the company's future viability as well. Therefore, a company faced with a possible criminal indictment had no bargaining power, and its only practical strategy was to abide with the government's heavy demands for cooperation.

In fact, one commentator noted that an organization's best bet in avoiding an indictment during the Thompson Memo era was to undertake "super cooperation" and make an immediate change in top management personnel. Another commentator stated similarly that, in terms of financial services companies, "[t]otal capitulation to

59. A somewhat more theoretical criticism of the Thompson Memo is that, because it was an internal DOJ policy, the entire document was implemented by the DOJ unilaterally and did not undergo any formal rule-making or legislative processes. Therefore, organizations were forced to live with the provisions of the Memo, essentially as law, without the provisions being subjected to any democratic scrutiny. See Harkness & Gabbay, supra note 32, at 19.

60. Ellard, supra note 32, at 993; see also Wray & Hur, supra note 30, at 1170–71.

61. Oesterle, supra note 32, at 473. The viability of a company is threatened by indictment because an indictment of a company is a "virtual death sentence." Wray & Hur, supra note 30, at 1097; see also supra notes 31–32 and accompanying text.

62. However, if an organization believed that "the possibility of a criminal conviction [was] only marginally less attractive than" the extreme level of cooperation it was required to provide, then the organization would not have cooperated because the burden of doing so was nearly equal to the burden associated with being indicted. See Wray & Hur, supra note 30, at 1171. While avoiding indictment is likely the ultimate objective for a company under governmental investigation, the impact of the company's decision to cooperate with the government can be detrimental for the company itself because many times when employees are fired, they disclose privileged communications, and they are forced to cooperate with investigators to keep their jobs. See Simons, supra note 56, at 997–98. This results in lower company morale and lower employee confidence in the organization. Id. at 998.

63. Oesterle, supra note 32, at 473–74, 476.

64. Simons, supra note 56, at 1017. Additionally, James Comey, Thompson's successor at the DOJ, said that in his view, "for a corporation to get credit for cooperation, it must help the Government catch the crooks." Janis, supra note 55 (emphasis added); see also Silbert & Joannou, supra note 32, at 1229 (quoting Christopher A. Wray, then the U.S. Assistant Attorney General, as saying, "[I]f you want to ensure that credit [for cooperation], your cooperation needs to be authentic: you have to get all the way on board and do your best to assist the government.") (emphasis added).

65. See supra text accompanying note 32 (discussing the extra burden an indictment brings financial services companies).
prosecutors by companies under threat of criminal sanction may be the only real business strategy left. . . ." 66 Essentially, the Thompson Memo's cooperation policy put "[t]he firm's life . . . in the hands and discretion of a prosecutor," and that policy enabled the government to impose very burdensome demands on the company. 67

One of the most burdensome and controversial provisions in the Thompson Memo's section on cooperation strongly discouraged organizations from advancing defense costs to its employees under investigation or indictment for work-related criminal activities. 68 The DOJ's enforcement of this provision raised significant criticism because many saw the practice as unreasonable and unjustifiable government interference with many white-collar defendants' rights and abilities to obtain representation of their choosing using all funds available to them.

C. Cutting off Advancement and the Problems Created

1. The DOJ's Policy Rationale for Discouraging Advancement

Specifically, the Thompson Memo stated that a business organization should not "appear[] to be protecting its culpable employees and agents" by undertaking the advancement of attorneys' fees to its workers who are under investigation or indictment. 69 The DOJ argued that advancing defense costs to employees under investigation or indictment was a "'breach of fiduciary duty [by the company] to the shareholders' and a 'misuse of shareholders' assets.'" 70

66. Oesterle, supra note 32, at 475.
67. Id. at 476.
68. Jeremy Harrell, Memo Echoes in Milberg Weiss Indictment, LONG ISLAND BUS. NEWS, May 26, 2006, at Commentary. The provision on waiving attorney-client privileges was probably equally controversial. Id.
69. Thompson Memo, supra note 15, at pt. VI.B.
70. Janis, supra note 55. However, the suggestion that the DOJ is truly concerned with the "'misuse of shareholders' assets'" appears questionable due to the substantial financial settlement agreements the department frequently requires from companies. Id.; see, e.g., infra note 118 (showing the KPMG settlement with the government to include a $456 million fine). Many corporate boards believe these settlements to be "wildly out of proportion to the conduct alleged, and often are seen . . . as an exorbitant cost of doing business, if not outright extortion." Janis, supra note 55. Furthermore, the argument that advancing defense costs would be a breach of the board's fiduciary duties does not generally carry much weight, at least in the corporate context, because "[t]he exercise of directors' fiduciary duties cannot . . . permit them to evade the corporation's own by-laws." United States v. Weissman, No. S2 94 Cr. 760, 1997 U.S. Dist. LEXIS 8540, at *52 (S.D.N.Y. June 16, 1997) (holding that a corporate board's fiduciary duties to its shareholders do not permit it to revoke advancement and indemnification rights granted to employees in the by-laws of the corporation).
Therefore, during the Thompson Memo era, if a company chose to advance defense costs to its employees without being legally bound to do so, then the government would deem the company uncooperative and an indictment would likely follow.\(^{71}\)

2. Problems and Threats for Employees and Their Firms Under the Thompson Memo Advancement Policy

However, the Thompson Memo policy on advancement of defense costs runs counter to a long-established common-law principle that says, "[I]f an agent has, without his own default, incurred losses or damages in the course of transacting the business of his agency, or in following the instructions of his principal, he will be entitled to full compensation."\(^{72}\) Although the common-law principle remains the same today, most states have broadened it by enacting statutes that permit\(^{73}\) organizations to advance defense costs to employees under investigation or indictment.\(^{74}\)

Because the DOJ policy announced in the Thompson Memo was at odds with many employees' traditional rights of indemnification and advancement, the Memo and the DOJ received significant criticism for making cooperation dependent upon the company's decision of whether to make advancement payments. The most common criticisms are summarized in this section.

\(^{71}\) See Silbert & Joannou, supra note 32, at 1238 (quoting Judge Lewis Kaplan as saying that "if advancement of legal fees is not required by law, their advancement will be considered a failure to cooperate. I mean, you don't have to be a rocket scientist to understand that [Thompson] memorandum.") (emphasis added).


\(^{73}\) These statutes permit the organization to advance defense costs, but they do not require such advancements. See, e.g., DEL. CODE ANN. tit. 8, § 145(e) (2001) (stating that expenses "may be paid by the corporation in advance") (emphasis added); MODEL BUS. CORP. ACT § 8.53(a) (2005) ("A corporation may, before final disposition of a proceeding, advance funds.") (emphasis added); Homestore, Inc. v. Tafeen, 888 A.2d 204, 218 (Del. 2005) ("No Delaware corporation is required to provide for advancement of expenses."). However, most companies "do adopt advancement provisions as an inducement which promotes ... attracting the most capable people into ... service." Id.

\(^{74}\) FLETCHER, supra note 13, § 1344.10; see, e.g., tit. 8, § 145(e); MODEL BUS. CORP. ACT § 8.53(a) (2005). Advancement is conditional upon a successful defense, so if the employee is convicted after receiving payments, then he must reimburse the company for the payments made. See tit. 8, § 145(e); MODEL BUS. CORP. ACT § 8.53(a)(2) (2005); FLETCHER, supra note 13, § 1344.10.
a. The Overwhelming Financial Burden for Individual Defendants

Without the benefit of advancement payments, most individuals are unable to afford an adequate defense for most white-collar criminal charges. The advancement of defense costs allows individuals "immediate interim relief from the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with investigations and legal proceedings." It is an important corollary to indemnification rights because it "fills the gap so the [organization] may shoulder . . . interim costs." The financial protections provided by the advancement of defense costs allow defendants the "ability to mount . . . a defense . . . by safeguarding [their] ability to meet [their] expenses at the time they arise, and to secure counsel on the basis of such an assurance."

On the other hand, if the company does not advance defense costs to its employees, then there is a danger that they will receive inadequate representation, or maybe no representation at all, considering most white-collar defendants do not qualify for court-appointed counsel.

b. The Dependence on Advancement Rights as an Employment Benefit

Furthermore, employees are dependent upon their employers to provide indemnification and advancement payments as part of their

75. *Homestore*, 888 A.2d at 211.

76. The "gap" being referred to here is the gap of time from indictment to final disposition where, without the benefit of advancement payments, an employee would be responsible for providing her own defense costs. Indemnification does not become effective until after final disposition, so without advancement rights, an employee is on her own during the course of the litigation. Therefore, advancement of defense costs has become pivotal for employees facing criminal charges arising from their jobs. *See also supra* notes 10–13 and accompanying text.


79. See, e.g., *supra* note 7 (showing the defense attorney seeking an application for withdrawal due to unpaid fees incurred in a white-collar defense costing nearly $18 million); *supra* note 10 (showing the tremendous financial burden that white-collar defense can have on individual defendants, even to the point of attorneys seeking permission to withdraw from representation); *see also* United States v. Stein (*Stein III*), 461 F. Supp. 2d 201, 203 (S.D.N.Y. 2006) (quoting one defendant's attorney as saying, "I don't have anything. . . . I have no staff. I'm basically by myself. The case has gotten longer and longer and more and more complex and more and more and more documents. And without relief in the fee case, I really don't know that I'll even be able to stay in this case, although I can tell you that I've tried everything humanly possible to do that and not to make an application like that [i.e., to be relieved], for many obvious reasons.") (insertion in original).
expected benefits of employment. As a result, individuals have come to rely on advancement rights just as much as other employee benefits, such as health benefits or retirement packages.

Consequently, by strongly discouraging advancement of defense costs, the Thompson Memo significantly disrupted the employment bargain between employer and employee and the employees' 

80. Janis, supra note 55. The employee’s dependence is a result of the massive amount of resources required to respond to the investigation and to defend one’s self, if necessary, in a white-collar context. Id.

81. Brian W. Walsh, Justice’s Trap for Unwary Employees: Cooperate or Else, SALT LAKE TRIB., Sept. 29, 2006, at Opinion. The following short story illustrates the vulnerability of the modern-day employee:

Imagine that after almost 10 years at your company, you’ve been promoted to supervisor of the finance department. Lately you’ve heard through the grapevine that the company is the subject of a federal criminal investigation, but you know you’ve done nothing wrong.

As you walk into your office one Monday morning, coffee in hand, you get a call from your company’s legal department. An attorney you’ve never met tells you that the federal prosecutors investigating the company would like to speak with you. You aren’t technically required to cooperate, he says, but it would be best for everyone if you did.

Your pulse races. What answer do you give? If you say yes, could you be waiving some important right? If you say no, do you look suspicious?

But, you remind yourself, you’ve done nothing wrong. Even if you inadvertently violated some federal law you knew nothing about during the course of your normal duties, your company will defend you and give you your own lawyer if you end up needing one. Right?

Id.

82. See United States v. Stein (Stein II), 435 F. Supp. 2d 330, 335 (S.D.N.Y 2006). The right to advancement of defense costs for matters arising from a person's job “is very much a part of American life.” Id. (emphasis added). Judge Kaplan explains how advancement is crucial for most people who work:

Persons in jobs big and small, private and public, rely on it every day. Bus drivers sued for accidents, cops sued for allegedly wrongful arrests, nurses named in malpractice cases, news reporters sued in libel cases, and corporate chieftains embroiled in securities litigation generally have similar rights to have their employers pay their legal expenses if they are sued as a result of their doing their jobs. This right is as much a part of the bargain between employer and employee as salary or wages.

Id. (emphasis added).
expectations regarding their organizations' provision of financial assistance in defending lawsuits that arise from their employment.

c. The Organizational Benefits Derived from Advancement

Additionally, advancement not only helps ensure the individual defendants' abilities to hire adequate private defense counsel, it also encourages service in organizations "by protecting their personal financial resources from depletion [as a result of] ... litigation that results by reason of that service." Without advancement of defense costs for matters arising as part of an individual's employment, firms would experience more difficulties attracting and keeping a talented workforce because "[o]nce the company is forced to withdraw its support, its employees are left to fend for themselves in any ensuing legal battles that may develop." Therefore, as Professor Larry Ribstein and others point out, without such protections, individuals may forego certain business practices or employment in certain industries altogether, due to the risk of having to defend a criminal indictment without financial assistance from the organization.

d. The Employee's Presumption of Innocence

A more fundamental argument in opposition to the Thompson Memo policy against advancement is that it disposed of the most basic right in United States criminal justice—for defendants to be presumed innocent until proven guilty. Under the Thompson Memo, in order to have been seen as cooperative in the government's investigation, "[t]he minute an employee [was] charged with a federal crime connected with his work—long before his 'culpability' [had] been determined in court, and even if the company believe[d] him to be innocent—the company

84. Couden, supra note 38, at 420.
85. See Ideoblog, http://busmovie.typepad.com/ideoblog/2006/06/the_kpmg_decisi.html (June 29, 2006, 05:34); see also Scharf v. Edgcomb Corp., C.A. No. 15224, 1997 Del. Ch. LEXIS 169, at *14–15 (Dec. 2, 1997) ("Indemnification for officers and directors should be seen as less an individual benefit arising from personal employment than as a desirable underwriting of risk by the corporation in anticipation of greater corporate-wide rewards."); United States v. Weissman, No. S2 94 Cr. 760, 1997 U.S. Dist. LEXIS 8540, at *7 (S.D.N.Y. June 16, 1997) (quoting the defendant, former Chief Financial Officer (CFO) of the company, as saying that he "would not have accepted the position of [CFO] if such indemnification [and advancement] was not provided").
[would] fire him and cut off all support for his defense." As a result, the pressure exerted on companies by the Thompson Memo's advancement policy forced them to deprive their employees of their basic right to presumptive innocence and to treat them as if they were already found culpable in the crimes alleged.

e. The Employee's Rights to Counsel and a Fair Trial

Finally, one of the most influential criticisms put forward against the Thompson Memo's advancement policy was that the policy "impair[ed] the ability of natural persons to enjoy the rights the Constitution grants them." In fact, during the KPMG tax-shelter cases, the constitutionality of the Thompson Memo and the DOJ's advancement policy were attacked by Judge Kaplan from the Southern District of New York. During 2002 and 2003, KPMG, one of the world's largest accounting firms, came under an Internal Revenue Service (IRS) investigation concerning tax shelters. Several of KPMG's top partners and employees were called to testify before the U.S. Senate at a hearing concerning the "development, marketing and implementation of abusive tax shelters." Following these developments, Eugene O'Kelly, then the

88. Ellard, supra note 32, at 994.
90. See Stein II, 435 F. Supp. 2d at 382 (declaring "that so much of the Thompson Memorandum and the activities of the USAO as threatened to take into account, in deciding whether to indict KPMG, whether KPMG would advance attorneys' fees to present or former employees in the event they were indicted for activities undertaken in the course of their employment interfered with the rights of such employees to a fair trial and to the effective assistance of counsel and therefore violated the Fifth and Sixth Amendments to the Constitution").
93. The terms "partner" and "employee" are used interchangeably in reference to this case because the distinction is immaterial as it relates to the issue of advancing defense costs for the individual.
94. Specifically, the Senate hearing took place under the auspices of the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs. See id.
95. Id. Some, including Judge Kaplan, have referred to this case as "the largest tax fraud case in United States history." Id. at 362; see also Jonathan D. Glater, & Former Partners of
Chairman of KPMG’s Board of Directors, retained legal representation from the well known law firm of Skadden, Arps, Slate, Meagher & Flom LLP (Skadden) to develop a “cooperative approach” in responding to the IRS inquiry.\(^9\)

However, in early 2004, despite the firm’s cooperative strategy and its termination of several top employees,\(^97\) the IRS made a criminal referral of the KPMG matter to the DOJ.\(^98\) The referral was passed along to the United States Attorney’s Office (USAO) for the Southern District of New York where it arrived on February 5, 2004.\(^9\) At the USAO, the case was supervised by Shirah Neiman\(^100\) and two Assistant United States Attorneys (AUSAs), Mr. Weddle and Mr. Okula.\(^101\) Upon learning that the referral had reached the USAO, Skadden scheduled a meeting with the USAO for February 25, 2004, to discuss the matter.\(^102\)

During the initial meeting between Skadden and the USAO, the subject of legal fees came up almost immediately.\(^103\) Skadden informed the USAO that it had always been KPMG’s customary practice to pay the legal fees of its employees.\(^104\) However, Skadden qualified its statement by saying that KPMG would not pay legal fees for those employees who do not cooperate with the investigation or for those

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\(^9\) Stein II, 435 F. Supp. 2d at 339.
\(^97\) The following defendants, former senior partners, were terminated by KPMG after their Senate testimony: Jeffrey Stein, Richard Smith, and Jeffrey Eischeid. Id.
\(^98\) Id.
\(^99\) Id. at 339–40.
\(^100\) Ms. Neiman was a participant in the drafting of the Holder Memo, the predecessor to the Thompson Memo. Id.
\(^101\) Id. at 341.
\(^102\) Id. at 340–41.
\(^103\) See id. at 341. The initial discussion dealt with the structure of KPMG and any potential conflicts of interest in the case. See id. Following the preliminary dialogue, the advancement of legal fees was the main issue on the USAO’s agenda. See id.
\(^104\) Id. at 342. It is interesting to note, as the court does in later proceedings, that when Mr. O’Kelly, the director of KPMG, first announced that the firm was being investigated, but before the initial meeting with the USAO, he stated the following to his employees:

> Finally, you should expect that I and other members of leadership will work diligently to bring this matter to a successful conclusion, provide you with all the necessary support and keep you updated on a periodic basis. 
> 
> In closing, I ask that you exhibit the resolve that you’ve shown throughout the Xerox investigation which defines what makes us a great firm.

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United States v. Stein (Stein IV), 495 F. Supp. 2d 390, 407 (S.D.N.Y. 2007). Notably, in the Xerox investigation referenced by Mr. O’Kelly, KPMG expended over a total of $20 million dollars in defense costs for four of its employees involved in the investigation. Id. at 408.
employees who invoke their Fifth Amendment right against self-incrimination.  

After hearing this pronouncement, Ms. Neiman emphasized the guidance offered by the Thompson Memo as it relates to advancement and said "‘misconduct’ . . . cannot ‘be rewarded.’" Mr. Weddle followed up Ms. Neiman’s statement by saying, “[I]f u [sic] have discretion re[garding] fees—we’ll look at that under a microscope.” At the conclusion of their initial meeting, it was clear that although the USAO did not specifically express itself, “it did not want KPMG to pay legal fees.”

Following their meeting, in March 2004, Skadden requested that the USAO notify it if any KPMG employees were not cooperating with the investigation. Subsequently, when the USAO did notify Skadden of uncooperative employees, Skadden would contact those employees’ representatives and stress that advancement of defense costs by KPMG was conditional upon the employees’ full cooperation with the investigation. Skadden emphasized that those employees not cooperating would be terminated and their advancement of funds would be cut off.

When the investigation concluded, Skadden met with then Deputy Attorney General James Comey in Washington to persuade the DOJ that KPMG had been cooperative and that an indictment was unnecessary. Skadden emphasized the fact that it had conditioned advancement of attorneys’ fees on each employee’s full cooperation with the investigation and that it had pressured employees to

105. Stein II, 435 F. Supp. 2d at 342. Ultimately, KPMG decided to cap advancement of defense costs at $400,000 per employee and condition the advancement on the employee’s cooperation with investigators. Id. at 345. In addition, KPMG said it would immediately cease payments if the employee was indicted. Id. at 345–46.

106. See supra Part II.C.1.


108. Id. at 344.

109. Id. The court said, “[N]o one at the meeting could have failed to draw that conclusion.” Id.

110. Id. at 347.

111. Id.

112. Id.

113. See supra note 64.


115. Id. at 349. Skadden argued that KPMG “had done something ‘never heard of before’” by conditioning advancement of defense costs on the employee’s cooperation. Id.
cooperate by holding the payment of fees over their heads. Skadden argued that the cooperation exhibited by KPMG in this case was at "a level . . . that is rarely done." On August 29, 2005, KPMG realized the success of its cooperative approach to the investigation by avoiding indictment and entering into a Deferred Prosecution Agreement (DPA) with the DOJ. However, around the same time, the government indicted the individuals under investigation, and as promised, KPMG proceeded to cut off payment of their defense costs.

Consequently, on January 19, 2006, the KPMG defendants filed a motion to dismiss their indictment, arguing that "the government had interfered improperly with the advancement of attorneys’ fees by KPMG in violation of their constitutional and other rights." In opposition, the government argued that KPMG decided by itself to cut off the payment of legal fees and that the government had not "coerce[d]" or "bull[ied]" KPMG into making its decision.

After hearing the arguments for each side, Judge Kaplan ruled that

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116. Id. Skadden explained to the DOJ that KPMG “took action” whenever it was notified of an uncooperative employee. Id. It argued that by taking such actions, “current or former personnel who otherwise would not have cooperated did cooperate, and those who did not had their fees cut off and, in two instances, were separated from the firm.” Id.

117. Id.

118. Id. The DPA required KPMG to admit wrongdoing, to accept charges in a one-count information, to pay a $456 million fine, to accept restrictions on its business practices, and to continue cooperating with the government. Id. If KPMG abided by all such requirements, then the government promised to dismiss the indictment against KPMG. Id.

119. There were eighteen individuals indicted, sixteen of which were former KPMG partners. Rodney R. Peck et al., United States v. Stein: DOJ Policy Threatening Companies with Indictment Based upon Advancement of Employee Legal Fees Ruled Unconstitutional, MONDAQ, Aug. 9, 2006, http://www.mondaq.com/article.asp?articleid=41880&login=true.

120. Stein II, 435 F. Supp. 2d at 350.

121. Id.

122. Id. In furtherance of its argument, Mr. Weddle prepared a declaration where he recounted the USAO’s initial meeting with Skadden on February 25, 2004, see supra text accompanying notes 103–09, and said the USAO “did not instruct KPMG whether KPMG should pay legal fees, whether KPMG should cap the payment of legal fees, or whether KPMG should condition the payment of legal fees,” Stein II, 435 F. Supp. 2d at 351–52 (emphasis omitted). However, Judge Kaplan did not seem persuaded by the “freedom of choice” argument offered by the government. Editorial, Corporate Injustice, WALL ST. J., Apr. 6, 2006, at A14. In fact, at a pretrial hearing, Mr. Weddle argued that “companies are free to say, ‘We’re not going to cooperate’” to which Judge Kaplan responded candidly, “That’s lame.” Id.

123. Although KPMG was not an official party to this case, the firm was allowed to participate in the proceedings, and it submitted a brief on the issue. Stein II, 435 F. Supp. 2d at 352.
the government had violated the individual defendants' Fifth and Sixth Amendment rights by causing KPMG to "cut [off] payment of [legal] fees and [other] defense costs [upon] indictment." Although Judge Kaplan did not dismiss the indictments immediately—he did eventually do so—he ordered that KPMG be allowed to advance the defendants' defense costs without interference by the government. Judge Kaplan did not base his decision on the fact that all employees have a constitutional right to have their legal costs paid by their employers; rather, he held that the government could not interfere unreasonably or unjustifiably with a defendant's constitutional

124. In relevant part, the Fifth Amendment states, "[N]or shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

125. The Sixth Amendment states the following: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense." Id. at amend. VI.

126. The court found that "KPMG's decision to cut off all payments of legal fees and expenses to anyone who was indicted and to limit and to condition such payments prior to indictment upon cooperation with the government was the direct consequence of the pressure applied by the Thompson Memorandum and the USAO." Stein II, 435 F. Supp. 2d at 353.

127. Id. at 356.

128. Id. at 374 (holding dismissal to be inappropriately premature because other remedies had not been exhausted to "restore[] [the defendants] to the position they would have occupied but for the government's interference"). But see United States v. Stein (Stein IV), 495 F. Supp. 2d 390, 427 (S.D.N.Y. 2007) (dismissing the charges against almost all of the individual defendants).

129. Id. The Second Circuit Court of Appeals ruled that the district court in this case did not have the power to exercise ancillary jurisdiction over fee advancement claims made by the individual defendants against KPMG. Stein v. KPMG, LLP, 486 F.3d 753, 756 (2d Cir. 2007); see infra note 130. Also, the district court was unsuccessful in its attempt to have the individual defendants and KPMG negotiate a settlement for the advancement of defense costs. Stein IV, 495 F. Supp. 2d at 394 n.6. Therefore, the individual defendants renewed their motion for dismissal, and for most of them dismissal was granted by Judge Kaplan, see id. at 425–27, "only after pursuing every alternative short of dismissal and only with the greatest reluctance," id. at 427. Upon the individual defendants' final motion for dismissal, the Government conceded dismissal as to all but three defendants, the same three who were not granted dismissal. Id. at 423, 425, 427. Apparently, "[t]he government wanted the dismissal," so it could appeal Judge Kaplan's ruling that the application of the Thompson Memo in this case was unconstitutional. Lynneley Browning, Prosecutors in KPMG Case Appeal Dismissal of Charges, N.Y. TIMES, July 19, 2007, at C4 (quoting Barry Boss, a defense attorney for Cozen O'Connor in the District of Columbia). The appeal was filed with the Second Circuit on July 16, 2007, the same day as Judge Kaplan's dismissal order was issued. See id.

130. Stein II, 435 F. Supp. 2d at 380. The court gave two alternatives: (1) KPMG could reinstate the advancement payments on its own, or (2) the defendants could obtain an order from the court demanding that KPMG make the advancement payments. Id.

131. See Colvin, supra note 87.
guarantees of a fair trial and effective assistance of counsel. Specifically, the court found that the government's interference with the defendants' ability to choose their own counsel and to use otherwise available resources for their defense costs resulted in a lack of fundamental fairness and an infringement on the defendants' due process rights under the Fifth Amendment. "In short, fairness in criminal proceedings requires that the defendant be firmly in the driver's seat, and that the prosecution not be a backseat driver."

Although the government submitted three justifications for its advancement policy, none were narrowly tailored to achieve the government's compelling interest in investigating and prosecuting crime. Therefore, the DOJ policy did not meet the strict scrutiny test.

133. Id. at 362; see Stein IV, 495 F. Supp. 2d at 422 ("A criminal defendant has a constitutional right 'to control the presentation of his defense.'") (quoting Lainfiesta v. Artuz, 253 F.3d 151, 154 (2d Cir. 2001), cert. denied, Lainfiesta v. Greiner, 535 U.S. 1019 (2002)); see also United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2563 (2006) (holding that the unjustified interference with the right to choose one's counsel violates the Sixth Amendment without regard to prejudice). The court demonstrated that the government's interference would affect the defendants' representation:

To prepare for and try a case of such length requires substantial resources. Yet the government has interfered with the ability of the KPMG Defendants to obtain resources they otherwise would have had. Unless remedied, this interference almost certainly will affect what these defendants can afford to permit their counsel to do. This would impact the defendants' ability to present the defense they wish to present by limiting the means lawfully available to them.

Stein II, 435 F. Supp. 2d at 362.
134. Id. at 365; see Stein IV, 495 F. Supp. 2d at 409 (finding that the actions of the AUSAs in this case "shock[] the conscience"); see also County of Sacramento v. Lewis, 523 U.S. 833, 845–53 (1998). In County of Sacramento, the court tested whether challenged government action of a particular employee "shocks the conscience" in reference to substantive due process protections against "the [government's] exercise of power without any reasonable justification in the service of a legitimate governmental objective." 523 U.S at 846.

136. Id. at 363. The justifications advanced by the government were the following: (1) the policy "is intended to facilitate just charging decisions concerning business entities by focusing on a consideration pertinent to gauging their degrees of cooperation"; (2) the policy "seeks to strengthen the government's ability to investigate and prosecute corporate crime by encouraging companies to pressure their employees to aid the government"; and (3) the policy "seeks to punish those whom prosecutors deem culpable." Id.

137. Id. at 364. The court explained why the Memo infringed on the defendants' constitutional rights by interfering with KPMG's advancement policy: [T]his aspect [advancement] of the Thompson Memorandum is not narrowly
applied to fundamental rights, and it was held to be in violation of the Due Process Clause of the Fifth Amendment.  

Moreover, Judge Kaplan recognized that the Thompson Memo and the DOJ violated the defendants' Sixth Amendment right to counsel as well. The court stated that the Thompson Memo and the government infringed upon the defendants' right to choose their own lawyers and to utilize all available funds for their defense.

In order for the government's interference to have been justified, the court needed to find that the government's interests in law enforcement sufficiently outweighed the defendants' interests in accessing the resources available to them for raising an adequate defense. However, the court rejected the government's explanation by finding that although "advancement of legal fees occasionally might be part of an obstruction scheme or indicate a lack of full cooperation . . . [, that] is insufficient to justify the government's interference with the right of
tailored to achieve a compelling objective. It discourages and, as a practical matter, often prevents companies from providing employees and former employees with the financial means to exercise their constitutional rights to defend themselves. . . . It therefore burdens excessively the constitutional rights of the individuals whose ability to defend themselves it impairs and, accordingly, fails strict scrutiny.

Id. at 364-65.

138. Id. at 365; see also Stein IV, 495 F. Supp. 2d at 409 (finding that the actions of the AUSAs in this case “shock[ed] the conscience” under County of Sacramento, 523 U.S. 833 (1998)).

139. Stein II, 435 F. Supp. 2d at 365-69. The court rejected two arguments set forth by the government saying that the Sixth Amendment should not apply in this case. See id. at 366-67. First, the government argued that the Sixth Amendment "attaches only upon the initiation of a criminal proceeding" and the alleged government interference took place pre-indictment. Id. at 366. The court rejected this argument by reasoning that although the government's actions did take place pre-indictment, its actions were known to likely have "an unconstitutional effect upon indictment." Id. Second, the court rejected the government's argument that the defendants were seeking to spend "other people's money," because the defendants had a reasonable expectation that any legal expenses arising from their employment at KPMG would be paid by the firm. Id. at 367.

140. Id. at 366; see Stein IV, 495 F. Supp. 2d at 422; see also United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2563 (2006) ("Deprivation of the right [to counsel] is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received."). Explaining the violation, the court said, "The government here acted with the purpose of minimizing these defendants' access to resources necessary to mount their defenses or, at least, in reckless disregard that this would be the likely result of its actions." Stein II, 435 F. Supp. 2d at 366-67. Furthermore, the court stated that the Thompson Memo "undermines the proper functioning of the adversary process that the Constitution adopted as the mode of determining guilt or innocence in criminal cases." Id. at 368-69.

141. Id. at 368.
individual criminal defendants to obtain resources lawfully available to them in order to defend themselves.”

Therefore, Judge Kaplan ruled that the DOJ’s advancement policy and the application of the Thompson Memo in this case violated the defendants’ Sixth Amendment rights.

Judge Kaplan’s opinion marked the first time a federal court took the DOJ to task over the “inherent unfairness of the Thompson Memo,” and the decision to do so was met with mostly enthusiastic praise. Moreover, because the decision was from the well-respected Southern District of New York, it had great impact potential. For example, Professor Ribstein predicted that the decision would be “a landmark.” Others suggested that it had “the potential of being a watershed case that [would] operate as a signal to the U.S. attorneys not to use the guidelines as a coercive vehicle.”

The true impact of Judge Kaplan’s decision on the DOJ is unknown, but the decision certainly added to the mounting pressure on the DOJ to revise the Thompson Memo and its advancement policy. In fact, the pressure became so great that the DOJ revised the Thompson Memo on

142. Id. at 369.
143. Id. at 365–69. The court did not require that the defendants make a showing of prejudice as is normally required in Sixth Amendment cases, Strickland v. Washington, 466 U.S. 668, 692 (1984), because the defendants were deprived outright of the right to choose their own counsel, see Gonzalez-Lopez, 126 S. Ct. at 2563.
144. Jack King, NACDL News: KPMG Case Is a Victory over the Thompson Memo, 30 CHAMPION, Aug. 2006, at 6; see also Browning, supra note 35.
145. For example, the July 24, 2006 edition of Fortune magazine opens a column with the following: “Thank you, Judge Lewis A. Kaplan. You’ve just done a big favor to anyone who could conceivably be charged, even unjustly, with a federal crime in connection with his or her job—which means anyone who works.” Colvin, supra note 87. On the other hand, some critics attacked Judge Kaplan for basing his decision on constitutional protections, despite Kaplan’s use of U.S. Supreme Court precedent. Posting of Dale Oesterle to Business Law Prof. Blog, http://lawprofessors.typepad.com/business_law/2006/06/the_kpmg_case.html (June 28, 2006) (stating that simply because a policy may be unfair does not make it unconstitutional). Another suggestion is that the decision could work in favor of the DOJ’s advancement policy. Professor Peter J. Henning says that insurers selling directors and officers coverage may begin to impose their own Thompson-like requirements in their policies by capping advancement payments and by requiring that payments be discontinued upon an individual’s indictment. Id. If so, Henning argues that companies will then be forced to impose formal limits and cut-off points for their own advancement policies, leaving more employees on their own without the support of their organizations. Id.
146. Peck et al., supra note 119.
147. Ideoblog, supra note 85.
148. Lynnley Browning, U.S. Tactic on KPMG Questioned, N.Y. TIMES, June 28, 2006, at C1 (quoting Steven J. Bronis, Chairman of the white-collar crime section of the American Bar Association).
December 12, 2006, less than three years after its promulgation.149

III. THE MCNULTY MEMO: REVISIGN THE DOJ’S ADVANCEMENT POLICY (SORT OF)

Here, the DOJ’s motivation for amending its advancement policy is discussed and the revisions contained in the McNulty Memo are presented. Then, the McNulty Memo’s lack of substantive change regarding advancement is illustrated, and finally, the possibility of congressional intervention is introduced.

A. Criticism of the Thompson Memo Motivates McNulty

Although Judge Kaplan’s decisions in the KPMG tax-shelter cases150 may have helped focus greater attention on the Thompson Memo’s advancement policy151 and in hastening the DOJ’s decision to revise its policy,152 it was not the only criticism that levied pressure on the DOJ to make an immediate change. In fact, a broad coalition of organizations and individuals had voiced their displeasure with regard to the advancement provisions in the Thompson Memo during the months immediately preceding the DOJ’s revision.153 Even former Deputy Attorney General Thompson154 said that the DOJ was using the

149. McNulty Memo, supra note 24.
154. See supra text accompanying note 15.
Thompson Memo too aggressively and that "the [DOJ] should consider perhaps making appropriate revisions to the memo." Moreover, on December 8, 2006, Senator Arlen Specter, then Chairman of the Senate Judiciary Committee, introduced the Attorney-Client Privilege Protection Act of 2006; the Act included, among other provisions, language that would completely prohibit federal government agents from conditioning an indictment on whether the company was cooperating by not advancing defense costs to its employees.

In the face of such widespread criticism, seemingly coming from all angles, the DOJ made a decision to revise the Thompson Memo, especially in relation to its advancement policy. Although Deputy Attorney General McNulty states that the DOJ's revisions were made after reviewing and meeting with "those in the business and legal communities who raised concerns about the [DOJ's] guidance," many speculate that the changes were made simply to fend off possible legislation and quiet the chorus of discontent.

Whatever the true motivation for the DOJ's policy shift concerning advancement may have been, the change was formally introduced on December 12, 2006, and has since been referred to as the McNulty Memo.
B. The Advancement Policy Under the McNulty Memo

1. The McNulty Memo Cover Letter—An Attempt to Frame the Issue

Preceding the text of the McNulty Memo is a cover letter from Deputy Attorney General McNulty that begins by touting the DOJ's "unprecedented success in prosecuting corporate fraud during the last four years," and he claims that the most significant success realized has been the increased recognition of the need for cooperation on the part of business organizations.\(^1\) Additionally, the cover letter states that he "remain[s] convinced that the fundamental principles that have guided [the DOJ's] enforcement practices are sound . . . [and] are welcomed by most corporations . . . because good corporate leadership shares many of our goals."\(^2\)

However, McNulty continues the letter by recognizing that many "responsible corporate officials" have expressed their concerns with the "challenges they face in discharging their duties to the corporation while responding in a meaningful way to a government investigation."\(^3\) Then, the letter concludes with McNulty revealing that the DOJ has decided to "adjust certain aspects" of its organizational charging policy "in ways that will 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.\(^4\)

Therefore, on its face, the cover letter is an attempt to set the stage for the text of the McNulty Memo by stating up-front that the DOJ does not see its charging practices as flawed or over-aggressive.\(^5\) Rather, the DOJ seems to take the position that the policies articulated in the Thompson Memo are simply unclear in practice and that the McNulty Memo revisions will restore clarity to the organizational charging guidelines.\(^6\) However, this is inconsistent with the fact that the text of the McNulty Memo significantly alters the DOJ's practices in regards to

\(^1\) McNulty Memo Cover Letter, supra note 162, at 1; see also supra text accompanying note 163.

\(^2\) Id. at 1; see also supra text accompanying note 163.

\(^3\) Id. at 2.

\(^4\) Id. at 1; see also supra text accompanying note 166.

\(^5\) Id. at 1; see also supra text accompanying note 167.
advancement, at least in theory. Consequently, the McNulty Memo Cover Letter is most likely nothing more than an instrument to help frame the DOJ’s revisions in a light that downplays its backtracking on the use of overly aggressive practices, such as discouraging organizations from advancing defense costs to its employees.

2. The McNulty Memo Revisions

The McNulty Memo itself begins with a newly created section that outlines the duties of federal prosecutors and corporate leaders. It points out that prosecutors, by investigating and prosecuting wrongdoing, and business leaders, by properly exercising their fiduciary duties, have a shared responsibility in promoting public trust and confidence in business organizations and markets. By doing so, the McNulty Memo makes clear that the DOJ continues to encourage and to expect organizations under investigation to cooperate with the government in an effort to punish wrongdoers, despite the changes made to the organizational charging policy.

Beyond that, there are only a few actual substantive changes made by the McNulty Memo relative to the Thompson Memo. First, the section entitled “Factors to Be Considered” amends the previous language of the Thompson Memo by eliminating provisions that allow prosecutors to consider the organization’s waiver of the attorney-client and work product privileges when determining the organization’s level of cooperation. Additionally, the section entitled “The Value of Cooperation” replaces the section in the Thompson Memo entitled “Charging a Corporation: Cooperation and Voluntary Disclosure.” The DOJ eliminates several factors from consideration in this section,

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168. Compare McNulty Memo, supra note 24, at pt. VII.B.3 ("Prosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment."), with Thompson Memo, supra note 15, at pt. VI.B ("[A] corporation's promise of support to culpable employees and agents, . . . through the advancing of attorneys fees, . . . may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.").


170. McNulty Memo, supra note 24, at pt. I.

171. Id.

172. Id.; Press Release, Justice Department, supra note 159.

173. See McNulty Memo, supra note 24, at pt. III.A.

174. Id. at pt. VII.

175. Thompson Memo, supra note 15, at pt. VI.
including the corporation’s willingness to make employees available as witnesses, the corporation’s timely disclosure of results from internal investigations, and, again, the corporation’s willingness to waive the attorney-client and work product privileges. Finally, in the same section of the McNulty Memo, the DOJ approaches the topic of advancement in a subsection entitled “Shielding Culpable Employees and Agents,” which may provide insight as to how the DOJ truly views the issue going forward. However, at least on the surface, the DOJ does take steps to limit government prosecutors’ discretion in considering advancement when determining an organization’s level of cooperation.

3. The McNulty Memo’s Advancement Policy, as Stated

Specifically, the new advancement policy states, “Prosecutors generally should not take into account whether a corporation is advancing attorneys’ fees to employees or agents under investigation and indictment.” Although seemingly a straightforward policy, the McNulty Memo includes a couple of exceptions to the general principle that may limit the practical effect of the new policy significantly. First, in “extremely rare cases,” prosecutors may take the issue of advancement into consideration “when the totality of the circumstances show that [advancement] was intended to impede a criminal investigation.” In such situations, permission must be obtained from the Deputy Attorney General before prosecutors may use the advancement issue as a consideration in their charging decisions. Additionally, the policy states that nothing in the McNulty Memo “prevent[s] a prosecutor from asking questions about an attorney’s representation of a corporation or its employees.” The DOJ claims that “routine questions” regarding an attorney’s representation arise frequently in corporate investigations and that such

176. See McNulty Memo, supra note 24, at pt. VII.A.
177. Id. at pt. VII.B.3.
179. See McNulty Memo, supra note 24, at pt. VII.B.3.
180. Id.
181. See infra text accompanying notes 200–10.
182. McNulty Memo, supra note 24, at pt. VII.B.3 n.3.
183. Id.
184. Id. at pt. VII.B.3.
questions are “appropriate.” 185

Therefore, although the general principle of the revised advancement policy prohibits prosecutors from considering advancement payments in their charging decisions, 186 the substantive information regarding the source of the legal fees can still be properly elicited by prosecutors at any point in an investigation 187 and, in some cases, may be considered in the charging decision if the DOJ feels there is intent to impede the investigation. 188 As a result, it is unlikely that the advancement policy promulgated in the McNulty Memo will actually improve protections for employees who traditionally have access to advancement payments.

C. Why the New Advancement Policy Lacks Substantive Improvement

Some argue that the DOJ’s revision concerning advancement is an encouraging development that may go “a long way toward restoring needed balance to the investigation process,” 189 while others view the change with more cautious optimism, 190 seeing the McNulty Memo as merely “a step in the correct direction.” 191 Most agree, however, that the new policy represents only “a modest improvement” 192 that does not go

185. Id. at pt. VII.B.3 n.4.
186. Id. at pt. VII.B.3.
187. Id. at pt. VII.B.3 n.4.
188. Id. at pt. VII.B.3 n.3.
189. David Z. Seide, Department of Justice McNulty Memo Curtails Controversial Portions of Thompson Memo—Legislation Introduced in the Senate, WilmerHale Email Alerts, (Dec. 13, 2006), http://www.wilmerhale.com/publications/whpubsdetail.aspx?publication=3507; see also Browning, supra note 151 (quoting Stephen J. Bronis, executive director of the white-collar crime committee of the American Bar Association, as saying, “[T]here are hopefully going to be less abusive [prosecutions].”); Guynn, supra note 153 (quoting Hastings College of Law Professor Rory Little as saying that the DOJ’s revision “is a good example of one of those healthy self-corrections”).
190. Woellert, supra note 153. Senator Patrick Leahy of Connecticut, Chairman of the Senate Judiciary Committee, seems to be hedging his opinion of the revisions by stating that he welcomes the new policy and is happy that the DOJ has “moved away from its most excessive practices,” Neil, supra note 153, but that the revisions do not go far enough, Guynn, supra note 153. Senator Leahy also says that he will “continue to monitor the implementation” of the policies embodied in the McNulty Memo. Neil, supra note 153. However, he has not joined in sponsoring the Attorney-Client Privilege Protection Act of 2007, nor has he included the issue on the Senate Judiciary Committee’s agenda. See 110 Bill Tracking S. 186 (2007); see also Sarah Johnson, You Have a Right to an Attorney (on the Company’s Dime), CFO.COM, July 24, 2007, http://www.cfo.com/article.cfm/9537367.
191. Podgor, supra note 160.
192. Woellert, supra note 153 (quoting Karen Mathis, president of the American Bar Association).
far enough to restore employee access to advancement payments, free from government interference. 193

Substantive complaints concerning the advancement provisions in the McNulty Memo revolve around three general issues.

1. The McNulty Memo’s Non-Binding Effect

One of the most significant weaknesses of the McNulty Memo is the fact that, like all other DOJ policy guidelines, 194 the provisions are non-binding and do not have the force of law. 195 Therefore, if a prosecutor violates the McNulty Memo’s provisions, there is very limited recourse available to remedy the violation. 196

Moreover, because the McNulty Memo is only an internal, non-binding policy statement, the DOJ is free to re-revise its advancement policy whenever it pleases by simply issuing a subsequent policy memorandum—something it apparently feels comfortable doing, as evidenced by the Thompson Memo replacing the Holder Memo 198 and the McNulty Memo replacing the Thompson Memo 199 in a span totaling only ten years.

2. Prosecutors Are Permitted to Ask “Routine” Questions Concerning Advancement

Additionally, as previously discussed, 200 under the McNulty Memo, government prosecutors still have the authority to ask “routine”...
questions regarding the payment of attorneys' fees for individual defendants. Of course, this allows the prosecution to gather substantive information about who is paying for the individual defendants' legal fees.

Therefore, while the McNulty Memo advancement policy directs prosecutors, for the most part, to forego considering this information when determining an organization's level of cooperation, the information is available and can be viewed by the prosecution, consciously or subconsciously, as a sign of whether the organization is acting cooperatively. All else being equal, an organization that volunteers information pertaining to advancement will be considered more cooperative than an organization that does not and, therefore, will be less likely to face indictment. Consequently, despite the revision, the result is the same under the McNulty Memo advancement policy as it would be under the Thompson Memo advancement policy where such information was used expressly to determine an organization's level of cooperation.

3. The Exception to the Rule

Finally, the McNulty Memo includes an exception to its general advancement policy that allows prosecutors to consider advancement payments when determining the level of organizational cooperation in the charging decision if the prosecution believes that advancement payments were made as part of an attempt to impede or obstruct an investigation. Although the exception can be employed only after prosecutors are granted approval from the Deputy Attorney General, the Deputy Attorney General will likely be naive to the circumstances surrounding the case and will be inclined to take the prosecutors' requests for approval at face-value. Therefore, like in the Thompson Memo,

201. McNulty Memo, supra note 24, at pt. VII.B.3 n.4.; see also Searles, supra note 178.
202. See infra Part III.C.3.; see also supra text accompanying notes 182–83.
204. See text accompanying notes 183–88. It is hard to imagine how the USAO could not view an organization that willingly provides information regarding advancement as being more cooperative than an organization that chooses not to provide such information. So, while the lack of disclosure may not be considered in determining the level of cooperation, voluntary disclosure will certainly be considered as a sign of cooperation.
205. Thompson Memo, supra note 15, at pt. VI.B.
207. Id. at pt. VII.B.3. n.3.
208. Id.
209. Searles, supra note 178.
Memo, field prosecutors are in the driver's seat in relation to when the issue of advancement will be considered in determining an organization's level of cooperation.210

D. The McNulty Memo's Lack of Substantive Improvement Gives Congress an Opportunity

While the McNulty Memo provides some guidance relative to how organizations should respond when faced with misconduct allegations,211 it is unclear, in light of the policy as stated, how prosecutors will attempt to use the advancement issue as a charging consideration going forward.212 As a result, the McNulty Memo may be more valuable for its acknowledgement of the problems with the Thompson Memo rather than for any of its proposed solutions to those problems.213 Consequently, the call for Congress to remove advancement completely from prosecutors' charging decisions continues to gain strength, despite the DOJ's attempt to placate concerns regarding its advancement policy.214 In particular, the Attorney-Client Privilege Protection Act of 2007,215 which removes the issue of advancement completely from the charging determination,216 has been introduced in both houses of Congress and looks to have promising viability.217

IV. THE CONTINUED CALL FOR LEGISLATION TO END THE CONTROVERSY

This section discusses the Attorney-Client Privilege Protection Act of 2007, presents its advantages over the McNulty Memo's advancement policy, and concludes that the advancement provisions in the proposed legislation should be adopted.

211. Fishbach, supra note 195.
212. In fact, some claim that the "McNulty Memorandum breaks no new ground from the Thompson Memorandum" in regards to advancement. Searles, supra note 178. The claim gains support in the fact that the McNulty Memo does not address a situation, like that in Stein, where the organization has a long-standing policy of advancing attorneys' fees but is not statutorily or contractually required to do so. Id. In such a situation, it may be unclear to an organization under investigation what practices will be viewed as legitimate as opposed to obstructive. Id.
213. McConnell, supra note 193.
214. Browning, supra note 151; Podgor, supra note 160.
A. The Attorney-Client Privilege Protection Act of 2007

On December 8, 2006, just before the end of the 109th Congress, in an attempt to encourage the DOJ to revise its guidelines concerning organizational charging decisions, Senator Arlen Specter introduced the Attorney-Client Privilege Protection Act of 2006. Senator Specter’s bill proposes several “bright-line” rules. Specifically, it prohibits federal prosecutors from requesting that the organization or its employees waive their attorney-client or work product privileges. It also forbids federal prosecutors from conditioning a charging decision on, or using as a factor in determining the level of an organization’s cooperation, any of the following: (1) the valid assertion of attorney-client or work product privileges, (2) the advancement of attorneys’ fees, (3) the use of joint defense agreements, (4) the sharing of information with an employee, or (5) the failure to terminate or sanction an employee for invoking his or her constitutional protections.

Shortly after Senator Specter proposed the Attorney-Client Privilege Protection Act of 2006, the DOJ announced that it would, in what ultimately became the McNulty Memo, revise some of its organizational charging policies found in the Thompson Memo.

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218. Johnson, supra note 153.
220. Searles, supra note 178.
227. Press Release, Justice Department, supra note 159. Because the DOJ announced the promulgation of the McNulty Memo only four days after Senator Specter introduced his proposed legislation, many speculate that the DOJ’s revisions were motivated by the desire to
However, apparently not satisfied with the extent of the DOJ's revisions, Senator Specter reaffirmed his desire to enact his proposed legislation by introducing the Attorney-Client Privilege Protection Act of 2007, identical to the 2006 legislation, at the beginning of the 110th Congress.

To date, there has been no action in the Senate regarding Senator Specter's proposed legislation. However, Congressman Robert "Bobby" Scott, a Democrat from Virginia, introduced his version of the Attorney-Client Privilege Protection Act of 2007, identical to the Senate bill, to the House on July 12, 2007. Moreover, the House Judiciary Committee, chaired by Michigan Democrat John Conyers, held a hearing on the subject in August 2007 and has continued to move the bill forward to the full House for debate and vote.

Not only does the Attorney-Client Privilege Protection Act of 2007 have bicameral and bipartisan support, it also provides a clear solution to the DOJ's flawed advancement policy by removing the issue completely from consideration when prosecutors are making their charging determinations. Such a policy provides several distinct advantages over the McNulty Memo's advancement policy.

B. Advantages of the Proposed Legislation

1. Greater Permanency

First, the Attorney-Client Privilege Protection Act of 2007, if adopted by Congress, would create a properly enacted law of the United States, which can be changed only by subsequent congressional action. Without legislation, nothing stops the DOJ from reverting back to using its over-aggressive tactics of the past, including the consideration of

avoid congressional control of the matter. See Sullivan, supra note 157; see also note 160 and accompanying text.

228. See Patti Waldmeir, US to Ease Corporate Fraud Crackdown, FIN. TIMES (London), Nov. 18, 2006, at 10 (stating that Senator Specter would continue to seek further changes if the McNulty Memo did not go far enough).

229. See text accompanying notes 229-33.


231. H.R. 3013, 110th Cong. (2007); see also Johnson, supra note 190.


234. See supra text accompanying notes 229-33.

advancement in the charging decision. Furthermore, permanency in the policy is an important attribute for business leaders and managers because they operate in an environment based, in large part, on long-term plans and objectives. As a result, enacting the proposed legislation will restore consistency relative to the issue of advancement and will help business leaders structure their operations in the most profitable, yet law-abiding manner.

2. Binding Effect

In addition to greater permanency, enacting the proposed legislation would make the prohibition on considering advancement payments in the charging decision binding law. This is important because, after the Thompson Memo, it had become "routine" practice for federal prosecutors to pressure companies into revoking advancement fees for uncooperative employees or for employees under investigation or indictment.

If the Attorney-Client Privilege Protection Act of 2007 is enacted, organizations and their employees can reference legal authority in refusing to entertain the issue of advancement. Also, if federal prosecutors attempt to compel disclosure of issues relating to advancement, corporate counsel can cite the Act in protest of the government's request. Therefore, the binding effect of the proposed legislation will provide greater protections for organizations deciding to provide advancement payments and for employees expecting to receive such advancement payments by removing the issue from prosecutorial consideration, without exception.

3. Application to All U.S. Agents

Finally, the Attorney-Client Privilege Protection Act of 2007 applies to all "agent[s] or attorney[s] of the United States," whereas the McNulty Memo applies only to the DOJ and the U.S. Attorneys because it is a DOJ policy memorandum. Therefore, enacting the proposed legislation will create a broader and more uniform prohibition against the federal government with regard to the consideration of advancement of defense costs in the decision to charge organizations.

236. Jordan, supra note 155; see also supra text accompanying notes 194–99.
238. S. 186, 110th Cong. § 3(b) (2007); H.R. 3013, 110th Cong. § 3(b) (2007).
239. See McNulty Memo, supra note 24; see also supra note 194 and accompanying text.
C. Congress Should Enact the Advancement Provisions in the Attorney-Client Privilege Protection Act of 2007

In light of the advantages the Attorney-Client Privilege Protection Act of 2007 enjoys over the McNulty Memo in relation to advancement and the problems with the McNulty Memo itself, this Congress should move swiftly to enact the advancement provisions of the proposed legislation. The proposed legislation provides a comprehensive framework that fully restores and protects much needed advancement rights, traditions, and expectations for organizations and their employees. Although the legislation contains no formal remedy or enforcement provision, judges are given discretion in devising an appropriate remedy against any government violation. This allows substantial flexibility to remedy the harm in each case presented based on the totality of the circumstances. Consequently, the advancement provisions in the legislation should be adopted.

V. CONCLUSION

Despite the criticisms from the business and legal communities, the boldness of Judge Kaplan's decisions in Stein, and the imminent threat of legislation, the DOJ still has not completely removed the issue of advancement from prosecutors' considerations when determining the authenticity of an organization's cooperation in an investigation.

The DOJ had its opportunity to remedy the problem with the McNulty Memo. Unfortunately, the McNulty Memo breaks little new ground on the advancement issue and provides only marginally more effective protections for employees. As a result, the call for legislation continues. Therefore, Congress should act to restore and protect employees' access to advancement payments, so they are able to raise an adequate defense against indictments or investigations that result from

240. See supra Part IV.B.
241. See supra Part III.C.
243. See Podgor, supra note 169. Arguably, flexibility in determining the consequences for a government violation may be the best option available to the organization, the government, and the court. Judicial discretion allows penalties for violations to reflect the harm done. If, for example, the violation is egregious, then the judge could dismiss the case entirely, like Judge Kaplan did, but if the violation is inconsequential, then the judge is not required to impose a significant penalty against the government. A middle-of-the-road approach could involve a judge ordering that the government cover the costs of individual defendants harmed by a government violation of the Act.
their employment.

The Attorney-Client Privilege Protection Act of 2007 provides meaningful and binding protections for employees and organizations engaged in advancing defense costs. Therefore, this Congress should enact the proposed legislation, at least in relation to the advancement provisions, to prohibit the government from interfering unjustifiably with the rights, traditions, and expectations of organizations and employees concerning the advancement of defense costs.

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