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Nicci Harrell*

I. Introduction

In recent years, it has been commonplace for corporations to face criminal indictment.[1] Curiously, employees[2] of corporations are winning the award for best lead actors in a criminal indictment series while corporations and business organizations are mere nominees for a supporting role. The question becomes: Why are employees facing significant criminal charges, when corporations, through mere "cooperation" with the Department of Justice ("DOJ"), are able to sit back and relax?

The answer is simple. In 2003, then Deputy Attorney General, Larry D. Thompson drafted a memorandum to all United States Attorneys entitled "Federal Prosecution of Business Organizations," better known as the Thompson Memorandum. The Thompson Memorandum is a revised set of principles instructing prosecutors to evaluate the criminal culpability of corporations through certain factors and guidelines.[3]

One of the most significant determinants for indicting a corporation

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1. Corporations are the most frequently named entities in white collar crimes, but courts have also allowed the prosecutions of other business entities, including partnerships. J. KELLY STRADER, UNDERSTANDING WHITE COLLAR CRIME 15 (2d ed. 2006).

2. Use of the term "employees" includes officers, directors, and agents.

3. Memorandum from the Dep't of Justice, Larry D. Thompson, Deputy Att'y Gen., to Heads of Department Components & U.S. Attorneys (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (last visited Nov. 14, 2007). [hereinafter Thompson Memo].

is the corporation's promise of support to culpable employees through the advancement of attorney's fees.[4] Pressuring corporations to withhold from advancing or indemnifying employees' legal fees instigates coerced statements by employees allowing corporations to avoid criminal liability because they cooperated. The deceptive tactics employed by prosecutors are inexorable concentrations of power that have skewed our system of justice.[5]

Judge Kaplan of the Southern District of New York, recognizing that the government let its zeal interfere with its judgment, deemed portions of the Thompson Memorandum unconstitutional.[6] Judge Kaplan held that the Thompson Memorandum violated the Fifth and Sixth Amendments of the United States Constitution because it interfered with the "rights of employees to a fair trial and to the effective assistance of counsel."[7]

Judge Kaplan's opinion specifically addressed the pressure and tactics employed by the United States Attorneys Office (USAO) against the defendants, employees of KMPG. However, his decision will undoubtedly have a rippling effect. The Thompson Memo has shifted the investigative charging and plea process toward an inquisitorial system by removing the power from courts and juries and placing it directly into the laps of the DOJ.[8]

This comment discusses two negative implications that the Thompson Memorandum had by recognizing the payment of legal fees by a corporation as an indicator of guilt. First, the memorandum's shift of power has caused government employees to violate the Constitution they have sworn to defend by pressuring the denial of the advancement of legal fees.[9] Second, the memorandum has placed the economic future of the United States at risk by serving as a potential barrier causing multinational corporations to relocate its corporate headquarters overseas.[10] This comment will also discuss whether the recent amendments regarding corporate prosecution implemented by current Deputy Attorney General, Paul J. McNulty, have sufficiently eliminated the issues surrounding the Thompson Memorandum.

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4. Thompson Memo, *supra* note 3, at VI.B.

5. 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, at 1095 (2006).

6. United States v. Stein, 435 F. Supp. 2d 330, at 336 (2006).

7. *Id.* at 382.

8. Wray & Hur, *supra* note 5, at 1095.

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

10. Steven V. Melnik, *Corporate Expatriations-The Tip of the Iceberg: Restoring the Competitiveness of the United States in the Global Marketplace*, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 81, at 81 (2004).

II. Criminalization and Corporations

As an intangible legal entity, a corporation can only act through its agents.[11] Agents are comprised of officers, members of the board of directors, and other employees.[12] Thus, crimes involving a corporation allow the government to choose whether to indict the corporation, its agents, or the corporation and its agents.[13]

Criminalizing both the corporation and its agents is difficult to conceptualize, because except for crimes that impose strict liability, proof of *mens rea* is required.[14] However, through the doctrine of *respondeat superior*,[15] the United States Supreme Court unanimously approved the concept of corporate criminal liability in 1909.[16] In 1909, Corporations were emerging as a dominant player in the United States economy.[17] This role caused the Court to reason against immunizing corporations from criminal punishment based on an old doctrine.[18] The Court rationalized that, to hold a corporation cannot commit a crime would virtually take away the only means of effectively controlling the subject matter of criminal statutes and the abuses at which they are aimed.[19]

Imposing liability on corporations is beneficial for three reasons. First, criminal liability ensures corporations will adequately supervise its agents and employees.[20] Second, criminalizing corporations encourages them to develop policies, such as compliance programs that deter wrongdoing.[21] Finally, criminal liability appropriately places the responsibility on the corporation which benefits from the wrongdoing, rather than solely upon individual employees.[22]

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11. THOMAS R. HURST & WILLIAM A. GREGORY, CASES AND MATERIALS ON CORPORATIONS 11 (2d ed. 2005).

12. *Id.*

13. STRADER, *supra* note 1, at 19.

14. *Id.* at 15. *Mens rea* is the required mental state for criminal culpability. *Id.* at 9. Generally, in addition to proof of *mens rea*, the government must prove *actus reus*, the required physical component, and if the crime requires a result, that the defendants acts caused the result. *Id.*

15. *Respondeat superior* imputes a corporate agent's acts to the corporation itself when the agents are acting on behalf of the corporation, to benefit the corporation, and within the scope of the agent's authority. *Id.* at 17.

16. *Id.* at 16. *New York Cent. v. United States* was the first case to recognize corporate criminal liability. *See generally* New York Cent. v. United States, 212 U.S. 481 (1909).

17. *New York Cent.*, 212 U.S. at 496.

18. *Id.*

19. *Id.*

20. STRADER, *supra* note 1, at 19.

21. *Id.*

22. *Id.*

III. The Financing of Legal Fees by Corporations

A. The Principles of Indemnification and Advancement

The Thompson Memorandum contradicts the principles of advancement and indemnification. Both principles date back to the nineteenth century.[23] Advancement and indemnification are derived from the common law proposition that if an employee has, without fault, incurred losses or damages during the course of employment, the employee is entitled to full compensation from their employer.[24] Modern common law remains the same.[25]

1. Indemnification

Indemnification is the reimbursement by a corporation to its employees for amounts paid in attorneys' fees, expenses, settlements, and judgments[26] incurred by reason of their official activity and matter.[27] Indemnification provides employees with the opportunity to obtain competent legal counsel, "secure in the knowledge that, if vindicated, the corporation will bear the expense of litigation."[28] However, the right to indemnification cannot be established until after successful defense, either on the merits or otherwise, of the legal proceeding.[29]

2. Advancement

Advancement is an important corollary to indemnification because it is an inducement for attracting capable individuals into corporate service.[30] Advancement protects employees from being required to personally finance litigation expenses by providing immediate interim relief.[31]

Although indemnification and advancement are alike in theory, they are in reality quite distinct rights.[32] In determining whether to advance

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23. *Stein*, 435 F. Supp. 2d at 353.
24. *Id.* (quoting JOSEPH STORY, STORY ON AGENCY § 339, at 413 (Charles P. Greenough ed. 1982)).
25. *Id.* at 354.
26. Stephen A. Radin, *"Sinners Who Find Religion": Advancement of Litigation Expenses to Corporate Officials Accused of Wrongdoing*, 25 TEX. REV. LITIG. 251, 257-58 (2006).
27. *See id.*
28. VonFeldt v. Stifel Fin. Corp., 714 A.2d 79, 84 (Del. 1998).
29. Homestore, Inc. v. Tafeen, 888 A.2d 204, 211 (2005).
30. *Id.*
31. *Id.*
32. Advanced Mining Sys., Inc., v. Fricke, 623 A.2d 82, 84 (1992).

fees to employees, a corporation does not determine the extent of its legal liability.[33] Rather, corporations advance credit to employees for legal fees that have yet to be incurred.[34] Advancement is necessary because the decision to indemnify an employee must wait until the outcome of the investigation or legal proceeding, while advancement provides immediate relief.[35] Nonetheless, advancement fills the gap allowing corporations to shoulder interim costs.[36]

IV. Foreign Investment in the United States

By taxing companies according to their worldwide income and restricting the advancement of legal fees to employees, the United States is placing "resident multinational corporations at a competitive disadvantage compared to foreign multinationals."[37] In order to ensure American competitiveness in the global economy, the United States must not only amend its international tax law, but also the Thompson Memorandum because it directly contradicts the policy of advancement and indemnification.[38]

The United States is accustomed to being financed by foreign investment. Foreign investment in the U.S. dates back to the 1700's.[39] In a Congressional report, Alexander Hamilton noted that foreign investment "ought to be considered as a most valuable auxiliary; conducing to put in motion a greater quantity of productive labor and a greater proportion of useful enterprise than could exist without it."[40]

The economic development of the United States was partially founded through portfolio investment, a form of foreign investment.[41] Foreign portfolio investment involves either voting or nonvoting stock in which foreign investors control less than twenty-five percent of total ownership in the corporation.[42]

As society evolved, foreign direct investment (FDI), a new type of

33. *Id.*
34. *Id.*
35. Kaung v. Cole Nat'l Corp., 884 A.2d 500, 504 (2005).
36. *Id.* at 509.
37. Melnik, *supra* note 10, at 82.
38. *Id.* at 83. United States tax laws implemented by Congress are used to support this Comment and will not be discussed at length. It should also be noted that since the publication of this Comment the DOJ superseded the Thompson Memorandum with the McNulty Memorandum.
39. Adis, M. Vila, *Legal Aspects of Foreign Direct Investments in the United States,* 16 INT'L LAW 1, 1 (1982).
40. DONALD T. WILSON, INTERNATIONAL BUSINESS CORPORATIONS XLIII (2d ed. 1984).
41. Vila, *supra* note 39, at 2.
42. *Id.*

foreign investment emerged.[43] FDI is direct or indirect ownership or control of ten percent or more of the voting stock of either an incorporated or unincorporated U.S. business by one foreign person.[44] The difference between portfolio investment and FDI is that portfolio investment involves only ownership or financial interest, whereas FDI involves ownership sufficient for a degree of control.[45]

Foreign investment in the United States grew during the 1970's.[46] Multinational enterprises contributed to this growth.[47] The enterprises migrated to the U.S. to obtain a share of the world's largest, richest, and most competitive market.[48] However, in recent years, foreign investment in the U.S. has sharply decreased.[49] For example, in 2004 foreigners invested approximately $100 billion in U.S. businesses and real estate, which is far below the $300 billion investment made in 2000, and half as much as U.S. firms invested abroad.[50] Conversely, non U.S. countries have seen investment inflows increase markedly.[51] For example, foreign investment in China increased from the annual actual foreign investment of $40.7 billion in 2000[52] to $70 billion in 2002.[53]

Although foreign investment is not a new phenomenon, the quality and quantity of it has changed dramatically in recent years.[54] The United States has become an undesirable location for corporate headquarters, not only because it taxes companies according to their worldwide income,[55] but also due to the restrictions placed on corporations through the Thompson Memorandum.

As a result of international tax laws, both multinational corporations and unincorporated U.S. businesses are incorporating in foreign countries in an attempt to decrease their tax liability.[56] Companies that do not relocate may be subject to foreign takeover, contributing to the $340 billion total of foreign takeovers.[57] Moreover, the prosecutorial

43. *Id.*
44. 15 C.F.R. § 806.15(a)(1) (2006).
45. Adis M. Vila, *supra* note 39, at 3.
46. *Id.*
47. *Id.* at 3-4.
48. *Id.*
49. JAMES K. JACKSON, CONGRESSIONAL RESEARCH SERVICE, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: AN ECONOMIC ANALYSIS, 2005, at 1.
50. *Id.*
51. *Id.* at 5.
52. Lai Pingyo, *Foreign Direct Investment in China*, 2 CHINA WORLD ECON. 25, 26 (2002).
53. JACKSON, *supra* note 49, at 5.
54. Vila, *supra* note 39, at 2.
55. Melnik, *supra* note 10, at 82.
56. *Id.* at 81.
57. *Id.* The $340 billion of foreign takeovers occurred in the year 2000. *Id.*

guidelines initially established in 1999 may also contribute to this corporate exodus.

V. Criminal Prosecution Guidelines and Corporations

A. The Holder Memorandum

The criminalization of corporations is not a new legal theory.[58] Throughout the years, however, there were no uniform elements utilized for determining the criminal culpability of corporations.[59] In 1999, Deputy Attorney General Eric H. Holder issued a memorandum titled, "Bringing Criminal Charges Against Corporations," or what is known as the Holder Memorandum.[60] The purpose of this memorandum was to serve as a guide for prosecutors to determine whether a corporation should be indicted.[61] The Holder Memorandum operated as a framework for prosecutors to analyze their cases and provide a common vocabulary to discuss their decision with fellow prosecutors, supervisors, and defense counsel.[62]

In addition to facilitating prosecutorial judgment,[63] this memo provided prosecutors with eight factors[64] to conduct investigations,

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58. New York Cent. v. United States, 212 U.S. 481, is the first case to hold a corporation liable for the criminal acts of their employees. The Court held that because employees of the corporation exercised the authority conferred upon them, the corporation could be responsible for and charged with the knowledge and purposes of their agents. *Id.*

59. Wray & Hur, *supra* note 5, at 1099.

60. Memorandum from the Dep't of Justice, Eric H. Holder, Deputy Att'y Gen., to All Component Heads U.S. Attorneys (June 16, 1999), *available at* http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html (last visited Nov. 14, 2007) [hereinafter Holder Memo].

61. *Id.* at preface.

62. *Id.*

63. Holder Memo, *supra* note 60, at § (II)(A) (recognizing that the factors normally considered in the sound exercise of judgment include the sufficiency of the evidence, the likelihood of success at trial, the probable deterrent, rehabilitative, and other consequences of conviction, and the adequacy of non-criminal approaches). *Id.*

64. Holder Memo, *supra* note 60, at § (II)(A) (establishing the eight factors to be considered include (1) the nature and seriousness of the offense, including risk of harm to the public; (2) the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management; (3) the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it; (4) the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents including, if necessary, the waiver of the corporate attorney-client and work-product privileges; (5) the existence and adequacy of the company's compliance program; (6) the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant

determine whether to bring charges, and negotiate plea agreements.[65] However, the delineated factors were only guidelines and not outcome-determinative.

B. The Thompson Memorandum

On January 20, 2003, then Deputy Attorney General, Larry D. Thompson, sent a memorandum entitled "Principles of Federal Prosecution of Business Organizations," (also known as the Thompson Memorandum) to United States Attorneys.[66] The Thompson Memorandum revised the principles set forth in its predecessor, the Holder Memorandum.[67] In contrast to the Holder Memo, the Thompson Memo placed a distinct emphasis on the authenticity of a corporation's cooperation with the DOJ through its "cooperation policy."[68]

The Memo directed prosecutors to, *inter alia*, gauge the extent of a corporation's cooperation.[69] Prosecutors were to consider a corporation's willingness to identify the culprits within its corporation, make witnesses available, disclose the complete results of the corporation's internal investigation, and waive attorney-client and work product protection.[70] Additionally, prosecutors were to heavily examine and weigh whether a corporation appeared to be protecting its culpable employees and agents through the advancement of attorney's fees.[71] Although the Thompson Memo includes the eight factors set forth in the Holder Memorandum, its revisions make clear that cooperation will weigh in favor of a corporation avoiding prosecution.[72] A corporation's cooperation is not simply a factor; it is a requirement to avoid indictment. The pressure of corporate cooperation is illustrated in the decision of *United States v. Stein*[73].

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government agencies; (7) collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable; and (8) the adequacy of non-criminal remedies, such as civil or regulatory enforcement actions).

65. *Id.*
66. Thompson Memo, *supra* note 3, at preface.
67. *Id.*
68. *Id.*
69. *Id.* at § (VI)(A).
70. *Id.*
71. Thompson Memo, *supra* note 3, at § (VI)(B).
72. *Id.* at preface.
73. *Stein*, 435 F. Supp. 2d 330.

VI. *United States v. Stein*: The Unconstitutionality of the Thompson Memorandum

A. The Fifth and Sixth Amendments of the United States Constitution

The right to the advancement of attorneys' fees is grounded in the Fifth and Sixth Amendments of the Constitution. The Due Process Clause is the foundation of a criminal defendant's right to fairness.[74] As an element of the Fifth Amendment, the Due Process Clause provides that no person shall be held to answer for a crime without a grand jury.[75] Further, the clause ensures that no person shall be, "deprived of life, liberty, or property, without due process."[76]

The Supreme Court has consistently held that criminal defendants have the right to be treated fairly throughout the process of a trial.[77] The constitutional requirement of fairness precludes the prosecution from interfering with the defense of an action.[78] Fairness also precludes the prosecution from indirectly interfering with a defendant's efforts to form a defense.[79]

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defence."[80] This right guarantees a defendant the right to choose a competent lawyer to defend his or her case.[81]

The right to counsel typically attaches at the initiation of adversarial proceedings.[82] Yet, "perhaps the most critical period of the proceedings" is during the pretrial phase, a time in which the defendant also enjoys the right to an attorney.[83] As revealed by *Stein*, the Thompson Memorandum promotes pressure upon corporations to essentially waive an employee's right to counsel and an adequate defense.

B. United States v. Stein

On June 26, 2006, Judge Lewis A. Kaplan of the Southern District of New York surprised corporations when he ruled that portions of the

74. *Id.* at 357.
75. U.S. CONST. amend. V.
76. *Id.*
77. *Stein*, 435 F. Supp. 2d at 357.
78. *Id.* at 358.
79. *Id.*
80. U.S. CONST. amend. VI.
81. *Stein*, 435 F. Supp. 2d at 366.
82. *Id.*
83. Massiah v. United States, 377 U.S. 201, 205 (1964).

Thompson Memorandum violated the United States Constitution.[84] The court held that the Thompson Memorandum, combined with the activities of the USAO, interfered with the defendants' rights to a fair trial and the effective assistance of counsel.[85] The violations infringed, respectively, on the Fifth and Sixth Amendment rights of the defendants.

Stein involved the criminal prosecution of sixteen employees of KPMG (Klynveld Peat Marwick Goerdeler), one of the largest accounting firms in the world.[86] Prior to the indictment of the employee defendants in 2004, it was the longstanding voluntary practice of KPMG to advance and pay employees' legal fees regardless of the crime and cost.[87] KPMG's practice was to pay legal fees without a preset cap or condition of cooperation for partners, principals, and employees of KPMG for any civil, criminal, or regulatory proceeding in connection with the employees' duties and responsibilities.[88] However, upon pressure from the government, KPMG cut off the payment of the defendants' attorneys' fees to the defendants.[89]

The USAO pressed the issue of payment of legal fees in their conversations with Skadden Arps[90] to determine if KPMG would adhere to its practice of paying the legal fees of employees who faced possible litigation.[91] During one of the conversations, the USAO informed KPMG that employee misconduct neither should nor could be rewarded and made reference to "federal guidelines."[92] The court was not persuaded that the USAO was making reference to the federal sentencing guidelines.[93] It concluded that the guidelines referred to by the USAO were the guidelines set forth in the Thompson Memorandum.[94] The court reasoned that this reference was understood by both KPMG and government representatives as a reminder that payment of legal fees would count against KPMG in the government's decision whether to indict KPMG.[95]

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84. *Stein*, 435 F. Supp. 2d at 382.
85. *Id.* at 353.
86. *Id. at* 336.
87. *Id.* at 340 (2006) (recognizing KPMG previously paid over $20 million to defend four partners in a criminal investigation and related civil litigation brought by the Securities and Exchange Commission).
88. *Stein*, 435 F. Supp. 2d at 340.
89. *Id.* at 336.
90. The law firm of Skadden Arps Slate Meagher & Flome was retained by KPMG to assist KPMG in coming up with a cooperative approach to the possible charges it was facing and to assist with the discussions that occurred with the USAO. *Id.* at 339.
91. *See id.* at 341-42.
92. *Id.* at 342.
93. *Stein*, 435 F. Supp. 2d at 343 n.44.
94. *Id.* at 343.
95. *Id.*

The actions of the USAO, coupled with the Thompson Memorandum, had the desired effect.[96] KPMG significantly limited its practice regarding the payment of legal fees to its employees in four ways.[97] First, if KPMG's employees cooperated with the government and were truthful, KPMG would pay a maximum of $400,000 of an individual's legal fees and expenses.[98] Second, the payment of legal fees would immediately cease if the employee was charged with a criminal wrongdoing.[99] Third, no legal fees would be paid to KPMG employees who invoked their Fifth Amendment privilege of self-incrimination.[100] Finally, KPMG informed its employees that they were not required to be assisted by a lawyer when speaking with government representatives.[101]

This pressure led KPMG to enter into a Deferred Prosecution Agreement (DPA) with the government.[102] Generally, DPAs provide that the filing of criminal charges will be dismissed after a period of time if the corporation fulfills the obligations set forth in the agreement.[103] The DPA provided that the indictment against KPMG would be waived in favor of a one count information.[104] KPMG would also be required to admit extensive wrongdoings, pay a $456 million fine, and accept restrictions on its practice.[105] The government agreed to seek a dismissal of the information if KPMG complied with its obligations.

The court made four broad factual conclusions as a result of the dealings between the USAO and KPMG.[106] These conclusions lead the court to hold portions of the Thompson Memorandum unconstitutional.[107] The court first concluded that even before meeting with the USAO, the Thompson Memorandum's influence caused KPMG to consider departing from its longstanding voluntary practice of paying legal fees and expenses of its personnel in all cases and investigations.[108]

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96. *Id.* at 345.
97. *Id.* at 345.
98. *Stein*, 435 F. Supp. 2d at 345.
99. *Id.*
100. *Id.* at 345.
101. *Id.* at 346 (stating that in the initial advisory memorandum to employees, KPMG informed its employees of their right to be represented by counsel when speaking with the government, mentioned the advantages of having counsel present, and informed the employees that KPMG arranged for independent counsel for those who wished to consult them. *Id.* However, the USAO did not like the tone of KPMG's advice to KPMG employees and suggested KPMG inform employees they could meet with the government without the assistances of counsel). *Stein*, 435 F. Supp. 2d at 346.
102. *Id.* at 349.
103. Wray & Hur, *supra* note 5, at 1104.
104. *Stein*, 435 F. Supp. 2d at 349.
105. *Id*
106. *Id.* at 352.
107. *Id.*
108. *Id.*

The court reasoned that, the language of the Thompson Memo implied that the payment of legal fees by a corporation may lead to indictment.

Second, KPMG sought an indication from the USAO that its practice of paying employees' legal fees would not be held against the corporation.[109] However, consistent with the DOJ policy, the USAO reinforced the Thompson Memorandum's implied threat of indictment.[110]

Third, the court found that the government's conduct revealed their desire to minimize attorney involvement.[111] The USAO accepted KPMG's offer to cut off fees to indicted employees and KPMG's assurance that it had no legal obligations to pay employees' fees, despite knowing it was KPMG's practice to advance legal fees.[112]

Finally, the court concluded that KPMG's decision to cut off legal fees to indicted employees and condition the payment of fees prior to indictment upon an employee's cooperation, was a direct consequence of the pressure applied by the USAO coupled with Thompson Memorandum.[113] Absent the Thompson Memorandum and the actions of the USAO, KPMG would have upheld their longstanding policy and paid the legal fees and expenses of all its partners and employees without regard to cost.[114]

VII. Protections by the Fifth Amendment of the United States Constitution

A. Concept of Fairness in a Criminal Proceeding

The Thompson Memorandum infringes on a criminal defendant's right to fairness. According to the Supreme Court, a criminal defendant's right to fairness is grounded in and protected by the Due Process Clause.[115] The Supreme Court has continuously affirmed criminal defendants' rights to fair treatment throughout the process of the trial.[116]

The required fairness that protects the autonomy of a criminal defendant takes more than one consideration into account.[117] Fairness prevents the prosecution from passively hampering with a defendant's efforts to make a defense by requiring prosecutors to conduct themselves

109. *Stein*, 435 F. Supp. 2d at 352.
110. *Id.* at 342.
111. *Id.* at 353.
112. *Id.*
113. *Id.*
114. *Stein*, 435 F. Supp. 2d at 353.
115. *Id.* at 357.
116. *Id.*
117. *Id.* at 353.

accordingly and not interfere with the defense.[118] These requirements apply to the structure and conduct of the entire criminal justice system and provide defendants with the right to either be represented by qualified counsel whom they can afford or to represent themselves.[119] This section is primarily concerned with a defendant's right to be represented by a qualified attorney.

The right to be represented by a qualified attorney bestows upon a defendant the right to control the manner and substance of their defense.[120] The substance of a defense includes a defendant's right to retain qualified representation with either their own assets or the assets advanced or indemnified by their employer.[121] The government may not interfere with a defendant's choice of counsel because the Constitution protects a defendant's right to free choice of counsel, independent of concern for the objective fairness of the proceeding.[122]

The Supreme Court has not explicitly characterized right to fairness in a criminal proceeding as a fundamental right.[123] Still, the Court has repeatedly recognized the constitutional mandate of fairness in criminal proceedings.[124] The Court's reasoning strongly suggests that the right to fairness in a criminal proceeding is a fundamental right for the purposes of due process.[125]

Fundamental rights are rights that are so critical to individual liberty that they shall not be infringed upon by the government absent a narrowly tailored compelling state interest.[126] The foundation of the right to fairness in a criminal proceeding is deeply rooted in the history of the United States.[127] Without a criminal defendant's right to fairness, neither liberty nor justice would be in existence.[128] The Thompson Memorandum must be strictly scrutinized in order to justify government

118. *Id.* at 358-59.
119. *Stein*, 435 F. Supp. 2d at 357.
120. *Id.*
121. *Id.* at 353.
122. *Id.*
123. *Id.*
124. *Stein*, 435 F. Supp. 2d at 361.
125. Quill v. Vacco, 80 F.3d 716, 724 (2d Cir. 1996), *rev'd on other grounds*, 521 U.S. 793 (1997) (recognizing that the Supreme Court has actually or impliedly identified the right to fairness in the criminal process as a fundamental right, thereby qualifying the right to fairness for heightened judicial scrutiny).
126. *Stein*, 435 F. Supp. 2d at 360. There are five categories of fundamental rights characterized by the Supreme Court: the rights to vote and participate in the electoral process; to travel interstate; to freedom of association; to fairness in procedures concerning individual claims against governmental deprivation of life, liberty, or property; and to freedom of choice in matter's relating to an individual's personal life. *Id.* at 360 n.148.
127. *Id.* (citing Moore v. City of East Cleveland, 431 U.S. 494 (1977)).
128. *Id.* (citing Washington v. Glucksberg, 521 U.S. 702 at 721 (1997)).

infringement upon a criminal defendant's fundamental right to fairness by denying their right to advancement of legal fees.

To survive strict scrutiny, government action must be narrowly tailored to achieve a compelling government interest.[129] The provision of the Thompson Memorandum at issue provides that the advancement of legal fees by a corporation is a factor to be weighed by the prosecution in determining whether to indict the corporation.[130] Advancement is a factor because a corporation that advances is presumed to be protecting culpable employees and agents.[131] This negative aspect has three goals.[132] First, this provision seeks to punish those whom prosecutors deem culpable.[133] Second, this provision is intended to facilitate whether to indict a business entity by focusing on the corporation's degree of cooperation.[134] Third, this provision attempts to strengthen the government's ability to prosecute white collar crime by encouraging companies to pressure their employees to aid in the government's investigation.[135]

Ultimately, the first goal of the advancement provision offends a principle of justice so rooted in the traditions and conscience of our people that is ranked as fundamental.[136] The Thompson Memorandum directly contradicts a criminal defendant's right to fairness. This contradiction is an abuse of power because it imposes economic punishment by prosecutors, prior to any findings of guilt.[137] Denying the advancement of attorneys' fees is contrary to a criminal defendant's right of being innocent until proven guilty. Consequently, employees are criminalized before they receive their right to a fair trial.[138]

Second, determining whether a corporation is cooperating with the government by not advancing legal fees to its employee's is overly broad. Today, the transfer of most of the wealth of our country is in the hands of corporations.[139] As a result, many financial obligations, such as charitable contributions and the payment of legal fees, have been shifted

129. *Id.* at 363.
130. Thompson Memo, *supra* note 3, at § (VI)(B).
131. *Id.*
132. *Stein*, 435 F. Supp. 2d at 363.
133. *Id.*
134. *Id.*
135. *Id.*
136. *See generally* Speiser v. Randall, 357 U.S. 513(1958) (holding that when the constitutional right to speak is sought to be deterred by a State's general taxing program, due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition).
137. *Stein*, 435 F. Supp. 2d at 363.
138. U.S. CONST. amend. V.
139. A.P. Smith Manufacturing Co. v. Barlow, 98 A.2d 581, 586 (1953) (holding that charitable contributions were a lawful exercise of the corporation's power).

to corporations because many individuals no longer have the financial means to make such large expenditures.[140] Corporations pay employees' legal fees to reciprocate the loyalty its employees have bestowed upon the corporation.[141] The assertion that the payment of legal fees by a corporation is indicative of an unwillingness to cooperate with the government is not only unpersuasive, but it fails to advance a compelling state or government interest.[142] Rather, the payment of legal fees by a corporation serves a compelling interest because it promotes employing individuals who take risks for a corporation without the stress of drying up their life savings.

The third goal of the Thompson Memorandum, encouraging employees to aid in the government's investigation, could be achieved through alternate drafting. For example, if the government intended to provide that the payment of legal fees was a negative factor when used solely to impede government investigation, then the Memorandum could have possibly been narrowly tailored.[143]

However, the language of the Thompson Memorandum is simple. The government is to consider the payment of attorneys' fees by a corporation as an indicator of guilt because a corporation is presumed to be, "protecting its culpable employees and agents."[144] If Larry Thompson intended for the payment of attorneys' fees to only be taken into account when the payment was used solely to impede the government's investigation, he failed to achieve that end.

The provision of the Thompson Memorandum that discourages the payment of legal fees by a corporation fails strict scrutiny because it is neither narrowly tailored nor serves a compelling governmental objective.[145] Consequently, these provisions violate the fundamental right of criminal fairness granted through the Fifth Amendment of the Constitution.

B. *The Infringement on a Criminal Defendant's Right to Fairness is Not Limited to the Facts of United States v. Stein*

United States v. Stein is perhaps the largest tax fraud case in the

140. According to the United States Census Bureau, the real median income of American households in 2005 was $46,326. Carmen DeNavas-Walt, Bernadette D. Proctor & Cheryl Hill Lee, *Income, Poverty, and Health Insurance Coverage in the United States: 2005*, at 5 (2006), http://www.census.gov/prod/2006pubs/p60-231.pdf.

141. *Stein*, 435 F. Supp. 2d at 364.

142. *Id.*

143. *Id.*

144. Thompson Memo, *supra* note 3, at § (VI)(B).

145. *Stein*, 435 F. Supp. 2d at 364.

history of the United States.[146] Although the case did not go to trial, the cost of the defendants to simply defend their case at trial would have easily exceeded the salaries of many of the defendants.[147] The government expected their case-in-chief alone to last at least three months, while the defense of the defendants would also be undoubtedly lengthy.[148] To illustrate, assuming the defendants in *Stein* were represented by a *single* attorney who devoted only eight hours per day in a six month trial at a fee of $400 per hour, the cost for a single attorney to simply attend the trial would be nearly $375,000.[149] This staggering figure does not even account for expenses such as copying costs, review of documents, preparation outside of the courtroom, additional attorneys, and other complex litigation tactics.[150]

Nonetheless, the Thompson Memorandum's infringement on the right of fairness is not limited to the facts of *Stein* for two main reasons. First, there is a need for legal representation by all criminal defendants. Second, the costly expenses associated with corporate litigation.

Corporate employees acting on behalf of a corporation may find themselves facing criminal charges. In justifying the pressure on companies to refrain from the payment of legal fees, Larry D. Thompson was quoted as stating that employees, "don't need fancy legal representation"[151] if they did not believe they acted with criminal intent.[152]

Thompson's statement could not be more inaccurate and undignified. In 2001, along with other corporations, came the fall of Enron and Tyco International and the rise of public attention and awareness to corporate scandals.[153] Consequently, the twelve reasonable persons who comprise the jury are cognizant of corporate scandals. This awareness may cause jurors to stigmatize the defendants simply because jurors may associate employees within corporate America as greedy or dishonest. Because of such stereotypes, the innocent may need competent legal representation in criminal matters as much as or even more than the guilty.[154]

It is common knowledge that attorneys' fees are not only expensive,

146. *See id.* at 362.
147. The defense of such complex litigation could cost as much as $25 million to $75 million. *See* Andy Vuong, *Nacchio's legal tab picked up by Qwest*, DENV. POST, Jan. 26, 2007, at A1.
148. *Stein*, 435 F. Supp. 2d at 362.
149. *Id.* at 362 n.163.
150. *Id.*
151. *Id.* at 338.
152. *Id.*
153. Wray & Hur, *supra* note 5, at 1101.
154. *Stein*, 435 F. Supp. 2d at 338.

but also multiply at a rapid rate.[155] Naturally, defense costs arising out of complex business litigation are often greater than the expenses of a less complex criminal matter.[156] To obtain adequate defense, corporate employees must retain counsel with sufficient skills, business sophistication, and resources.[157] Generally, legal counsel will be comprised of a specialized team to review and request documents, attend depositions, and spend countless hours preparing. These tactics are required to present the best possible case for their client. The payment of attorneys' fees by a corporation is a sure way that an employee can "control the manner and substance of his defense."[158]

VIII. The Thompson Memorandum and the Sixth Amendment of the U.S. Constitution

A. Enjoyment of the Right to a Defense

A central feature of our adversarial system[159] is a defendant's Sixth Amendment right to have the assistance of counsel for their defense.[160] The right to counsel generally attaches at preliminary hearings, formal charging, indictment, information, or arraignment.[161]

However, due to the mandate of the Thompson Memo and conduct coupled with it, the Sixth Amendment rights of employee defendants are likely to be violated prior to trial or hearings.[162] Violations may occur even if the government did not consciously seek to violate the Sixth Amendment.[163] Employees' rights will likely be violated because through the Thompson Memorandum, the government acts to purposely minimize a defendant's access to resources necessary to assure an adequate defense.[164]

The Thompson Memo's minimization of a defendant's access to resources necessary to assure an adequate defense is a constitutional error. There are two distinct types of constitutional errors, trial errors

155. The legal fees of former Enron CEO, Jeff Skilling, were reportedly around $65 million. Vuong, *supra* note 147, at A1.
156. *Stein*, 435 F. Supp. 2d at 338.
157. *Id.*
158. *Id.* at 370.
159. Martin R. Gardner, *The Sixth Amendment Right to Counsel and its Underlying Values: Defining the Scope of Privacy Protection*, 90 J. CRIM. L. & CRIMINOLOGY 397, 397 (2000).
160. U.S. CONST. amend. VI.
161. Kirby v. Illinois, 406 U.S. 682, 682 (1972).
162. *Stein*, 435 F. Supp. 2d at 366.
163. *Id.*
164. *Id.* at 366-67.

and structural errors.[165] Trial errors occur when evidence is presented before the court.[166] Structural errors permeate the entire proceeding by affecting the conduct of the trial from beginning to end.[167]

A defendant seeking to overturn their conviction on a trial error, due to the ineffective assistance of counsel, is required to prove prejudice by demonstrating effective counsel would have produced a different outcome.[168] However, a criminal defendant is not required to prove prejudice when the constitutional error is structural.[169] Prejudice against the defendant is presumed because deprivation of the right to counsel occurs when the defendant is erroneously prevented from being represented by the lawyer of their choice.[170] Thus, the defendant does not need to prove the outcome would have differed.[171]

There are three ways a structural error may exist: first, when a defendant is actively or constructively denied counsel at a critical stage of the trial; second, when defense counsel is burdened by a conflict of interest; or, finally, although counsel may be available, the likelihood that a lawyer could provide effective assistance is small.[172] The Thompson Memorandum falls into the third category of structural errors because it limits the advancement/indemnification of attorneys' fees to employees.

B. The Constitutional Error of the Thompson Memorandum

Properly defending white collar crimes requires "substantial financial resources."[173] Most employee defendants may not be able to afford attorneys who specialize in white collar crimes. Consequently the defendants are unable to receive the effective assistance counsel.[174] Despite the possibility of employee defendants being represented by counsel, prejudice may be presumed. Prejudice may be presumed because, through the Thompson Memorandum, the government interferes with the resources a defendant has or may legally obtain.

The provision in the Thompson Memorandum limiting the advancement of attorneys' fees to employees is presumed to be prejudicial because it is a structural error. Additionally, the provision

165. *Id.* at 370.
166. *Id.*
167. *Stein*, 435 F. Supp. 2d at 370.
168. *Id. See also* Strickland v. Washington, 466 U.S. 668 (1984) (recognizing that the right to counsel includes the right to effective counsel).
169. *Stein*, 435 F. Supp. 2d at 369.
170. *Id.*
171. *Id.* at 370.
172. *Id.* at 371.
173. *Id.*
174. *See* Vuong, *supra* note 147; *see also supra* note 155 and accompanying text.

violates the Sixth Amendment because it is unfair and unjustified.

1. Fairness and the Sixth Amendment

The underlying principle supporting the Sixth Amendment's right to counsel is to provide fair trials for criminal defendants.[175] The value of "fairness" is present during trial, certain circumstances in pretrial matters,[176] and as in the case of the Thompson Memorandum, when government actions limit a defendant's access to funds for their defense.[177]

In *Gideon v. Wainwright*,[178] the Supreme Court recognized unfairness is inherent when defendants are financially unable to obtain counsel for trial.[179] The Court noted, "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[180] However, if white-collar employee defendants are or become indigent, relying upon state appointed counsel is unrealistic, because appointed counsel will not likely possess the required expertise for defending a white-collar crime.[181]

The Sixth Amendment protects more than the mere presence of a lawyer.[182] The Sixth Amendment protects a defendant's right to reasonably choose the legal counsel they desire.[183] As with any defendant, employees of a corporation are likely to select counsel capable to defend complex litigation.[184]

Employees facing white-collar crimes are generally financially unable to obtain such expensive counsel.[185] As a result, many employees expect that attorneys' fees sustained in defending charges brought against them by reason of their employment or contract, will be paid by their employer. By restricting corporations from advancing attorneys' fees, unfairness is inherent. Unfairness is inherent, because employees are unable to finance complex litigation when it has become commonplace for them to bear the blame for corporate wrongdoing. Consequently, the Thompson Memorandum violates the Sixth Amendment, because it precludes employees from presenting an

175. Gardner, *supra* note 159, at 399.
176. *Id.*
177. *Stein*, 435 F. Supp. 2d at 366.
178. Gideon v. Wainwright, 377 U.S. 335 (1963).
179. Gardner, *supra* note 159, at 399.
180. *Gideon* 377 U.S. at 344.
181. *Stein*, 435 F. Supp. 2d at 371.
182. *Id.* at 366.
183. *Id.*
184. *Id.* at 371.
185. *See* Vuong, *supra* note 174.

adequate defense.[186]

Unfairness is also inherent in the Thompson Memorandum, because the memo is a purposeful attempt by the government to obtain an unfair advantage over the agents of a corporation.[187] By limiting the advancement of attorneys' fees through the Thompson Memorandum, the government knowingly has an unfair advantage over individual defendants. The majority of employees are not able to pay for counsel knowledgeable in white-collar crimes. As a result, the government can pillage the insufficient counsel just as a lion would prey on a mouse. Moreover, the government is conscious of its advantage. The government has pressured corporations to inform employees they are not required to use available counsel to meet with investigators, informed the corporation when employees failed to comply with the USAO's demands, and implied attorneys' fees should not be advanced. Such actions are illustrative of the government's conscious advantage and are unjustified.[188]

2. Limiting Advancement is Unjustified

The Thompson Memorandum limits employee defendants' access to funds for their defense by using the advancement of attorneys' fees as a factor to determine whether to indict a corporation.[189] Thompson himself may not have been aware that limiting the advancement of attorneys' fees would be unconstitutional. However, unless justified, such limitations prior to indictment violate the Sixth Amendment.[190]

In determining whether interference with the advancement of attorneys' fees was justified, *Stein* utilized the common law tort of interference with prospective economic advantage.[191] This tort examines whether a private actor can justifiably interfere with another's economic relations.[192] However, because the Thompson Memorandum was drafted by the government, the court in *Stein* examined whether the government's law enforcement interests sufficiently outweighed the interests of the defendants in having the necessary resources for an adequate defense.[193]

186. McKaskle v. Wiggins, 465 U.S. 168, 177 (1984) (recognizing that the right to appear *pro se* affirms the dignity and autonomy of the accused, thereby allowing the presentation of the best possible defense).
187. Gardner, *supra* note 159, at 414.
188. *Stein*, 435 F. Supp. 2d at 344-47.
189. *Id.* at 366.
190. *Id.*
191. *Id.* at 367.
192. *Id.* at 368.
193. *Stein*, 435 F. Supp. 2d at 368.

The Thompson Memorandum undermines a central feature of the United States' adversarial system by discouraging and possibly preventing corporations from providing the financial means to employees necessary to defend an action.[194] Consequently, regardless of the legal standard of scrutiny, there is no justification in limiting the advancement of attorneys' fees to employees.[195] Employees have the right to obtain resources lawfully available for their defense.[196] The Thompson Memorandum violates the Sixth Amendment of the Constitution by simply providing that advancement of legal fees is a factor for determining whether to indict a corporation. The Memo violates the Sixth Amendment, because the provision is not justified.

IX. Barrier to Foreign Investment

No country, including the United States, could prosper without the flow of foreign capital.[197] However, the Thompson Memorandum may undo years of goodwill and profits.[198] Multinational corporations incorporated or wanting to incorporate in the United States may follow the correct process of incorporating in its state of incorporation. However, multinational corporations may fail to be aware or understand the legal mores of criminalizing a corporation developed by the Thompson Memorandum.[199] In fact, the Holder Memorandum warned that prosecution guidelines may give rise to financial policy concerns because corporate conduct, particularly that of national and multi-national corporations, necessarily intersects with federal economic policies.[200]

In addition to U.S. tax laws, the Thompson Memorandum has a great impact on multinational incorporation. Although the Thompson Memorandum did not undergo the proper administrative law procedures,[201] it is, "binding on all federal prosecutors."[202] That is, all United States Attorneys are required to consider the advancement of legal fees by corporations as a factor in determining whether to indict a corporation.[203] The Thompson Memorandum is a barrier to foreign

194. *Id.*
195. *Id.* at 369.
196. *Id.*
197. Stephen J. McGarry, *Pathfinder for Doing Business Abroad*, 22 INT'L LAW. 483, 486 (1988).
198. *Id.* at 483.
199. *Id.* at 484.
200. Holder Memo, *supra* note 60, at § (III)(A).
201. The administrative law issues of the Thompson Memorandum will not be discussed in this Comment.
202. *Stein*, 435 F. Supp. 2d at 338.
203. *Id.*

investment because it interferes with the policies supporting advancement and indemnification.[204]

Delaware, the leading state of corporate law, recognizes dual policies supporting the principle of indemnification.[205] First, indemnification allows corporate officials to resist unjustified lawsuits through the security that, if vindicated, the corporation will pay litigation associated expenses.[206] Second, indemnification encourages individuals to serve as corporate directors and officers with the security that the corporation will pay the cost of defending the honesty and integrity of its employees.[207]

Although some may view the indemnification of corporate employees receiving six and seven figure salaries as an undue benefit to already exorbitant salaries, indemnification is quite beneficial to corporations. The democratic nature of corporations illustrates that shareholders want and encourage most employees to engage in broad decision making.[208] Such broad decision making may include taking economic risks to increase the value of shareholders' stock.[209] Indemnification allows employees to venture out and take risks that benefit the corporation without the stress of financing possible legal repercussions.[210]

Advancement of attorneys' fees, similar to indemnification, is sound public policy.[211] Individuals who serve corporations should not be required to finance a defense that is generally beyond their financial means.[212] Advancement promotes the same salutary public policy as indemnification, which is to attract the most capable people into corporate service.[213] Thus, advancement also allows employees to take reasonable risks that benefit shareholders. Despite the benefits of a corporation paying the legal fees of its employees, advancement is a, "desirable underwriting of risk by the corporation in anticipation of greater corporate wide rewards."[214] Simply put, advancement and indemnification benefit a corporation more than the covered employee.[215]

Advancement and indemnification encourage well-qualified persons

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204. *See* McGarry, *supra* note 197, at 483.
205. *VonFeldt*, 714 A.2d 79 at 84.
206. *Id.*
207. *Id.*
208. Radin, *supra* note 26, at 260.
209. *Id.*
210. Risks taken by employees of a corporation should be prudent because the right to indemnification requires a successful defense.
211. *Id.* at 262.
212. *Id.*
213. *Homestore, Inc.*, 888 A.2d 204 at 218.
214. *Id.* at 211 (citing Gentile v. SinglePoint Fin., Inc., 788 A.2d 111 (Del. 2001).
215. Radin, *supra* note 26, at 260.

willing to exercise good faith and care to take risks that enhance the economic return of a corporation.[216] Thus, multinational corporations located in the United States are able to obtain competent and qualified employees who benefit the corporation while keeping up with a competitive market.

Yet, by factoring the advancement of attorneys' fees in determining whether to indict a corporation,[217] the Thompson Memorandum deters and contributes to the exodus of multinational corporations for two reasons. First, multinational corporations require employees familiar with the United States economy. Second, multinational corporations want employees willing to take risks in order to place the corporation in an aggressive economic position of one of the most competitive markets in the global economy.

Many qualified employees may be unwilling to work for a corporation who does not advance or indemnify attorneys' fees. This unwillingness limits the availability of competent employees and contributes to the decline of FDI. Foreign investors want to maintain a competitive position, but are restricted when they cannot obtain adequate employees.

The decline of FDI results from corporate exodus. Corporate exodus weakens both the economic and political position of the United States.[218] Corporations who relocate or incorporate in a country other than the United States cause economic and social activities such as law, finance, and distribution to also relocate.[219] For example, a multinational corporation relocating to a foreign country would have to obtain attorneys and accountants from the country in which it relocated to assist with legal activities and familiarize it with the country's economy. The exodus of multinational corporations that may have been caused by the Thompson Memorandum not only impacts the U.S. economy through the removal of business, but also creates fewer business opportunities for American industries.[220] The Thompson Memorandum places the economic future of the United States at risk by factoring the advancement of attorneys' fees as an indicia of guilt. In order to restore the economic standing of the United States a change is necessary.

216. Fasciana v. Elec. Data Systems, 829 A.2d 160, at 170 (Del. Ch. 2003).
217. Thompson Memo, *supra* note 3, at § (VI)(B).
218. Melnik, *supra* note 10, at 108.
219. *Id.*
220. *Id.*

X. A Time for Change

A. The McNulty Memorandum

Following the decision of *United States v. Stein*, there was an eruption of criticism surrounding the Thompson Memorandum as it relates to attorneys' fees. The DOJ surrendered to the legitimate criticism and acknowledged their tactics were relentless by making an unprecedented change to the prosecutorial guidelines.

Senator Arlen Specter, then Chairman of the Senate Judiciary Committee, was perhaps the cardinal critic of the Thompson Memorandum. On December 7, 2006, Senator Specter introduced the "Attorney-Client Privilege Protection Act of 2006."[221] The proposed Act was designed to curtail the aggressive tactics of the Thompson Memorandum.[222] One of the purposes of the Act was to reflect that, "[j]ustice is served when all parties to litigation are represented by experienced diligent counsel."[223] The Act was designed to preserve the fundamental legal protections and rights of employees by preventing federal agents and attorneys from considering the contribution of legal fees to employees as an indicator of guilt.[224] In response to Senator Specter's Bill, and the concerns of the legal community, Deputy Attorney General, Paul McNulty, realized the Thompson Memo guidelines were abusive.[225] Subsequently, McNulty introduced what has been dubbed the McNulty Memorandum.

The McNulty Memorandum was introduced only five days after Senator Specter introduced his proposed legislation.[226] Pursuant to the McNulty Memorandum, prosecutors should no longer factor a business organization's advancement of legal fees to employees as an averment of guilt.[227] Yet, a footnote provides, in extremely rare cases the advancement of attorneys' fees can be considered when the totality of the circumstances indicate advancement was intended to impede a criminal

221. Ashby Jones, *Specter Takes on Thompson Memo*, WALL STREET JOURNAL ONLINE, Dec. 7, 2006 http://blogs.wsj.com/law/2006/12/07/specter-takes-on-thompson-memo/. Senator Specter's Bill was introduced to the public, but not before Congress.

222. *Id.*

223. Attorney-Client Privilege Protection Act of 2006, 109th Cong. § 2 (2006).

224. *Id.* at § 3.

225. Lynnley Browning, *Judge's Rebuke Prompts New Rules for Prosecutors*, N.Y. TIMES, Dec. 16, 2006, at C4.

226. Jones, *supra* note 221.

227. Memorandum from the Dep't of Justice, Paul J. McNulty, Deputy Att'y Gen., to Heads of Department Components U.S. Attorneys, at (VII)(B)(3) (Dec. 12, 2006), *available at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf § (VII)(B)(3) (last visited Nov. 14, 2007) [hereinafter McNulty Memo].

investigation.[228]

This dramatic shift by the DOJ clearly indicates the government was aware it was exploiting the advancement of attorneys' fees to the detriment of employees. Commanding federal agents to no longer consider the advancement of fees in prosecuting a corporation is the inverse of the DOJ's Thompson Memorandum. Moreover, the Memorandum went into effect without awaiting an appeal of *Stein*, thereby implying that the DOJ anticipated Judge Kaplan's ruling would be affirmed.

B. Mixed Signals

Since the introduction of the Holder Memorandum in 1999, federal prosecutors have factored the payment of attorneys' fees by a corporation in determining whether to indict the corporation. Consequently, the introduction of the McNulty Memorandum has sent mixed signals to federal prosecutors, corporations, and foreign investors.

Written in the preface of the McNulty Memorandum is a hidden message. Deputy Attorney General McNulty states, "corporations recognize the need for self-policing, self-reporting, and cooperation with law enforcement."[229] The message to corporations is that the denial of fees to employees is an appropriate method of policing and cooperating with officials.[230] Moreover, applauding the fundamental principles guiding prosecutors as "sound," McNulty ignores both the communal outcry and the Thompson Memorandum's violation of the Constitution.[231] The McNulty Memorandum may not be sufficient to preclude federal prosecutors and agents from regressing to their aggressive tactics that ignore the constitutional rights of employees.

C. Is the McNulty Memorandum Constitutional?

Since the introduction of the McNulty Memorandum, the majority of critics have focused on the issue of whether McNulty properly addressed the issue of the waiver of attorney-client privilege and neglected the issue of advancement. The negligence is due to the wording of the McNulty Memorandum appearing to overhaul the constitutional issues faced by the Thompson Memorandum.

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228. *Id.* at n.3. Even if the circumstances indicate the advancement of fees was intended to impede investigation, the agent(s) and/or prosecutor(s) must obtain permission from the Deputy Attorney General to consider advancement as a factor for indictment of the corporation. *Id.*

229. *Id.* at preface.

230. *Id.* at preface.

231. McNulty Memo, *supra* note 226, at preface.

By providing that prosecutors generally should not evaluate the advancement of attorneys' fees when determining whether to indict a corporation, the McNulty Memorandum is narrowly tailored and minimizes, if not eliminates the violation of the Fifth Amendment.[232] This provision is narrowly tailored because prosecutors are only to consider the advancement of fees in extremely rare cases when circumstances indicate advancement is intended to impede a criminal investigation.[233] Although the McNulty Memorandum may minimize the violation of the Fifth Amendment, an issue with the Sixth Amendment remains.

Pursuant to the Sixth Amendment, employees have a constitutional right to receive and utilize attorneys' fees advanced by their employer. The fact that the advancement of fees may be part of an obstruction scheme is, "insufficient to justify the government's interference with the right of individual criminal defendants to obtain resources lawfully available to them in order to defend themselves, regardless of the legal standard of scrutiny applied."[234] Yet again, the DOJ falls short of defending and complying with the Constitution. The Sixth Amendment provides all individuals with the constitutional right to be represented by the attorney of their desire through utilizing fees advanced to them by their employer. Corporations are advancing fees to employees to acquire the most qualified individuals, not to hinder an investigation. To suggest the advancement of fees may hinder an investigation implies that the attorney(s) of an employee may be acting in an unethical manner, which is an entirely separate issue.

XI. Conclusion

The prosecution of corporations has undergone various transitions. The transitions, set out as principle guidelines, have caused corporations to deny the advancement of legal fees to its employees. Subsequently, employees have been victimized and are forced to play the leading role in criminal indictments because they cannot afford suitable counsel. This denial caused and still causes the government to violate the supreme law on which our country is founded. The guidelines of corporate prosecution have also contributed to multinational corporate exodus, because they directly contradict the policies supporting advancement and indemnification. The government has tried to correct their inexcusable oversight. Whether prosecutors will follow the new practice, may still require an act of Congress.

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232. *Id.* at § (VII)(B)(3).
233. *Id.*
234. *Stein*, 435 F. Supp. 2d at 369.