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Preserving the Corporate Attorney-Client Privilege

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I. INTRODUCTION

The logic is undeniable—if a corporation is willing to own up to its wrongful conduct by cooperating with the government’s criminal investigation, the government may reward the corporation with more lenient treatment. But, the devil is in the details of defining “cooperation.” For many years, the Department of Justice (DOJ) defined cooperation to include waiver of the attorney-client privilege and work product doctrine as well as terminating payment of legal fees for targeted employees. Thus, the DOJ threatened corporations with indictment if they did not cooperate with the criminal investigation by turning over the results of their attorney-conducted internal investigations, such as witness interview memoranda, factual summaries, and reports. Overuse of this tactic led to what many have called a “culture of waiver,” where the DOJ forced corporations to waive the attorney-client privilege and give the DOJ the evidence to convict their employees to save the corporation from indictment. The DOJ came under immense pressure from interest groups and Congress to amend its policy and show more respect for the corporate attorney-client privilege. Ultimately, the DOJ changed its policy twice to thwart

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passage of legislation introduced to protect the attorney-client privilege. The DOJ’s current policy prohibits prosecutors from considering the privileged status of documents in assessing cooperation. Under the new policy, the cooperation question is whether the corporation has provided the DOJ all of the facts, not whether the corporation waived the attorney-client privilege.

The DOJ’s changes have not, however, alleviated all concerns about the vulnerability of the corporate attorney-client privilege. To address these concerns, U.S. Senator Arlen Specter reintroduced his Attorney-Client Privilege Protection Act in 2009 (ACPPA or the Act). The ACPPA purports to save the corporate attorney-client privilege by prohibiting government attorneys from basing a charging decision on a corporation’s refusal to hand over attorney-client privileged documents, but the Act does not provide a remedy for its violation. Thus, it leaves corporations in the same position they would be without the legislation.

This Article argues that, while legislation such as the ACPPA is necessary to preserve the corporate attorney-client privilege, any such legislation must include judicial oversight to deter prosecutorial misconduct effectively. Part II examines the costs and benefits of granting corporations the attorney-client privilege in criminal investigations. It concludes that the benefits of the privilege far outweigh the costs and that the privilege must be safeguarded from unnecessary infringement. Part III traces the evolution of the DOJ’s waiver policies that have threatened the corporate attorney-client privilege. It also examines the costs and benefits of the waiver policy and finds that the costs of the policy are substantial compared to the benefits. Thus, it concludes that congressional intervention is necessary to protect the corporate attorney-client privilege. Part IV argues that Congress should enact the ACPPA or similar legislation, but that there must be a provision in the legislation that permits courts to review charging decisions where the corporation alleges that the DOJ violated


7. Id.
the statute. Thus, it outlines a proposal for overseeing prosecutorial corporate charging decisions that involve waiver of the corporate attorney-client privilege. It concludes that the benefits of this procedure prevail over the costs and that this proposal is more effective than the alternatives.

II. THE NEED FOR A STRONG CORPORATE ATTORNEY-CLIENT PRIVILEGE IN CRIMINAL INVESTIGATIONS

This Part examines the need for the corporate attorney-client privilege in criminal investigations of corporate wrongdoing. It finds that the corporate attorney-client privilege is justified both by the corporation’s right to present a defense to criminal charges and the long-established utilitarian justification for the traditional attorney-client privilege. Further, it concludes that the purported costs of the corporate attorney-client privilege are either minimal or do not exist in the criminal context.

A. Corporate Criminal Liability and the Attorney-Client Privilege

Corporate criminal liability is one method of regulating corporations. This method of regulation has expanded as the number of federal criminal laws has increased. Ordinary criminal liability includes imprisonment, fines, or community service. A corporation, however, is a fictional person that may only act through its agents and, thus, may be held criminally liable for the acts, omissions, or failures of its agent. Courts hold a corporation vicariously liable for the acts of its employees if the individual (i) acted within the scope and of employment; and (ii) acted, at least in part, to benefit the corporation. The standard is not stringent and a corporation may be held liable for the acts of a rogue employee even if the corporation had rules prohibiting the employee’s


10. See N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 491–95 (1909) (finding corporation liable because it acts only through its agents or employees whose knowledge and purpose may be attributed to the corporation).

11. See United States v. 7326 Highway North, 965 F.2d 311, 316 (7th Cir. 1992) (stating agent’s knowledge of illegal act may be imputed to corporation if agent was “acting as authorized and motivated at least in part by an intent to benefit the corporation” (citing United States v. Cincotta, 689 F.2d 238, 241–42 (1st Cir. 1982))).

12. See id.
conduct. If a corporation is found liable for the criminal acts of its employees, the corporation may be punished by fine.\(^\text{14}\) In addition to monetary penalties, a convicted corporation may suffer collateral consequences. Often a company’s stock price will decrease dramatically upon indictment and then even further upon criminal conviction.\(^\text{15}\) Indeed, a mere indictment can cause consumer confidence and the stock price of a company to decrease so dramatically that even an overturned conviction cannot save the company.\(^\text{16}\) In addition, a convicted corporation may lose its ability to contract with the government.\(^\text{17}\) For companies that depend heavily on their relationship with the government for their business, a conviction could mean the demise of the business.\(^\text{18}\) The low threshold for corporate criminal liability combined with the collateral consequences of conviction increases the pressure on the corporation to cooperate and avoid indictment for any alleged wrongdoing on the part of its employees.\(^\text{19}\)

When the government charges a corporation with criminal

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13. See United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972) (holding corporation liable for its employee’s violation of the Sherman Act where the employee gave preferential treatment to suppliers in violation of corporate policy).


16. See, e.g., Linda Greenhouse, Justices Unanimously Overturn Conviction of Arthur Anderson, N.Y. TIMES, May 31, 2005, available at http://www.nytimes.com/2005/05/31/business/31wire-andersen.html (explaining that Arthur Anderson lost its clients after being indicted for obstruction of justice charges and that even though the conviction was overturned there was no chance that Arthur Anderson could come back as a viable business).

17. See, e.g., 42 U.S.C. § 1320a-7 (2006) (mandatory exclusion of firms from participating in Medicare and Medicaid upon conviction of program-related crimes); 15 U.S.C. §§ 78o(b)(4)(B)(i)-(iv) (detailing the criminal offenses that trigger the SEC’s enforcement power over registered brokers to censure, place limitations on the broker’s operations, revoke the broker’s registration, or suspend the broker up to twelve months); Jonathan R. Macey, Agency Theory and the Criminal Liability of Organizations, 71 B.U. L. REV. 315, 326 (1991) (noting that firms convicted of government procurement fraud often face formal and informal suspension or disbarment from doing business with the government).

18. See, e.g., David R. Dearden, How to Avoid Medicare Provider Exclusion, PHYSICIAN’S NEWS DIGEST, Mar. 2008, available at http://www.physiciansnews.com/law/308dearden.html (explaining that exclusion from Medicare for a criminal conviction can lead to the “end of a career in medicine” because insurers decredential medical providers who have been excluded from Medicare and a medical practice cannot survive without reimbursements from insurers).

19. Preet Bharara, Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants, 44 AM. CRIM. L. REV. 53, 86-87 (2007) (“No amount of supplication, therefore, can overcome the mercilessness of the applicable legal doctrines; so long as there is a hint of criminality by even a single lowly employee, the corporation’s counsel has no leverage and no bargaining power. Only the prosecutor can be merciful, and for his mercy the corporation rationally chooses to cooperate in any way demanded.”).
misconduct, the corporation does not have the same protections as an individual charged with a crime.\textsuperscript{20} Importantly, corporations do not have a Fifth Amendment privilege against self-incrimination.\textsuperscript{21} Thus, corporations must comply with all government document requests during an ongoing investigation even if it means turning over documents that clearly establish the corporation’s criminal liability. One of the few protections that corporations have is the constitutionally mandated right to retain legal assistance.\textsuperscript{22} The Supreme Court has made clear that “[t]he assistance of counsel is often a requisite to the very existence of a fair trial.”\textsuperscript{23} The question is whether the corporation’s communications with counsel must remain confidential to make the right to legal assistance meaningful.

Communications between counsel and corporate clients will only remain private if those communications are protected by the attorney–client privilege. The attorney–client privilege is “the oldest of the privileges for confidential communications.”\textsuperscript{24} It is an exception to the rule that the government is entitled to “every man’s evidence” because it protects from disclosure confidential communications between attorneys and clients.\textsuperscript{25} The Federal Rules of Evidence have adopted the attorney–client privilege as it existed at common law.\textsuperscript{26} The Supreme Court has explained that the attorney–client privilege is intended “to

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\item \textsuperscript{20} See Donovan v. Dewey, 452 U.S. 594, 598–99 (1981) (holding the Fourth Amendment gives the government greater latitude to search commercial property than private homes); Oklahoma Press Publ’g Co. v. Walling, 327 U.S. 186, 208 (1946) (concluding “the Fifth Amendment affords no protection by virtue of the self-incrimination provision, whether for the corporation or for its officers; and the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be ‘particularly described,’ if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.”); Hale v. Henkel, 201 U.S. 43, 75–76 (1906) (holding corporations are not entitled to protection under the Fifth Amendment).
\item \textsuperscript{21} Curcio v. United States, 354 U.S. 118, 122 (1957) (“It is settled that a corporation is not protected by the constitutional privilege against self-incrimination.”).
\item \textsuperscript{22} See generally Gideon v. Wainwright, 372 U.S. 335, 340 (1963); Powell v. Alabama, 287 U.S. 45, 67 (1932).
\item \textsuperscript{23} Argersinger v. Hamlin, 407 U.S. 25, 31 (1972).
\item \textsuperscript{24} See generally Peter J. Henning, The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions, 63 TENN. L. REV. 793 (1996) (tracing the history of constitutional rights for corporations).
\item \textsuperscript{25} Id. § 2192.
\item \textsuperscript{26} Federal Rule of Evidence 501 states that “the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” Fed. R. Evid. 501; see also Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (citing this rule with approval).
\end{itemize}
encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." This utilitarian justification for the privilege is grounded in the recognition that legal consultation serves the public interest.

Just like individuals, corporations need the best possible legal advice in defending themselves against criminal charges. The Supreme Court has long recognized that the privilege can apply to organizations as well as individuals. Prior to 1981, however, the Supreme Court had not decided whether, for purposes of the privilege, any employee within the corporation speaks for the corporation or if only upper-level employees speak for the corporation. In *Upjohn Co. v. United States*, the Court explicitly held that the privilege could apply to communications between in-house counsel and corporate employees during an internal investigation. *Upjohn* rejected the "control group" test previously used by some courts, which limited the corporate privilege to communications between the attorney and members of the corporation’s upper management. The *Upjohn* Court stated that the control group test “frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation,” and the Court declined to adopt another test. The *Upjohn* Court emphasized, however, that the "privilege extends only to communications and not to facts." The Supreme Court later made

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28. As early as 1915, in *United States v. Louisville and Nashville Railroad Co.*, 236 U.S. 318, 336 (1915), the Supreme Court assumed, without deciding, that the privilege could apply to a corporation.
30. See id. at 396.
31. See id. at 390–94. The control group test:

analogizes the corporation to the human client, and the courts attempt to decide which employees are the functional equivalent of the human brain. Thus, only employees high enough in the corporate hierarchy to have authority to seek legal advice and to decide whether to use it on behalf of the corporation fall within the control group. The identity of these people may be clear at the very highest levels of corporate management; however the uncertainty increases as one descends the corporate ladder. Lower-level employees are clearly not within the control group, so the attorney–client privilege is not available to encourage their communications with counsel.

33. Id. at 396 ("Needless to say, we decide only the case before us.").
34. Id. at 395.
clear that the privilege belongs to the corporation, not its employees, and that only the corporation may waive the attorney-client privilege.\(^{35}\)

Despite the Supreme Court’s pronouncement affirming the corporate attorney-client privilege, many commentators have attacked the privilege’s usefulness.\(^{36}\) Thus, a cost–benefit analysis of the corporate attorney-client privilege in the criminal context is necessary\(^{37}\) before examining the DOJ’s waiver policy. If the costs of the privilege outweigh its benefits, then the DOJ’s waiver policy could be viewed as restoring balance rather than doing harm.

B. The Costs and Benefits of the Corporate Attorney–Client Privilege in Criminal Investigations

The benefits of the corporate attorney–client privilege in criminal investigations are similar to the benefits of the individual attorney-client privilege. The corporate attorney-client privilege encourages clients to speak openly and freely with their attorneys without fear of disclosure to third parties.\(^{38}\) In turn, attorneys are able to give reasonably informed professional advice. If a client is concerned that his statements to his attorney will possibly be used against him, the client may decide to withhold some information.\(^{39}\) As a result, the attorney’s legal advice to the client will be based on incomplete information. Preventing attorneys from offering legal advice based on imperfect information is crucial to the fair administration of justice.\(^{40}\)

Some scholars have argued that the corporate attorney-client

\(^{35}\) Commodity Futures Trading Comm’n v. Weintraub, 471 U.S. 343, 348–49 (1985) (explaining that the privilege belongs to the corporation and is controlled by the corporation’s management and is normally directed by the corporation’s officers and directors who must exercise the privilege in accordance with their fiduciary duty to act in the best interest of the corporation).

\(^{36}\) See infra notes 41–43 and accompanying text.

\(^{37}\) This discussion is limited to the corporate attorney–client privilege in criminal investigations of corporate wrongdoing. It does not address the costs and benefits of the corporate attorney-client privilege in private civil litigation.

\(^{38}\) Upjohn, 449 U.S. at 389 (explaining that the purpose of the privilege is “to encourage clients to make full disclosure to their attorneys”).

\(^{39}\) See Fisher v. United States, 425 U.S. 391, 403 (1976) (“As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.”); Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (“The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.”).

\(^{40}\) See Upjohn, 449 U.S. at 390 (“[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.”).
privilege is not necessary to encourage employees to share information with the corporate attorney. Critics believe that because the privilege belongs to the corporation, not its directors, officers, or employees, the personal incentive for lower-level employees to communicate truthfully with a lawyer may not be as strong or—even present—in the corporate context. They believe that the threat of being fired for failure to cooperate with the corporation’s internal investigation is a more effective motivator for confiding in the lawyer than the corporate attorney–client privilege.

It is probably true that lower-level employees are motivated by fears about job security, but that is not the whole story. The pertinent question is whether these communications would take place in the absence of the privilege, not whether the lower-level employees are personally motivated by the privilege. If communications between counsel and lower-level employees were not protected by the privilege, it is unlikely that corporate decisionmakers would threaten lower-level employees’ jobs, either explicitly or implicitly, to convince them to cooperate with counsel. It would not be in the corporation’s best interests to require lower-level employees to speak with counsel if the government could discover and use the content of those communications against the corporation. Because those communications are protected by the privilege and not discoverable by the government, however, it is in the best interests of the corporation to encourage lower-level employees to communicate with counsel. It is only through those communications that counsel will learn all the facts and be able to represent the corporation effectively. Thus, the employee may not be directly motivated by the privilege, but the corporation is motivated to direct employees to communicate with counsel because of the privilege’s protections. Therefore, in the corporate context, the privilege encourages communications between lower-level employees and counsel that would not take place in the absence of the privilege.

Another benefit of the corporate attorney–client privilege is that it encourages voluntary compliance with the law and thereby fosters

41. See, e.g., Thornburg, supra note 31, at 157–58 (arguing that the traditional Justifications for the attorney–client privilege are only “myths” in the corporate setting); see also DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 233 (1988) (concluding the attorney–client privilege has no justification in the organizational context); Daniel R. Fischel, Lawyers and Confidentiality, 65 U. Chi. L. Rev. 1, 33 (1998) (concluding the attorney-client privilege is “of dubious value to clients and society as a whole”).

42. Thornburg, supra note 31, at 173–74.

43. Id. at 175; In re Crazy Eddie Sec. Litig., 131 F.R.D. 374, 377 (E.D.N.Y. 1990) (observing that when lower-level employees reveal information to counsel they generally do so under orders from their superiors and not in reliance on the corporation’s privilege).
effective administration of the laws and respect for the rule of law. The privilege encourages corporate clients to consult freely with their attorneys, and attorneys are better able to advise corporate clients about legal requirements and recommend a lawful course of action to achieve corporate objectives. Thus, counsel plays a pivotal role in assuring the board of directors that the corporation is acting within the law. For example, some corporations will be prompted by another company’s legal problems to hire an outside law firm to conduct an internal investigation into the corporation’s practices.

In this type of situation, the audit committee (or special committee created by the board of directors) of the corporation will want outside counsel to produce a reliable and independent internal investigation for investors to assure them that there are not any legal issues surrounding the corporation’s practices. Thus, outside counsel will determine whether misconduct occurred, the nature and scope of any misconduct, who is involved and responsible, why the misconduct occurred, and how widespread the problem may be. If outside counsel discovers a problem, it can advise the company on the remedial steps necessary to insure that the conduct does not recur, the need for disciplinary actions, as well as the effectiveness of the current corporate compliance program. Finally, outside counsel will be able to develop an appropriate response to possible charges of wrongdoing and potentially obtain more lenient treatment from government regulators for approaching them

44. Upjohn, 449 U.S. at 389; see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 cmt. c (2000).
45. See United States v. United Shoe Mach. Corp., 89 F.Supp. 357, 358 (D. Mass. 1950) (“In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential.”).
46. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 cmt. c (2000) (explaining that the rationale behind the privilege is that confidentiality encourages full and frank disclosure by clients); but see Developments in the Law—Privileged Communications, 98 HARV. L. REV. 1450, 1481–83 (1985) (explaining compelled disclosure is seen as inherently wrong because it causes embarrassment and results in a breach of an entrusted confidence).
47. See, e.g., Eric Dash & Milt Freudenheim, Chief Executive at Health Insurer is Forced Out in Options Inquiry, N.Y. TIMES, Oct. 16, 2006, available at http://www.nytimes.com/2006/10/16/business/16united.html?_r=2&oref=slogin (explaining that United Health hired a law firm to investigate the potential backdating of stock options at its company and noting that more than 100 companies had come under scrutiny for backdating options to maximize compensation to employees).
48. See id. (explaining that the independent law firm that conducted an internal investigation into backdated stock options recommended, inter alia, that the board fire the Chief Executive Officer, replace all of the directors on its compensation committee who approved the backdated options, and create new senior executive posts to oversee ethics and compensation).
voluntarily. In the absence of the corporate attorney–client privilege, however, corporations may decide to bury their heads in the sand and hope that regulators will not discover any misconduct. Thus, the corporate attorney–client privilege is beneficial because it encourages corporations to take a proactive approach to complying with legal requirements.

One commonly mentioned cost of the corporate attorney–client privilege is the loss of information or evidence. Because corporate lawyers review documents and interview employees during internal investigations, the lawyers may serve as repositories of information gathered from sources throughout many levels of the corporation. During the course of an investigation, corporate counsel will create, inter alia, witness interview memoranda, factual summaries, and timelines. The theory is that the corporation, as a fictional person, cannot easily convey the attorney-gathered information to the government. Thus, without access to the corporate attorneys’ records, the government has to track down the widely dispersed information.

Of course the underlying facts are not privileged. As corporations do not have a Fifth Amendment privilege, the government can subpoena the relevant documents to learn the facts of the case. Once the government is familiar with the documents, the government can call employees before a grand jury to question them about the documents and their knowledge of, or involvement in, the alleged wrongdoing. The government may also grant immunity to a knowledgeable employee


50. Fischel, supra note 41, at 7-8 (arguing that the attorney–client privilege increases the costs of discovery and can be used to shield information from discovery completely).

51. Thornburg, supra note 31, 203-04 (noting defendant corporations have ready access to internal corporate documents and employees, whereas those attempting to pierce the corporate veil must undergo the difficult task of deposing scores of employees at all levels of a corporation to learn the relevant information).

52. See, e.g., William R. McLucas et al., The Decline of the Attorney-Client Privilege in the Corporate Setting, 96 J. CRIM. L. & CRIMINOLOGY 621, 639 (2006) (observing that the government has taken to “deputizing” private counsel who conduct internal corporate investigations).


55. Grand juries exercise their investigatory function by issuing subpoenas under FED. R. CRIM. P. 17. See also Daniel C. Richman, Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket, 36 AM. CRIM. L. REV. 339, 345 (1999) (explaining that the “greatest use of grand juries as investigative tools is in the white collar area” because white collar witnesses are more likely to succumb to the pressure of the grand jury).
to convince the employee to give the government the entire story.\(^{56}\) Certainly, there is a cost to the government to conduct its investigation, but the nature of the cost, in theory, is no different than the cost imposed on the government in the criminal prosecution of an individual.\(^{57}\) Indeed, if the corporation did not retain counsel, the government would encounter the same costs of investigating the corporation. Thus, the government is in the same position in criminal investigations with or without the information generated from the corporate attorney-client privilege.\(^{58}\)

An additional cost often mentioned in applying the privilege to corporations is that the corporation may manipulate the privilege to hide information used for business (i.e., nonlegal) purposes.\(^{59}\) The theory here is that corporations will send copies of ordinary business material to internal counsel to establish that those materials are privileged and shield them from discovery in future litigation. In criminal investigations, however, it is much less likely that the corporation is funneling business information through attorneys to conceal that information from the government. The communications that would occur between counsel and the corporation in a criminal investigation would be directly related to the counsel's legal purpose in representing the corporation. Indeed, in a criminal investigation the prosecution is interested in obtaining the attorney-prepared witness interview memoranda, timelines, investigation reports, and factual summaries. Thus, it may be true that manipulation of the privilege is a cost of the corporate attorney-client privilege in the civil context, but it cannot properly be judged as a cost in the criminal context.

The corporate attorney-client privilege makes a corporation's right to retain legal assistance meaningful. It permits the corporation to communicate openly with counsel to formulate a defense to criminal

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56. See 18 U.S.C. §§ 6001–05 (explaining the rules for granting immunity to witnesses in exchange for their testimony).

57. The actual cost of investigating a corporation is much higher than investigating an individual. See Michael L. Seigel, Corporate America Fights Back: The Battle Over Waiver of the Attorney-Client Privilege, 49 B.C. L. REV. 1, 13–20 (2008) (describing the costs associated with investigating a corporation); see also United States v. Stein, 435 F. Supp. 2d 330, 371 n.205 (S.D.N.Y. 2006) (noting the government had reviewed 5 to 6 million pages of documents, transcripts of 335 depositions, and 195 income tax returns). But see Stephen A. Saltzburg, The Control of Criminal Conduct in Organizations, 71 B.U. L. REV. 421, 425 (1991) (arguing that it is less burdensome to prosecute an organization than an individual because the government may not need to establish who committed the offense or the mental state of the individual actors).

58. Upjohn, 449 U.S. at 395 (explaining that in internal investigations “[a]pplication of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place”).

challenges. It also permits the corporation to control its destiny by proactively conducting internal investigations to determine if the corporation has engaged in any wrongdoing and the appropriate response. The corporation is able to do this without the threat that the government will be privy to each conversation that corporate counsel has with the corporation’s employees and agents. While the government may argue that by upholding the corporate attorney–client privilege, corporations may deny the government information or even obstruct the government’s investigation, the government’s ability to discover the facts is neither helped nor hurt by the existence of the corporate attorney–client privilege. As the benefits to the corporate attorney–client privilege significantly outweigh its costs, the corporate attorney–client is valuable and worth protecting. Thus, any infringement on the corporate attorney–client privilege must be carefully scrutinized. This is necessary to ensure that the privilege is not weakened by ill-advised policy considerations.

III. TRACING THE DEVELOPMENT OF THE CURRENT DOJ CHARGING POLICY AND THE PROPOSED ACPPA

This Part examines the development of the DOJ corporate charging policy, from the 1999 Holder Memorandum to the 2008 Filip Guidelines, and their role in creating a “culture of waiver.” It also explores the costs and benefits of the DOJ’s waiver policy, concluding that the negative consequences of the waiver policy overshadow its positive aspects. Finally, this Part analyzes the proposed Attorney–Client Privilege Protection Act to determine whether it is an appropriate response to the DOJ’s waiver policy. This Part concludes that although the Attorney–Client Privilege Protection Act is a suitable answer to the DOJ waiver policy, it falls short of responding to all of the dangers of the DOJ waiver policy because it does not include a remedy for its violation.


ATTTORNEY-CLIENT PRIVILEGE

A. History of DOJ Charging Policy

Prior to 1999, when the DOJ issued its first guidance memorandum on prosecuting corporations, DOJ standards for charging corporations were unclear. Prosecutorial discretion shrouded the DOJ's charging considerations in secrecy. It was widely understood, however, that prosecutors valued cooperation. Traditionally, prosecutors conducting a criminal investigation of a corporation would seek cooperation by granting individual employees immunity in exchange for their testimony, issuing grand jury subpoenas for documents, or issuing grand jury subpoenas requiring particular employees to testify. Over the past several years, however, the DOJ has shifted to a policy of encouraging corporations to waive their attorney-client privilege and work product protection to obtain the information needed to prosecute them. Because corporations typically hire outside counsel to perform an internal investigation when they discover that they are under scrutiny by the DOJ, the DOJ's policy shift makes it possible for the DOJ to benefit from outside counsel's labor by obtaining access to the results of internal investigations.

The first iteration of the waiver policy was promulgated in June of 1999 when then-Deputy Attorney General Eric Holder issued a memorandum entitled "Federal Prosecution of Corporations." The Holder Memorandum, as it became known, identified eight factors that prosecutors were permitted to weigh in deciding whether to indict a corporation. The factor most important here is the corporation's willingness to cooperate with the government during its investigation. The Holder Memorandum explained:

In determining whether to charge a corporation, that corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider

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64. See Thompson Memorandum, supra note 1. See generally McLucas et al., supra note 52 (outlining the rapid decline of the attorney-client privilege in the wake of the Enron and WorldCom scandals).
65. Holder Memorandum, supra note 60.
66. The eight factors include: (1) “[t]he nature and seriousness of the offense”; (2) the frequency of misconduct within the corporation; (3) the corporation’s history of engaging in comparable conduct; (4) the “corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents”; (5) the “existence and adequacy of the corporation’s compliance program”; (6) the “corporation’s remedial actions”; (7) “[c]ollateral consequences”; and (8) the “adequacy of non-criminal remedies.” Id. at II.A.
the corporation's willingness to... disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges. 67

Prosecutors and practitioners alike, however, believed that the Holder Memorandum was merely advisory. 68 In addition, the waiver request was largely seen as a response to the advice-of-counsel defense 69 that had arisen more frequently in the highly regulated business community. Accordingly, the Holder Memorandum received little attention in the legal community and did not significantly alter how corporations conducted internal investigations.

After a wave of corporate scandals involving major companies such as Enron 70 and WorldCom, 71 President Bush created a Corporate Fraud Task Force to make the prosecution of financial crimes a DOJ priority. 72 One of the duties of the Corporate Fraud Task Force was to change rules, regulations, and policy to improve the effective investigation and prosecution of significant financial crimes. 73 On the same day that the President issued the executive order creating the Corporate Fraud Task

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67. Id.


69. A defendant may negate proof of specific intent by establishing the defense of good faith reliance on advice of counsel. To take advantage of this defense, the defendant must show that after making a full disclosure of all relevant facts he relied in good faith on his attorney's advice. See, e.g., United States v. Eisenstein, 731 F.2d 1540, 1544 (11th Cir. 1984). However, this defense presents significant risks. Because the defense requires the disclosure of privileged attorney-client communications, some courts have held that the defense constitutes a waiver of the privilege. See, e.g., United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991).

70. On December 2, 2001, Enron filed for bankruptcy with $13.1 billion in debt for the parent company and an additional $18.1 billion for affiliates. The company used special purpose entities (SPEs), loopholes in the Generally Accepted Accounting Principles (GAAP), and mark-to-market accounting in an effort to hide debt. Sixteen Enron employees were guilty of crimes committed at Enron, and Arthur Andersen, a major accounting firm, dissolved as a result of the scandal. Wendy Zellner & Stephanie Anderson Forest, The Fall of Enron, BUS. Wk., Dec. 17, 2001, available at http://www.businessweek.com/magazine/content/01_51/b3762001.htm.

71. In the summer of 2002, Mississippi based WorldCom filed for bankruptcy following the discovery of a $3.8 million dollar fraud accomplished through creative accounting methods used to mask the company's declining financial condition. WorldCom's accounting department perpetrated the fraud through capitalization of line costs on the balance sheet and inflated revenues with bogus accounting entries. By the end of 2003, it was estimated the company's total assets had been inflated by about $11 billion. The former CEO, Bernard Ebbers, was found guilty of all criminal charges, including fraud, conspiracy, and filing false documents with regulators. The former CFO, controller, accounting director, and accounting managers all pled guilty in accordance with plea agreements. Jones Joneston, WorldCom Scandal: A Look Back at One of the Biggest Corporate Scandals in U.S. History, Mar. 08 2007, available at http://www.associatedcontent.com/article/162656/worldcom_scandal_a_look_back_at_one.html.


73. Id. § 3(c)(iii).
Force, he also released a Corporate Responsibility Fact Sheet, which set forth the President’s proposal to fight corporate fraud.\textsuperscript{74} Among other goals, the President called for harsher penalties for corporate crimes.\textsuperscript{75} The Corporate Fraud Task Force put the Holder Memorandum at the top of its priority list for policy revisions. Just six months after the President created the Corporate Fraud Task Force, then-Deputy Attorney General Larry Thompson issued a memorandum to replace the Holder Memorandum entitled “Principles of Federal Prosecution of Business Organizations,” which became known as the Thompson Memorandum.\textsuperscript{76} The Thompson Memorandum was the crowning achievement of the Corporate Fraud Task Force.

The Thompson Memorandum was intended to “increase[] [the] emphasis on and scrutiny of the authenticity of a corporation’s cooperation.”\textsuperscript{77} Like its predecessor, the Thompson Memorandum provided that cooperation included waiving the attorney-client and work product privileges.\textsuperscript{78} The Thompson Memorandum, however, elevated the importance of waiver by removing the “only” from the Holder Memorandum’s admonishment that waiver of the privilege was “only one factor in evaluating the corporation’s cooperation.”\textsuperscript{79} In addition, the Thompson Memorandum no longer referred to the attorney–client and work product privileges as “privileges.” Instead, the Thompson Memorandum referred to them as “protections.”\textsuperscript{80} Thus, the attorney–client privilege became the attorney–client protection in the Thompson Memorandum.\textsuperscript{81} These were the first signals that the DOJ intended to afford the attorney–client and work product privileges less respect in the course of their investigations than they had in the past. Although the policy stated that prosecutors were permitted to request waiver in “appropriate circumstances,”\textsuperscript{82} the Thompson Memorandum failed to...
explain what those appropriate circumstances might have been.83 Thus, prosecutors used their discretion to determine that virtually every case was an appropriate circumstance to seek waiver of the attorney–client privilege.84

In evaluating cooperation, the Thompson Memorandum also instructed prosecutors to examine whether the corporation appeared to protect its culpable employees and agents.85 Thus, advancing attorneys’ fees, entering joint defense agreements, sharing information with employees, or retaining employees without disciplining them for their misconduct, were all factors to weigh against the corporation in determining the corporation’s cooperation.86 Collectively, these changes appeared to make cooperation the most significant factor in the prosecutor’s decision whether to indict a corporation.

The Thompson Memorandum also added a ninth factor for the prosecutor to consider—“the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance.”87 At the same time, the Thompson Memorandum noted that it would be a minority of cases in which a corporation or partnership was itself subjected to criminal charges.88 Thus, even though the Thompson Memorandum claimed to address when to charge a corporation, the DOJ’s focus had clearly shifted to punishing individual employees where possible instead of the corporation. The threat of prosecuting the corporation, however, would serve as the DOJ’s leverage in seeking cooperation from the corporation.

The Corporate Fraud Task Force and the implementation of the Thompson Memorandum dramatically changed the atmosphere of internal investigations. Often in the very first meeting between the

84. See id. (explaining that some prosecutors interpreted the Thompson Memorandum to permit them to seek a blanket waiver of all attorney–client communications, other than communications regarding how to defend the case, from the very outset of a criminal investigation); see also ASS’N OF CORPORATE COUNSEL ET AL., THE DECLINE OF THE ATTORNEY–CLIENT PRIVILEGE IN THE CORPORATE CONTEXT: SURVEY RESULTS (Mar. 6, 2006), available at http://www.acc.com/vl/public/Surveys/loader.cfm?csModule=security/getfile&amp;pageid=16306.
85. Thompson Memorandum, supra note 1, at VI; see also Buchanan, supra note 82, 592–93 (explaining the culpability factor of the test for making charging decisions).
86. Thompson Memorandum, supra note 1, at VI; see also Holder Memorandum, supra note 60, at VI.
88. Thompson Memorandum, supra note 1; see also Bharara, supra note 19, at 79 (describing the Department’s broad discretion as “an expression of untrammeled power in theory, but also suggestive of reasonable restraint in practice”).
government and corporate counsel, the DOJ would inquire whether the corporation was prepared to cooperate by waiving the attorney-client privilege and turning over the results of its internal investigation. Ultimately, aggressively using the Thompson Memorandum’s cooperation provision assisted the government in securing convictions of corporations and individuals, but as discussed below, the impact on corporations and their employees was far less rosy.

B. The Costs and Benefits of the DOJ Waiver Policy

For the government and the public, the biggest advantage of the waiver policy was that it made government investigations into corporate criminal conduct more efficient and less costly. The government did not need to go through the initial expense of conducting a large-scale investigation, such as securing witness cooperation agreements or sifting through thousands of documents. Instead, the government was able to piggyback off of the work of corporate counsel. Thus, the government was able to pursue more corporate wrongdoers with fewer resources, including individuals who otherwise would have been granted immunity for the government to gain the information necessary to prosecute the corporation. The DOJ’s new cooperation strategy was immensely successful. In the first ten months of the Corporate Fraud Task Force’s existence, it obtained over 250 corporate fraud convictions, handled over 320 investigations involving more than 500 subjects, and recovered over $2.5 billion in fines, forfeitures, and restitution.

The government’s approach was understandable. Undoubtedly, when corporations are involved in accounting scandals, the culpable actors within the corporation often employ a wide variety of accounting tricks to make it difficult to discover the fraud. Enron, where the executives created a financial house of cards to conceal billions in debt from unsuccessful projects and deals, is an example of the difficult job that the government would have in uncovering accounting fraud on its own. Certainly the government’s waiver policy assisted in bringing accounting frauds to light, much to the benefit of the public. But the difficulty of proving fraud, standing alone, does not justify stripping

89. See Weissman Statement, supra note 83.
90. CORPORATE FRAUD TASK FORCE, FIRST YEAR REPORT TO THE PRESIDENT 2.2 (2003). The Task Force’s second year report revealed that the DOJ had won over 500 corporate fraud convictions or guilty pleas and had charged over 900 defendants with corporate fraud. CORPORATE FRAUD TASK FORCE, SECOND YEAR REPORT TO THE PRESIDENT 2.3 (2004).
91. CORPORATE FRAUD TASK FORCE, FIRST YEAR REPORT TO THE PRESIDENT, supra note 90, at 2.3 & 2.4; CORPORATE FRAUD TASK FORCE, SECOND YEAR REPORT TO THE PRESIDENT, supra note 90, at 2.3.
corporations of one of the few constitutional protections that they possess in criminal investigations. Even if the difficulty of proving fraud in these cases justified the waiver policy, the DOJ did not confine using its policy to those situations where it was impossible to ascertain the facts without waiver of the attorney–client privilege. Instead, the DOJ applied its waiver policy across the board in the name of efficiency. While convenience and efficiency are laudable goals, the Supreme Court has made clear that they "do not overcome the policies served by the attorney–client privilege."  

For the corporation and its employees, the consequences of cooperating with the government by waiving the corporate attorney–client privilege were far-reaching. First, it put corporate counsel in a difficult ethical situation. If counsel knew that the corporation may waive the privilege, counsel was essentially an agent of the government conducting an investigation on its behalf and providing the government with all the findings. Corporate counsel were in the unenviable position of trying to zealously represent their clients while being beholden to the demands of the government. This was particularly difficult because counsel had to decide how to convince the corporation's employees to cooperate when there was a very real possibility that the corporation would turn over any communications that implicated the employee in the wrongdoing. If corporate counsel

92. Upjohn Co. v. United States, 449 U.S. 383, 396 (1981). The Court explained that "[d]iscovery was hardly intended to enable a learned profession to perform its functions... on wits borrowed from the adversary." Id. (quoting Hickman v. Taylor, 329 U.S. 495, 516 (1947) (Jackson, J., conccurring)).

93. See Sarah Helene Duggin, Internal Corporate Investigations: Legal Ethics, Professionalism, and the Employee Interview, 2003 COLUM. BUS. L. REV. 859, 865 (2003). Duggin explains that the biggest dilemmas for counsel include: "when and how to disclose to an interviewee that counsel represents the business entity, not the individual; what to say in response to questions such as 'Do I need my own lawyer?'; and what to advise corporate clients with respect to government demands for privilege waivers, constituent requests for advancement of attorneys' fees, and related issues." Id.


95. Typically, corporate attorneys advise employees that they represent the corporation, not the individual employee, and that the corporation considers the conversation between the attorney and the employee to be protected by its attorney–client privilege. Therefore, corporate attorneys ask employees to keep the content of their conversations confidential. They also advise the employees that the corporation, not the employee, has the power to waive the attorney–client privilege and reveal the content of the conversation. Prior to the waiver policy, corporate counsel was able to downplay the fact that the corporation could decide to disclose the communication to the government because it was unlikely to happen in a typical case. Alternatively, counsel could reassure the employee that the corporation had no reason to believe that the individual engaged in any wrongdoing and that counsel was merely trying to gain an understanding of the facts so that counsel can properly advise the corporation. With the pressure on the corporation to waive the privilege to demonstrate cooperation, however, counsel cannot assure employees that the corporation does not intend to waive the privilege.
suspected that a particular employee was involved in the wrongdoing, counsel had to decide whether to advise the employee to retain independent counsel before speaking with corporate counsel. There was also the possibility that counsel’s belief that the employee participated in criminal conduct could arise during the course of the interview. At that point, corporate counsel had to decide whether she was obligated to stop the interview and advise the employee to retain separate counsel or continue the interview and uncover as much information as possible for the corporation and the government. Finally, counsel’s position between the client and the government put employees at risk for obstruction of justice charges based on the theory that once a corporation decided to waive the privilege, counsel was essentially an agent of the government and any lie to counsel would necessarily be passed on to the government. The DOJ’s waiver policy turned representing a corporation in a criminal investigation into an ethical minefield fraught with dangers for the corporation and its employees at every turn.

Second, once the corporation waived the privilege as to the government, the privilege was waived as to all parties. In other words, corporations could not “selectively waive” the privilege to gain favor with the government and then strategically reassert that privilege to protect the disclosed information from all other current or future litigants. Thus, waiver placed the results of the internal investigation directly into the hands of any potential civil litigant. Future litigants

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Even if it is true at the time the statement is made, it could be potentially misleading because the corporation may decide to waive the privilege to stave off prosecution. The more explicit the warning to the employee regarding the potential for the employee’s statements to be turned over to law enforcement and/or the possible need for independent counsel, the less likely it is than an employee is willing to be forthcoming with the attorney. Duggin, supra note 93, at 942–45.

96. See, e.g., United States v. Singleton, No. H-06-080, 2006 WL 1984467, at *6 (S.D. Tex. July 14, 2006) (explaining that Greg Singleton was indicted under 18 U.S.C. § 1512(c)(2) for obstruction of justice based on the claim that his company’s outside counsel was “acting as an arm of the investigating agencies,” that Singleton lied to the outside counsel, and that Singleton believed that his statements to outside counsel would be given to the investigating federal agencies); United States v. Kumar, 04 CR 846(S-2) (ILG), 2006 U.S. Dist. LEXIS 96142, at *9 (E.D.N.Y. Feb. 21, 2006) (explaining that Sanjay Kumar, the Chief Executive Officer of Computer Associates International, Inc. was indicted for obstruction of justice charges under 18 U.S.C. § 1512(c)(2) based, in part, on allegations that he lied when the company’s outside law firm interviewed him and that outside counsel passed those lies on to the government).

97. In re Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 303 (6th Cir. 2002) (“The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality as to others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit.”); In re Steinhardt Partners, L.P., 9 F.3d 230, 235 (2d Cir. 1993); Westinghouse Elec. Corp. v. Philippines, 951 F.2d 1414 (3d Cir. 1991); Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981). But see Diversified Indus. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc) (recognizing selective waiver doctrine).
who successfully obtained internal investigation reports due to the corporation’s cooperation with the government essentially had a roadmap to proving liability against the corporation. Therefore, the monetary cost of cooperating with the government by waiving the attorney-client privilege could be very high.98

Third, the waiver policy damaged the corporation’s relationship with its employees. Once employees understood that the corporation would turn them and their privileged statements over to the government to save the corporation from prosecution, employee distrust and resentment would build.99 In addition to the damage to the employer–employee relationship, the waiver policy threatened to infringe on individual employee rights, such as the Sixth Amendment right to counsel and the Fifth Amendment privilege against self-incrimination. The potential infringement on employees’ constitutional rights came to light in United States v. Stein,100 which was the first time a court had the opportunity to scrutinize the DOJ’s preindictment conduct under the waiver policy. The opinion in that case was concerned with the Thompson Memorandum’s cooperation factor, and specifically with the advancement of attorneys’ fees. The court found that KPMG, one of the world’s largest accounting firms, had a long standing policy of paying the legal fees of its employees even if they were charged with crimes.101 KPMG changed this policy, however, after a meeting between KPMG management and DOJ prosecutors where the prosecutors told KPMG that “[the DOJ] would look at any discretionary payment of [attorneys’] fees by KPMG ‘under a microscope.’”102 In addition, the DOJ was

98. See, e.g., In re Columbia/HCA, 293 F.3d at 311 (Boggs, J., dissenting) (“The court’s rule [rejecting selective waiver] does nothing more than increase the cost of cooperating with the government.”).

99. Ellen S. Podgor, White-Collar Cooperators: The Government in Employer-Employee Relationships, 23 Cardozo L. Rev. 795, 803 (2002) (explaining that pitting employers and employees against each other in an attempt to obtain the benefits of cooperation, “interferes with the overriding fiduciary employment relationship.”). Podgor also notes that corporations are in a superior position to their employees when it comes to negotiating cooperation. Corporations can pressure employees to cooperate by threatening dismissal. Corporations are also more likely to be the “first in the race to the courthouse to serve in the role of government cooperator.” Id. at 805.


102. Id. at 353. After the meeting, KPMG decided to limit preindictment advancements to $400,000 and required full cooperation with the government as a condition of the advancement of legal fees. After further correspondence with the DOJ, KPMG decided to immediately cut off all attorney fee advancements if an employee were later indicted. As the investigation of KPMG employees progressed, KPMG’s attorneys asked government prosecutors to notify them whenever a particular KPMG employee was not cooperating fully with the investigation. Whenever the DOJ gave KPMG notice that an employee was not cooperating with the investigation, KPMG would threaten to terminate the payment of the employee’s legal fees unless the government informed KPMG within the next ten business days that the employee was willing to submit to a government interview. In some instances,
hostile to independent counsel representing KPMG employees during government interviews, so the DOJ pressured KPMG to inform its employees that they could attend government interviews without independent counsel to represent them. The court found that the portion of the Thompson Memorandum touching upon attorneys’ fees and the actions of the prosecutors violated the KPMG employee-defendants’ Fifth and Sixth Amendment rights. Thus, according to the court, the pressure exerted by the Thompson Memorandum and the federal prosecutors to cut off attorneys’ fees to KPMG employees under investigation necessarily interfered with the employees’ ability to defend employees did not agree to an interview with the government and KPMG promptly fired the employee and cut off payment of the employee’s legal fees. Although KPMG would be permitted to make those types of determinations regarding the payment of legal fees without violating the constitutional rights of their employees, the court found that the actions of KPMG were properly characterized as attributable to the government because of the DOJ policies as outlined in the Thompson Memorandum. Specifically, the court found that KPMG’s departure from its long standing policy of paying the legal fees of its employees without limit was due to the Thompson Memorandum’s cooperation factor.  

103. KPMG sent a letter to its employees regarding the investigation. The letter “advised . . . [the] recipients [that they] had a right to be represented by counsel if they were contacted by the government, mentioned some advantages of consultation with counsel, and stated that KPMG had arranged for independent counsel for those who wished to consult them.” Id. at 346. The DOJ prosecutors told KPMG that they were “disappointed with [the letter’s] tone” and . . . ‘one-sided presentation of potential issues’ and demanded that KPMG send out a supplemental memorandum in a form they proposed.” Id. After a sentence in the letter telling employees that they are “free to obtain their own counsel,” the government wanted KPMG to add the following language: “or to meet with investigators without the assistance of counsel.” Id. KPMG succumbed to the DOJ’s pressure and amended its “Q & A” form for its employees so that the form more explicitly communicated that employees could deal with government representatives without counsel. Id.

104. Id. at 365. The court found that the Thompson Memorandum violated the Fifth Amendment in that it impermissibly impeded a criminal defendant’s Due Process right to be treated fairly during the criminal process. Id. The court declared that the right to fairness in the criminal process at a minimum means that “a criminal defendant has a right to obtain and use in order to prepare a defense resources lawfully available to him or her, free of knowing or reckless government interference.” Id. at 361. The court concluded that even the most minimal criminal defense would cost between $500,000 and $1 million. Id. at 362 n.163 (explaining that this case represented the largest tax fraud case in United States history with at least 5 million pages of documents, 335 depositions, and 195 income tax returns).

105. Id. at 365–66. While the Sixth Amendment right to counsel normally attaches upon indictment, the government’s actions and policies to cut off the defendants’ attorneys’ fees preindictment had the purpose of limiting the defendants’ access to counsel post-indictment. According to the court, the DOJ’s preindictment conduct impermissibly restricted the employees’ right to counsel post-indictment by pressuring KPMG to cut off advancing attorneys’ fees to those KPMG employees who had been indicted. Id. at 366–67. To remedy these constitutional violations, the court decided to exercise ancillary jurisdiction over the KPMG defendants’ claims against KPMG for the advancement of attorneys’ fees. In addition, because the court found that some of the KPMG defendants made proffers to the government that they would not have made had KPMG not threatened to cut off their attorneys’ fees, Judge Kaplan requested that the parties brief that issue more fully to determine which statements to the government the court ought to suppress. Id. at 373. A month later, the court concluded that the government impermissibly coerced the proffers of two of the KPMG defendants; the court therefore suppressed these statements. Id. at 337–38.
themselves.\textsuperscript{106}

The costs of the waiver policy were significant to the business community. It became difficult for corporate counsel to operate freely during the course of an internal investigation because the government was constantly looking over counsel’s shoulders. In turn, counsel confronted difficult ethical choices in interviewing employees and employees’ rights were jeopardized by the waiver policy. If the corporation succumbed to the government’s pressure to waive the privilege, it would be vulnerable to future lawsuits supported by its own internal investigation. This “culture of waiver” threatened the corporate attorney-client privilege and everything it stood for. In contrast, the government leveraged its power under the Thompson Memorandum to save time and money. Ultimately, this dynamic would lead to a backlash against the government, explored below.

\section*{C. Pressure to Change the DOJ Waiver Policy Mounts}

The legal community quickly mobilized against the DOJ’s threat to the corporate attorney-client privilege. In September 2004, the American Bar Association (ABA) formed a Task Force on the Attorney-Client Privilege.\textsuperscript{107} Its goal was to preserve and protect the attorney-client privilege and work product doctrine.\textsuperscript{108} On May 2, 2006, the

\textsuperscript{106} Judge Kaplan explained that a competent defense lawyer would not advise his corporate client to feel free to advance attorneys’ fees to its employees in the face of the language in the Thompson Memorandum itself. Indeed, it would be irresponsible to take the chance that prosecutors might view it as “protecting . . . culpable employees and agents.” \textit{id.} at 364 (alteration in original). The court applied strict scrutiny constitutional analysis and held that the Thompson Memorandum’s inclusion of advancement of attorneys’ fees in its cooperation factor was unconstitutional. \textit{id.} Under substantive Due Process judicial review, laws that restrict fundamental liberty interests are subject to the most rigorous judicial review: strict scrutiny analysis; the law is constitutional only if it is narrowly tailored to serve a compelling state interest. \textit{id.} at 360. While the Supreme Court has never explicitly characterized the right to fairness in criminal proceedings as a fundamental liberty interest, the \textit{Stein} court found cases supporting this extension. \textit{id.} at 360–61. The court then held that the Thompson Memorandum’s restrictions on the right to fairness in the criminal proceedings were not narrowly tailored to achieve a compelling state interest. \textit{id.} at 364.


\textsuperscript{108} The ABA Task Force held a series of public hearings on the privilege waiver issue and received testimony from numerous legal, business, and public policy groups. \textit{See The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 88 (2006) (statement of Karen J. Mathis, President, Am. Bar. Ass’n). The Task Force successfully enacted a new ABA policy endorsing the corporate attorney-client privilege and work product doctrine and resisting DOJ policies that threaten them. The ABA and its Task Force have also worked along side a broad array of business and legal groups to lobby the DOJ to reexamine its waiver policy and convince the Sentencing Commission to remove the 2004 privilege waiver amendment to the Sentencing Guidelines that permitted judges to examine waiver of the attorney-client privilege and work product doctrine in determining cooperation. \textit{id.} On April 5, 2006,
ABA sent a letter to Attorney General Alberto Gonzales, which expressed the ABA’s concerns over the DOJ’s privilege waiver policy and urged the DOJ to adopt the ABA Task Force’s revisions to the Thompson Memorandum. The ABA proposed amending the DOJ’s policy by prohibiting prosecutors from seeking privilege waivers during investigations; specifying the types of factual, nonprivileged information that prosecutors may request from companies as a sign of cooperation; and clarifying that any voluntary waiver of privilege shall not be considered when assessing whether the entity effectively cooperated. These suggested revisions to the DOJ’s policy would have balanced rectifying the problem of government-coerced waiver and maintaining prosecutors’ ability to gather the important factual information necessary to effectively enforce the law. But the DOJ responded by simply reasserting the existing waiver policy. Although the DOJ seemed to indicate its unwillingness to engage the legal community in a discussion regarding its waiver policy, the ABA forged ahead with its campaign to preserve the attorney-client privilege.

The pressure on the DOJ was not just from the ABA. On September 5, 2006, ten prominent former senior DOJ officials from both major political parties—including three former Attorneys General, three former Deputy Attorneys General, and four former Solicitors General—submitted a letter to Attorney General Gonzales opposing the privilege

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112. On August 8, 2006, the ABA approved a resolution, sponsored by the ABA Task Force on Attorney–Client Privilege and the New York State Bar Association, opposing government policies, practices and procedures that erode employees’ constitutional and other legal rights by requiring, encouraging, or permitting prosecutors to consider certain factors in determining whether a company or other organization has been cooperative during an investigation. Task Force on Attorney–Client Privilege & N.Y. State Bar Ass’n, Report to the House of Delegates (Aug. 8, 2006), available at http://www.abanet.org/media/docs/302Brevised.pdf. These factors include whether the organization (1) provided or funded legal representation for an employee, (2) participated in a joint defense and information sharing agreement with an employee, (3) shared its records or historical information about the conduct under investigation with an employee, or (4) declined to fire or otherwise sanction an employee who exercised his or her Fifth Amendment rights in response to government requests for information. Id.
waiver provisions of the Thompson Memorandum. In this letter, the former officials voiced many of the same concerns previously raised by the ABA and urged the DOJ to amend the Thompson Memorandum "to state affirmatively that waiver of attorney-client privilege and work product protections should not be a factor in determining whether an organization has cooperated with the government in an investigation." This letter from former DOJ senior officials indicated that opposition to the DOJ's waiver policy was not limited to corporate attorneys.

Pressure on the DOJ reached a fever pitch in summer 2006 when Judge Kaplan, U.S. District Judge for the Southern District of New York, found portions of the Thompson Memorandum and actions of federal prosecutors under its guidance unconstitutional. The Stein decision, described in subpart III.B, supra, was a huge victory for opponents of the Thompson Memorandum, giving them a much-needed boost in gaining Congress's attention. On September 12, 2006, the U.S. Senate Judiciary Committee held a hearing on "The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations." The battle lines between the Bush Administration and the attorney interest groups were clearly drawn. Then-Deputy Attorney General Paul McNulty testified on behalf of the waiver policy. He credited the Thompson Memorandum for over 1,000 corporate fraud convictions, restoring the public's confidence in the market, and providing corporations predictability.


114. Id.


117. See The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before S. Comm. on the Judiciary, 109th Cong. 110 (2006) (statement of Paul J. McNulty, Deputy Att'y Gen.) [hereinafter McNulty Statement]. He began his testimony by recounting the large scale bankruptcy of Enron and other companies at the beginning of the millennium that led to the call for greater accountability for corporations and the formation of the Corporate Fraud Task Force. McNulty explained that since that time, the DOJ had obtained over 1000 corporate fraud convictions. McNulty asserted that the DOJ's more aggressive stance on corporate crime helped to restore the public's confidence in the market. McNulty also claimed that the Thompson Memorandum had reined in prosecutorial discretion because it required prosecutors to look at collateral consequences to shareholders, not just whether the prosecutor could obtain a conviction under the law, when making a charging decision. Id. at 110–11.

118. Id. at 113 (explaining that without the Thompson Memorandum, "the federal criminal justice system would be a much harsher, less predictable, and less transparent environment for corporations and their counsel").
"litmus test" for cooperation. Nevertheless, McNulty admitted that the DOJ believed the best way for a corporation to communicate all of the facts to the government was for the corporation to turn over its internal investigation report. McNulty also defended the Thompson Memorandum’s consideration of attorneys’ fee advancements to employees (at issue in the Stein decision). He made the broad assertion that the “Thompson Memo does not, and could not, drive corporate policy or practice.” McNulty concluded by stating his belief that the Thompson Memorandum appropriately struck the balance between the interests of the business community and the investing public.

Former Attorney General Edwin Meese spoke in opposition to the Thompson Memorandum and offered concrete suggestions to improve it. Meese recommended (1) removing any mention of waiver of either the attorney-client privilege or work product protection from the corporate charging policy; (2) eliminating any reference to the payment of attorneys’ fees.

119. Id. at 114. McNulty claimed that, in most cases, the DOJ’s waiver requests are made only to gain a quicker, more accurate understanding of the facts. Id. He explained that if a company can communicate the facts and identify the wrongdoers without waiving any privileges, the government is satisfied. Id. Of course this contradicts the language of the Thompson Memorandum itself which states that waiver of the attorney-client and work product privileges may be necessary so that the government can be satisfied that the corporation had made a complete disclosure of the facts to the government.

120. Id. at 114–15. McNulty maintained that, even in the absence of the Thompson Memorandum’s cooperation factor, companies would still frequently waive privileges to speed up the government’s investigation. Id. McNulty also noted that corporate waiver is in the taxpayers’ interest because the DOJ can save time and financial resources by obtaining the corporation’s internal investigation. Id. Finally, McNulty asserted that the waiver policy was necessary because corporations overly assert the attorney-client and work product privileges by running all of their documents, even those that concern purely business matters, through in-house counsel. This in turn leads to prolonged pre-trial litigation regarding the privilege. Id. at 117–18. This argument, however, is a bit disingenuous since the issue is whether the government should have access to evidence that would not exist but for the attorney’s involvement in the internal investigation, not pre-existing documents.

121. Id. at 119–20. He argued that advancement of attorneys’ fees is only one “small part of the overall assessment as to whether a corporation cooperated.” Id. at 119. He stated that, “[t]he untold story is that the government’s investigation is generally enhanced when experienced and informed defense counsels represent targeted employees.” Id. at 120. Of course, this assertion flies in the face of the prosecutors’ concerted efforts in the Stein case to conduct interviews of KPMG employees without the benefit of counsel. McNulty further asserted that whether to advance fees “is the company’s choice alone.” Id. at 121. McNulty failed to address Judge Kaplan’s contrary findings in the Stein case where KPMG changed its policy regarding the advancement of attorneys’ fees due to pressure from federal prosecutors and the Thompson Memorandum.

122. Id. at 121.

123. Id. at 122 (explaining that individual defendants waive their privilege against self-incrimination regularly and that corporations should not receive preferable treatment simply because they have more money).

of employees’ attorneys’ fees; and (3) explicitly stating that the government will only seek waiver in “exceptional circumstances,” such as the crime fraud exception.\(^\text{125}\) In the interim, Meese proposed that the DOJ provide uniform national policies on waiver, require that a prosecutor obtain authorization at the national level before making a waiver request, and provide statistics on the regularity of DOJ waiver requests.\(^\text{126}\)

Chamber of Commerce President Thomas Donohue discussed the adverse effects of the waiver policy.\(^\text{127}\) He explained that a corporation that is unwilling to waive the privilege is immediately labeled “uncooperative,” which damages the company brand and shareholder value.\(^\text{128}\) Donohue called on Congress to “invalidate provisions of DOJ’s Thompson Memorandum and similar policies at other federal agencies that prevent executives and employees from freely, candidly and confidentially consulting with their attorneys.”\(^\text{129}\) Donohue explained that “[a]s long as the Department of Justice exercises a policy that threatens companies with indictment if they do not waive their privilege, companies will feel compelled to waive—whether a front-line prosecutor ‘formally’ requests the waiver or not.”\(^\text{130}\)

The strong opposition to the waiver policy from business leaders and former Attorney Generals placed the DOJ in the position of justifying and defending its policy. There was no question that the policy led to a substantial number of convictions and settlements. But, the DOJ had difficulty convincing the business community and Congress that the ends justified the means.

**D. The McNulty Memorandum Is Born**

Following the Senate Judiciary Committee hearings, the ABA and other groups continued their crusade to convince the DOJ to change the Thompson Memorandum. The DOJ refused to change its policy until Senator Arlen Specter introduced the Attorney–Client Privilege

\(^{125}\) Meese Statement, *supra* note 124, at 19. The crime fraud exception prevents a client from asserting the attorney–client privilege when the communication was for the purpose of effecting a future or ongoing crime or fraud. EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 392 (4th ed. 2001).

\(^{126}\) Meese Statement, *supra* note 124, at 19.


\(^{128}\) *Id.* at 72.

\(^{129}\) *Id.* at 71.

\(^{130}\) *Id.* at 73.
Protection Act of 2006 in December 2006.\(^\text{131}\) The proposed Act prohibited a federal agent from demanding, requesting, or conditioning treatment on the disclosure of attorney–client privileged communications.\(^\text{132}\)

In response to the proposed legislation, the DOJ adopted a revised version of Principles of Federal Prosecution of Business Organizations written by then-Deputy Attorney General Tom McNulty.\(^\text{133}\) The McNulty Memorandum, as it became known, required federal prosecutors to consider the same nine factors enumerated in the Thompson Memorandum when determining whether to charge a corporation.\(^\text{134}\) It did, however, make some changes to the cooperation factor. The McNulty Memorandum, unlike the Thompson Memorandum, restricted the prosecutors’ ability to request waiver of the attorney–client privilege. The McNulty Memorandum limited prosecutors’ ability to request waiver to situations where there was “a legitimate need for the privileged information to fulfill their law enforcement obligations.”\(^\text{135}\) If the prosecutor found a legitimate need,
she had to first seek "purely factual information, which may or may not be privileged, relating to the underlying misconduct ("Category I")." The revised procedure required prosecutors to obtain written authorization from the U.S. Attorney before requesting that a corporation waive the attorney-client or work product protections for Category I material. The government was permitted to consider the corporation's response to the waiver request in determining whether the corporation had cooperated in the government's investigation. Thus, under the McNulty Memorandum, the government was still permitted to hold the refusal to waive the attorney-client privilege against the corporation in assessing cooperation. Indeed, there was no real change from the Thompson Memorandum because the Thompson Memorandum purported to limit waiver requests to Category I materials.

If the corporation complied with the government's request to waive the privilege with respect to Category I material, but the prosecutor found that the factual information "provide[d] an incomplete basis to conduct a thorough investigation," the prosecutor could then request that the corporation provide attorney-client communications or nonfactual attorney work product (Category II). The McNulty Memorandum explained that Category II information should only be sought in "rare circumstances." Before requesting that a corporation waive the attorney-client or work product protections for Category II information,
the U.S. Attorney had to obtain written authorization from the Deputy Attorney General. If the Deputy Attorney General authorized the request, the U.S. Attorney was required to communicate the request in writing to the corporation. The prosecutor was prohibited from considering a corporation’s refusal to waive the privilege for Category II information when making a charging decision. Prosecutors could, however, favorably consider a corporation’s willingness to grant the government’s waiver request in determining whether a corporation had cooperated in the government’s investigation.

Another factor the prosecutor had to weigh in assessing a corporation’s cooperation was whether the corporation appeared to, or actually did, protect its culpable employees and agents. Therefore, if the corporation retained the employees who engaged in misconduct without penalizing them, or made information about the government’s investigation available to employees by entering a joint defense agreement, the government was permitted to consider those factors in weighing “the extent and value of a corporation’s cooperation.” Unlike the Thompson Memorandum, however, the McNulty Memorandum stated that prosecutors generally should not consider whether a corporation was paying its employees’ attorneys’ fees when deciding whether to indict the corporation. Prosecutors were allowed to consider advancement of attorneys’ fees only when the “totality of the circumstances” demonstrated that the corporation advanced attorneys’ fees for the purpose of hindering a criminal investigation.

Despite the procedural hurdles that prosecutors had to clear before

142. The authorization request must set forth law enforcement’s legitimate need for the information and identify the scope of the waiver sought. The Deputy Attorney General must keep a copy of each waiver request and authorization for Category II information in his files. For federal prosecutors litigating in Main Justice, the Assistant Attorney General must submit waiver requests for Category II information for approval to the Deputy Attorney General. Id. at 10–11.
143. Id. at 10.
144. Id. If a corporation voluntarily offers privileged documents without a request by the government, federal prosecutors are not required to obtain authorization. The federal prosecutor must, however, report voluntary waivers to the United States Attorney or the Assistant Attorney General in the Division where the case originated. Id. at 11. A record of that report must be maintained in the files of that office. Id.
145. Id. at 11.
146. Id.
147. Id. This provision was changed in direct response to the decision in United States v. Stein, 435 F. Supp. 2d 330, 371 (S.D.N.Y. 2006), where Judge Kaplan held that the government had acted unconstitutionally when it threatened KPMG.
148. McNulty Memorandum, supra note 133, at 11 n.3. The McNulty Memorandum explained that when these circumstances were present, the prosecutor had to get permission from the Deputy Attorney General before considering this factor in his charging decisions. Prosecutors were instructed to follow the authorization process established for waiver requests of Category II information. Id.
seeking a privilege waiver, the McNulty Memorandum fell short of adequately protecting the attorney-client privilege. The McNulty Memorandum, like its predecessor, left it to the DOJ—rather than the corporation—to determine when it was appropriate to waive the attorney-client privilege. The McNulty Memorandum created an unnatural division of attorney-client privileged materials by labeling all attorney-created documents from the internal investigation as factual information (Category I) and labeling all communications that contained the attorney's mental impressions, such as legal advice, as nonfactual information (Category II). Even the supposed factual materials in Category I would necessarily include the attorney's mental impressions. In addition, it permitted prosecutors to consider a corporation's unwillingness to waive the attorney-client privilege with respect to Category I documents when determining whether the corporation had cooperated with the government. Further, while prosecutors could not hold a corporation's refusal to waive the attorney-client privilege with respect to Category II materials against it, they could look favorably upon a corporation's willingness to turn over those materials. So long as the government could offer a benefit for waiver, a similarly situated corporation that did not waive the attorney-client privilege necessarily received less favorable treatment.

Due to the underlying similarities between the Thompson and McNulty Memoranda, the DOJ failed to please the business community and Congress. The changes were negligible and the Thompson Memorandum's "culture of waiver" still lurked in the background of the McNulty Memorandum. Therefore, the battle over the corporate attorney-client privilege remained just as intense, if not more so, than before the DOJ adopted the McNulty Memorandum.

E. The Current Charging Policy: The Filip Guidelines

As the DOJ continued to receive intense pressure from Congress and various interest groups, it again amended its corporate charging policy in

149. See supra notes 136 and 140 and accompanying text.

150. Keith Paul Bishop, The McNulty Memo—Continuing the Disappointment, 10 CHAP. L. REV. 729, 740–41 (2007) (noting the line between Category I and Category II information "can often be indistinct at best" as many "factual reports" are necessarily opinion-laden).

151. See Lauren E. Taigue, Justice Department's Policy on Corporate Prosecutions Under Attack: United States v. Stein Assails Thompson Memorandum, 52 VILL. L. REV. 369, 406 (2007) (stating that the "culture of waiver" that existed under the Thompson memorandum would largely be continued by the McNulty Memorandum); Bharara, supra note 19, at 93 (arguing the Thompson Memorandum's "culture of waiver" persisted even after the Thompson Memorandum was replaced by the McNulty Memorandum).
August 2008 to further restrict DOJ attorneys’ ability to request attorney–client privileged information from corporations. This time, however, the DOJ made the corporate charging policy part of the U.S. Attorneys’ Manual rather than a freestanding directive. The new corporate charging policy, Principles of Federal Prosecution of Business Organizations, commonly called the Filip Guidelines after then-Deputy Attorney General Mark Filip, instructs prosecutors to consider the same nine factors provided in the Thompson and McNulty Memoranda. The major difference between the Filip Guidelines and the prior iterations of the corporate charging policy is its explanation of the cooperation factor. The Filip Guidelines go into much greater detail regarding the benefits of cooperation for both the government and the corporation. The Filip Guidelines note that the government’s lack of knowledge regarding what happened, where to find the evidence, and which individuals are to blame for the illegal corporate actions, could lead to the government refusing to consider a “disposition short of indictment of the corporation.” Further, the Filip Guidelines state that cooperation assists the government by allowing prosecutors to avoid extended delays that could impede their ability to discover and deal with the corporate crimes. It explains that corporations can benefit from cooperation because the government will direct its investigative resources in a manner that will not upset the corporation’s business and,

152. See supra note 134 and accompanying text. U.S. ATTORNEYS’ MANUAL, supra note 5, § 9-28.300, instruct prosecutors to examine the following factors when deciding whether to bring charges or negotiate a plea:

(1) the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime (see USAM 9-28.400); (2) the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management (see USAM 9-28.500); (3) the corporation’s history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it (see USAM 9-28.600); (4) the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents (see USAM 9-28.700); (5) the existence and effectiveness of the corporation’s pre-existing compliance program (see USAM 9-28.800); (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 government agencies (see USAM 9-28.900); (7) collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution (see USAM 9-28.1000); (8) the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance; and (9) the adequacy of remedies such as civil or regulatory enforcement actions (see USAM 9-28.1100).

153. Id. § 9-28.700.
154. Id.
perhaps more importantly, the corporation may earn credit for its cooperation efforts.\footnote{155}

The Filip Guidelines also include a new section on the attorney–client and work product protections which affirms their importance in the legal system.\footnote{156} The Guidelines then acknowledge the controversy over the DOJ's prior privilege waiver policies, but claim that the policies were not used coercively to force corporations into waiving the attorney–client privilege.\footnote{157} They clarify that the government does not need corporations to waive their attorney–client and work product privileges to demonstrate cooperation; instead the government is really seeking the facts known to the corporation regarding the alleged illegal conduct.\footnote{158}

With respect to internal investigations, the Filip Guidelines explain that a corporation that uses attorneys to conduct its internal investigation will be held to the same standard of cooperation as a corporation that uses nonlawyers.\footnote{159} Accordingly, even if the results of a corporation's internal investigation are privileged because lawyers conducted the investigation, the corporation still must turn over the relevant facts to the government if it wants to receive cooperation credit.\footnote{160} The Filip Guidelines explain that “so long as the corporation timely discloses relevant facts about the putative misconduct, the corporation may receive due credit for such cooperation, regardless of whether it chooses to waive privilege or work product protection in the process.”\footnote{161} The Filip Guidelines also affirm (1) that the government may not compel a corporation to make disclosures and (2) a corporation's failure to provide relevant evidence does not mean that the corporation should be indicted.\footnote{162} The Guidelines note that the government retains the discretion to charge even the most cooperative corporation if it is required in the interests of justice. Thus, they make clear that “[c]ooperation is a relevant potential mitigating factor, but it alone is not dispositive.”\footnote{163}

Although the Filip Guidelines make a point of stating that the corporate attorney–client privilege is valued and respected by the DOJ, they still distinguish between the information gained from an internal

\footnotesize
155. \textit{Id.}
156. \textit{Id.} § 9-28.710.
157. \textit{Id.}
159. \textit{Id.}
160. \textit{Id.}
161. \textit{Id.}
162. \textit{Id.}
163. \textit{Id.}
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investigation and legal advice sought outside of the "fact-gathering process" of an internal investigation. The distinction is close to the controversial Category I–Category II division in the McNulty Memorandum. The Filip Guidelines note that communications regarding legal advice that are independent of the fact-gathering part of the internal investigation "lie at the core of the attorney–client privilege" and need not be disclosed as a condition for the corporation's eligibility to receive cooperation credit. Similarly, nonfactual work product, such as an attorney's mental impressions or legal theories, need not be revealed to the government. Thus, the Filip Guidelines appear to recharacterize any legal involvement with the internal investigation as factual, so whether it may technically be protected by the attorney–client privilege is irrelevant. So long as the prosecuting attorney asks only for the relevant facts and never specifically requests waiver of the attorney–client privilege, the attorney has not violated the guidelines. But, if facts are understood to mean what they meant in the McNulty Memorandum, i.e., to include interview memoranda, factual chronologies created by counsel, and reports containing investigative facts, then providing those facts would probably lead to a full waiver of the attorney–client privilege. Indeed, some lower courts have held that if a corporation makes these types of factual disclosures to the government then the corporation has waived the privilege on any underlying attorney notes and memoranda in subsequent litigation. These courts were operating under a prior version of the corporate charging policy where corporations attempted to cooperate, but still preserve the privilege, by verbally sharing the facts gathered from the internal investigation. Thus, the requirement in the Filip Guidelines that a corporation disclose all relevant facts to be eligible for cooperation, as opposed to directing

164. See supra notes 136 and 140 and accompanying text.
165. U.S. ATTORNEYS' MANUAL, supra note 5, § 9-28.720. The Filip Guidelines note, however, that a corporation claiming the advice of counsel defense should expect a waiver request so that the government may evaluate whether it is a legitimate defense. Id. They also state that any communications between attorney and client made in furtherance of a crime or fraud are not entitled to the protection of the attorney–client privilege. Id.
166. See id.
167. See, e.g., Sec. & Exch. Comm’n v. Roberts, 254 F.R.D. 371 (N.D. Calif. 2008) (ordering a law firm to disclose all documents, factual information, and attorney notes previously made available to the SEC in an SEC action against the former Vice President of the client for whom the firm conducted the investigation); Ryan v. Gifford, No. 2213-CC, 2008 WL 43699 (Del. Ch. Jan. 2, 2008) (ordering the production of all documents produced in the course of an internal investigation when some of those documents were previously disclosed to third parties including NASDAQ and the SEC).
168. See e.g., Lance Cole, Corporate Criminal Liability in the 21st Century: A New Era?, 45 S. TEX. L. REV. 147, 169 (suggesting that it may be possible for corporations to cooperate with the government by providing relevant factual information without disclosing privileged attorney–client communications or work-product “that reflects the opinions or legal theories of counsel”).
the government to the appropriate documents and individuals, jeopardizes the corporate attorney-client privilege in later litigation.

Another new provision in the Filip Guidelines describes the type of corporate conduct that amounts to obstruction. Under the Thompson Memorandum, the prosecutor was permitted to consider the advancement of attorneys’ fees and the use of joint defense agreements against the corporation in assessing its cooperation. The Filip Guidelines make clear, however, that prosecutors “should not take into account whether a corporation is advancing or reimbursing attorneys’ fees or providing counsel to employees, officers, or directors under investigation or indictment.” Similarly, the Filip Guidelines maintain that “mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit, and prosecutors may not request that a corporation refrain from entering into such agreements.” Importantly, prosecutors are also prohibited from requesting that corporations refuse to pay their employees’ attorneys’ fees. These changes in the Guidelines were a direct reaction to United States v. Stein, which garnered a great deal of media attention.

Finally, the Filip Guidelines include a provision regarding oversight concerning demands for waivers of attorney-client privilege or work product protection. The Filip Guidelines state that “[c]ounsel for corporations who believe that prosecutors are violating such guidance are encouraged to raise their concerns with supervisors, including the appropriate United States Attorney or Assistant Attorney General.” The section explains that these allegations are subject to “potential investigation through established mechanisms.” There is no means to hold supervisors accountable if they choose not to investigate allegations of misconduct. Ultimately, the Filip Guidelines require the DOJ to

169. Thompson Memorandum, supra note 1, at VI (characterizing the payment of attorneys’ fees and joint defense agreements as the corporation “protecting its culpable employees and agents”).
170. U.S. ATTORNEYS’ MANUAL, supra note 5, § 9-28.730 (reserving the right of the prosecutor to hold the payment of attorneys’ fees against the corporation if it were used in a manner that would otherwise constitute criminal obstruction of justice such as advancing fees with the agreement that the employee or agent stick to a version of the facts that the employee and corporation know to be false); see also Brandon L. Garrett, Corporate Confessions, 30 CARDOZo L.Rev. 917, 928 (2008).
171. U.S. ATTORNEYS’ MANUAL § 9-28.730. The guidelines do advise corporations to “avoid putting itself in the position of being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government and thereby limiting its ability to seek such cooperation credit.” Id.
172. Id.
175. Id. (emphasis added).
police itself on waiver of the corporate attorney–client privilege, which is exactly what caused the “culture of waiver” to begin with.

Although the Filip Guidelines are an improvement over prior versions of the corporate charging guidelines, they still leave the corporate attorney–client privilege vulnerable. Thus, the need for legislation to address the corporate attorney–client privilege remains.

F. The Legislative Remedy: The Attorney–Client Privilege Protection Act of 2009

Senator Arlen Specter introduced the Attorney–Client Privilege Protection Act of 2009176 (ACPPA) in the Senate on February 13, 2009.177 The ACPPA begins by explaining the importance of the attorney–client privilege.178 The ACCPA notes that guarding the attorney–client privilege from compelled disclosure promotes voluntary compliance with the law.179 Further, the ACPPA provides that corporations are better able to have compliance programs and conduct internal investigations if there is “clarity and consistency” regarding the attorney–client privilege.180 The ACPPA asserts that government officials should be able to conduct their investigative work while respecting the attorney–client privilege and the work product doctrine.181 It notes that the DOJ and other agencies’ policies undermine the adversarial system of justice by pushing organizations to waive attorney–client privilege and work product protections to avoid indictment or other sanctions.182 Thus, the purpose of the ACPPA is to institute “clear and practical limits” to safeguard the corporate attorney–client privilege and work product protection.183

1. The ACPPA’s Provisions

The ACPPA prohibits an agent or attorney of the United States from:

178. Id. § 2.
179. Id. § 2(a)(2).
180. Id. § 2(a)(4).
181. Id. § 2(a)(5).
182. Id. § 2(a)(7).
183. Id. § 2(b).
(1) demanding or requesting that an organization, its employees or agents, waive the attorney–client privilege or the work product doctrine; (2) offering to reward or actually rewarding an organization, its employees or agents, for waiving the attorney–client privilege or the work product doctrine; and (3) threatening adverse treatment or penalizing an organization, its employees or agents, for declining to waive the attorney–client privilege or work product protection.184

Further, the ACPPA prohibits an agent or attorney of the United States from making a civil or criminal charging or enforcement decision based on a good faith assertion of the protection of the attorney–client privilege or the work product doctrine; payment of legal fees for an employee or agent; good faith entrance into a joint defense agreement between the organization and one or more of its employees or agents; information sharing between an organization and its current or former employees or agents; and failing to terminate the employment of any employee or agent because of that agent or employee’s decision to exercise personal constitutional rights or other legal protections in response to a government request.185 With respect to voluntary disclosures, the ACPPA does not “prohibit an organization from making, or an agent or attorney of the United States from accepting, a voluntary and unsolicited offer” to waive the attorney–client privilege and work product protection, but the agent or attorney of the United States may not consider the privileged or otherwise protected nature of the material when making a charging decision or determining whether the organization is cooperating with the government.186

2. Criticisms of the ACPPA

Although many critics of the DOJ’s waiver policy hailed the ACPPA as a much-needed intervention, the proposed legislation has not been without criticism. One criticism of an earlier, but nearly identical, version of the ACPPA raised by Professor Liesa L. Richter is that it eliminates a company’s incentive to offer privileged information to the government because there is no reward for such a disclosure.187 The ACPPA states that a prosecutor may not consider the “privileged or otherwise protected nature of the material voluntarily provided” when

184. Id. § 3(b)(1).
185. Id. § 3(b)(2).
186. Id. § 3(d).
making a charging decision or when deciding whether the organization has cooperated. This provision does not appear to suggest that an organization could not receive cooperation credit for producing privileged information to the government; instead, it seems to indicate that the government must judge the information on its usefulness without crediting the organization simply because of the information’s privileged status. Thus, it is the information itself, and not its status, that should guide the prosecutor in deciding whether to charge a corporation or award cooperation credit. Corporations would still have an incentive to produce privileged information if they believe it would help the government understand the case and potentially keep them from being prosecuted.

Professor Richter seems to be arguing that organizations should have an incentive to waive the attorney–client privilege even if it does not serve their clients’ interests in the investigation. The incentive that we should be trying to create, however, is an incentive to cooperate in the investigation. Professor Richter’s criticism of the ACPPA appears to make waiving the attorney–client privilege synonymous with cooperating with the government. But the purpose of the ACPPA is to separate these two concepts to protect the sanctity of the attorney–client privilege. Corporations must be able to cooperate without being forced to waive the attorney–client privilege. The government is most anxious to obtain evidence that would not exist but for the attorney’s involvement in the investigation, e.g., interview memoranda and time lines prepared by attorneys. But, there are certainly ways to cooperate and convey the information in those documents without waiving the attorney–client privilege. For instance, corporate counsel could inform the government of the identity of the witnesses with the most relevant information and make those individuals available for questioning. Counsel could share their compilation of the critical documents rather than forcing prosecutors to wade through millions of documents. Both these steps could save the government investigation time and the government would be free to reward the corporation for its cooperation. Thus, an organization’s incentive to cooperate with the government would not be diminished because of the ACPPA.

Some might argue that there is no need for the ACPPA now that the DOJ has adopted the Filip Guidelines and made them a part of the U.S. Attorneys’ Manual. Because the Filip Guidelines prohibit prosecutors from requesting attorney–client privileged information from corporations, the argument goes, they adequately safeguard the

188. S. 445, § 3(d)(2).
attorney–client privilege. There are several problems with this argument. First, unlike legislation which would require hearings, bicameralism, and presentment to change, the Attorney General may change the U.S. Attorneys’ Manual at any time for any reason or for no reason at all. Therefore, after the fire storm about the “culture of waiver” dies down, the U.S. Attorney would be free to direct the Deputy Attorney General to amend the guidelines. In terms of predictability, it would be much better to have a legislative rule in place rather than a changeable guideline. The DOJ rule on requesting waiver of the corporate attorney–client privilege has changed three times in four years.

Second, the U.S. Attorneys’ Manual is not enforceable in any court. Thus, if a U.S. Attorney disregards the guidelines and demands that a corporation waive the attorney–client privilege, the corporation has no recourse. On the other hand, if legislation protected the attorney–client privilege, presumably there would be legal consequences for failure to abide by the rule. Therefore, legislation would be preferable to the U.S. Attorneys’ Manual because there would be a mechanism to ensure compliance with the rule.

Third, the Filip Guidelines do not apply widely to all government agencies like the ACPPA does. For example, the SEC is not bound by the DOJ policy and could require a corporation to waive the attorney–client privilege to demonstrate cooperation. Therefore, the government would be free to use the corporation’s failure to waive the privilege in a criminal action against them in pursuing a civil action. So long as the waiver policies across government agencies are not uniform, the risk to the privilege remains.

The Filip Guidelines do not adequately address the “culture of waiver” that has developed over the last several years. Although the Guidelines prohibit a U.S. Attorney from demanding waiver of the corporate attorney–client privilege, they do not provide any remedy if a U.S. Attorney violates the policy. Instead, they instruct corporations to raise their concerns with the U.S. Attorney’s supervisor.

189. Tom Lininger, Sects, Lies and Videotape; The Surveillance and Infiltration of Religious Groups, 89 IOWA L. REV. 1201, 1268 (2004); see also Rory K. Little, The Future of the Federal Death Penalty, 26 OHIO N.U. L. REV. 529, 573 (2000) (predicting the manuals would be immediately withdrawn if they were held to be enforceable in court).

190. On October 13, 2009, the SEC confirmed that it entered a waiver agreement wherein Bank of America agreed to disclose documents related to the legal advice Bank of America received in connection with its merger with Merrill Lynch. By disclosing the privileged documents to the SEC Bank of America also made the documents available to the many other state and federal regulators investigating Bank of America’s merger with Merrill Lynch. See Kara Scannell et al., BofA to Hand Over Documents Related to Its Merrill Deal, WALL ST. J., Oct. 14, 2009, at A21.

191. U.S. ATTORNEYS’ MANUAL, supra note 5, § 9-28.760 (explaining that “[l]ike any other allegation of attorney misconduct, such allegations are subject to potential investigation through
Corporations do not have a right to bring a court proceeding to enforce the Filip Guidelines or any other aspect of the U.S. Attorneys’ Manual.\textsuperscript{192} And without any formal procedure for pursuing a violation, a report to the supervisor may do little more than aggravate the U.S. Attorney handling the case. This could damage a client’s position even more. Similarly, the ACPPA does not address an appropriate remedy. It merely prohibits a U.S. Attorney from requesting a waiver of the attorney–client privilege or threatening to hold a corporation’s refusal to waive the attorney–client privilege against the corporation when making a charging decision. The ACPPA does not allow a corporation to bring suit against a U.S. Attorney for violating the law, nor does it provide for a hearing that would allow a judge to intervene in the matter. Therefore, a judicial remedy must be added to the ACPPA to protect the corporate attorney–client privilege from any current or future intrusion.

IV. LIMITED JUDICIAL OVERSIGHT

The U.S. Attorneys’ Manual and ACPPA are meaningless protections of the corporate attorney–client privilege because they do not provide any consequences for U.S. Attorneys who violate their provisions. If the ACPPA is going to be significant, it must provide for some oversight of the U.S. Attorneys making charging decisions. Prosecutors should have discretion in deciding whether to prosecute a particular corporation. Where the DOJ has maintained that a corporation’s refusal to waive its attorney–client privilege is an inappropriate ground for making a charging decision, however, there should be some mechanism to ensure that prosecutors are following this directive. Of course, any oversight must respect the role of the prosecutor and the courts’ long-time reluctance to second guess prosecutorial discretion.\textsuperscript{193} At the same time, it must provide corporations a meaningful opportunity to demonstrate that the U.S. Attorney is improperly using the corporation’s refusal to waive the attorney–client privilege as a motivating factor in the U.S. Attorney’s charging decision.

\textsuperscript{192} Id. § 9-27.150 (explaining that the principles in the United States Attorney Manual are internal policy and do not create any rights or benefits).

\textsuperscript{193} Historically, prosecutors have been entitled to broad discretion because the Court has said that “the decision to prosecute is particularly ill-suited to judicial review.” Wayte v. United States, 470 U.S. 598, 607 (1985). The decision to prosecute is “ill-suited” for judicial review because courts are not competent to examine factors such as the strength of the case, the general deterrence value, the enforcement priorities of the government, or how the particular prosecution fits into those priorities. Id. at 607–08. In addition, there are concerns with respect to the cost of an inquiry into prosecutorial decision making such as a delay in the proceedings, a potential chilling effect on law enforcement, and less effective prosecutorial enforcement because of a revelation of the enforcement goals. Id.
It would be nearly impossible to oversee prosecutorial decisionmaking without infringing on prosecutorial discretion. It is particularly difficult in white collar crime because, as many scholars have noted, prosecutorial discretion in this area is particularly broad.\footnote{194}{See, e.g., John C. Jeffries, Jr. & John Gleeson, The Federalization of Organized Crime: Advantages of Federal Prosecution, 46 HASTINGS L.J. 1095, 1125 (1995) ("With legislation covering virtually any crime they might plausibly wish to prosecute, federal prosecutors pick their targets and marshal their resources, not in response to the limitations of the substantive law but according to their own priorities and agendas."); Julie R. O’Sullivan, The Federal Criminal “Code” is a Disgrace: Obstruction Statutes as Case Study, 96 J. CRIM. L. & CRIMINOLOGY 643, 654–55 (2006) (noting the sprawling federal criminal code empowers prosecutors to pick from among a "smorgasbord" of statutes that may apply to any given action).} When a corporation is involved, the prosecutor has the choice of prosecuting the corporation, the individual wrongdoer(s), both, or neither.\footnote{195}{U.S. ATTORNEYS’ MANUAL, supra note 5, § 9-28.200 ("In all cases involving wrongdoing by corporate agents, prosecutors should not limit their focus solely to individuals or the corporation, but should consider both as potential targets.").} The prosecutor also has the option of pursuing the corporation civilly instead of, or in addition to, criminally. Further, the prosecutor has a plethora of criminal statutes from which to make a charging decision because many federal criminal laws overlap and reach the same conduct.\footnote{196}{O’Sullivan, supra note 194, at 665 (arguing that the federal criminal statutes overlap and are internally inconsistent).} Once the prosecutor has selected a charge, he has basically set the sentence because of the Organizational Sentencing Guidelines.\footnote{197}{O’Sullivan, supra note 194, at 647.} All of these factors combine to give prosecutors enormous power to negotiate with corporations. Indeed, it is this broad discretion and power to negotiate that has permitted prosecutors to coerce corporations into waiving the corporate attorney–client privilege to demonstrate cooperation and avoid indictment. Thus, any judicial oversight of prosecutorial decisionmaking will necessarily reduce prosecutorial discretion in white collar crime cases.

\textit{A. The Proposal}

The DOJ took the first step in reducing the discretion of its prosecutors. The current policy, however, permits prosecutors to request material that they know is likely privileged, without running afoul of the Filip Guidelines. Therefore, if Congress chooses to use the ACPPA to address this DOJ-created “culture of waiver,” the ACPPA should include a remedy that contains judicial oversight to ensure that prosecutors do not abuse their power. Specifically, Congress should amend the ACCPA to add a provision that permits corporations to
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request a hearing in a U.S. district court if the corporation has reason to believe that the U.S. Attorney or other government attorney made a charging decision or otherwise based unfavorable treatment on a corporation’s refusal to turn over attorney–client privileged information. This hearing, which the district court could properly assign to a magistrate judge, would be based on the nine factors in the Filip Guidelines.\footnote{198}{See supra notes 134, 152 and accompanying text.}

At first blush, a hearing may seem like an unduly burdensome intrusion on prosecutorial decisionmaking. After all, prosecutors do not normally have to explain or justify their charging decisions. To ease the burden, it is important to create mechanisms to protect government attorneys from frivolous claims. First, to reduce the burden on the court system and the U.S. Attorneys, a corporation must accompany any request for a hearing with an affidavit signed by corporate counsel that outlines the U.S. Attorney’s explicit or implicit conduct and statements that support the corporation’s claim that the U.S. Attorney improperly requested a waiver of the corporate attorney–client privilege or threatened to use the corporation’s refusal to waive the privilege in the charging decision. The judge could summarily dismiss the claim at this stage if the judge believes that the claim either has no merit or is being used merely as a tactical device to slow down the proceedings.

Second, if the claim makes it past the affidavit stage without being dismissed, the corporation would be required to submit a brief and supporting documents to the court detailing not only the factual circumstances of its claim, but also the nine Filip Guidelines factors and how those factors counsel against charging the corporation. There would be little to no need for discovery because the first seven factors include information within the corporation’s control or that would be easily obtainable. Again, at this point in the proceeding, the judge could dismiss the claim. If the judge believes there is merit to the claim, the judge would order the government attorney to respond to the corporation’s brief. Thus, the corporation would essentially go through two rounds of pleading before the government attorney is required to do anything. In addition to requiring the prosecutor to respond to the corporation’s brief, the judge would order the prosecutor to temporarily cease all proceedings against the corporation. This is necessary so that the court’s decision can have an impact on the case. If it is evident at this point in the proceeding that the corporation’s claim is frivolous, the court would be permitted to sanction the corporate attorney and force the corporation to pay attorneys’ fees to the government for the time the
government spent responding to and litigating the frivolous claim of prosecutorial misconduct. Conversely, it may be appropriate for the court to sanction a prosecutor for particularly egregious violations of the ACPPA even if those violations did not lead to an inappropriate charging decision.

Third, once the proceeding has made it past the briefing stage and survived dismissal, there would be a factual hearing with the burden on the corporation. The corporation would have to demonstrate by clear and convincing evidence that the prosecutor charged the corporation or acted in an unfavorable manner toward the corporation simply because the corporation refused to waive the attorney-client privilege. The high standard of proof would be necessary to respect the prosecutor’s ability to make choices in close cases. Thus, if after reviewing the factors, the court believes that the prosecutor could have gone either way in the charging decision, the judge must defer to the prosecutor’s decision. On the other hand, if the corporation has proven by clear and convincing evidence that the prosecutor based the charging decision on the corporation’s refusal to turn over privileged documents, the judge must provide relief to the corporation for the violation.

Once the judge determines that the prosecutor acted improperly, the need to protect the prosecutor’s discretion must give way to the need to protect the corporation’s right to the attorney-client privilege. The remedy for violating the ACPPA should take account of both the need to deter prosecutors and to cure the prosecutor’s violation. But ultimately the judge will need a range of options to fashion an appropriate remedy in each case. One could argue that in an extreme case where the prosecutor violated the ACPPA by demanding privileged materials and threatening an indictment even though the facts of the situation did not support an indictment under the Filip Guidelines, the only remedy that would cure the prosecutor’s violation would be to enjoin the prosecutor from seeking an indictment. After all, the harm to the corporation (i.e., drop in stock price, credit lines drying up, loss of consumer confidence and market share, loss of jobs, class actions, etc.) stems from the indictment. But enjoining a prosecution is an extraordinary remedy only granted in limited situations. Further, there may be separation-of-
power concerns in enjoining a prosecutor from seeking an indictment.\textsuperscript{200} Even if the separation-of-powers concerns could be alleviated by creating a statutory entitlement to an injunction,\textsuperscript{201} judges may be reluctant to grant an injunction because it would be a permanent bar to an indictment. Thus, if an injunction was an available remedy, it would need to be temporary so that the prosecutor would be permitted to return to the judge and argue that there is new independent evidence that supports an indictment.

In less extreme cases, where the violation is implied by the fact that the prosecutor is seeking an indictment despite the fact that a low-level rogue employee took the criminal actions, the company took immediate action to fire the employee when they learned of the conduct, the company had no prior criminal conduct, the company had an extensive compliance program, and the company cooperated by quickly turning over all nonprivileged documents and making employees available for government interviews, a lesser remedy would be appropriate. In such a situation, where the prosecutor cannot offer a plausible explanation that does not involve the corporation’s refusal to waive the privilege, the judge should have the option of removing the prosecutor from the case. Removing the prosecutor will restore the corporation’s right to the privilege because the corporation will have a fair opportunity to argue its case to a new prosecutor who does not have a tumultuous history with the corporation. Although the cost of the remedy would be high due to the loss of time and resources, it would only delay rather than prohibit an indictment. In other situations, the appropriate remedy may be sanctions against the prosecutor.

\textbf{B. The Costs and Benefits of the Proposal}

This proposal would be beneficial because it would restore the attorney–client privilege to the status it held before the DOJ’s waiver policy. The DOJ’s waiver policy has made the privilege uncertain. Corporate counsel could not predict when a prosecutor would require waiver to demonstrate cooperation. Nor could counsel guarantee its client or the client’s employees that their conversations would remain confidential. As the Supreme Court explained in \textit{Upjohn}, “[a]n

\textsuperscript{200} See \textit{Stolt-Nielsen, S.A. v. United States}, 442 F.3d 177 (3d Cir. 2006) (holding that in normal circumstances separation of powers would prevent a federal court from enjoining the Executive Branch from filing an indictment).

\textsuperscript{201} A full discussion of whether there is a separation of powers problem with a federal court enjoining a prosecutor from seeking an indictment and whether that concern could be alleviated by creating a statutory remedy is beyond the scope of this Article.
uncertain privilege . . . is little better than no privilege at all.”\textsuperscript{202} This proposal restores that certainty because it permits judges to review the DOJ’s practices to ensure that the prosecutor does not put efficiency and convenience ahead of the attorney–client privilege. If judges hold prosecutors accountable for improperly requesting waiver, lawyers and clients will have more faith in the confidentiality of their communications.

In addition, the proposal will deter prosecutors from threatening corporations with indictment if the corporation refuses to disclose its internal investigation report to the prosecutor. Prosecutors will know that they will be held responsible for any actions they take in the investigation that are contrary to the statute’s directives. The threat of the remedy combined with the likelihood of being reported by opposing counsel will convince prosecutors to follow the statute. Prosecutors will not want to face the prospect of being embarrassed or subjected to sanctions for violating the statute. Thus, they will come up with alternative means to collect the information they need to enforce the law that do not involve waiver of the corporate attorney–client privilege.

In turn, corporate lawyers will not be put in dubious ethical situations with corporate employees where the interests of the corporation and its employees are adverse.\textsuperscript{203} Instead, corporate counsel will be able to gather information to advise the corporation on the appropriate response to potential criminal charges. Employees will feel confident sharing information openly and freely with counsel. Counsel will not be forced to alter their internal investigations to account for the fact that the corporation may disclose the results to the prosecutor. As a result, counsel will be in a better position to provide good advice to the corporation. Thus, the proposal restores the benefits of the corporate attorney–client privilege as they existed before the DOJ adopted the waiver policy.

The proposal, however, is not without costs. The strongest objection to the proposal would be the potentially sizeable burden it would place on the judiciary and prosecutors. Specifically, critics may argue that the negative impact of administering waiver hearings would significantly outweigh the advantages of the approach. The hearing would require courts to examine ambiguous situations where prosecutors requested information that turned out to be contained in documents that were protected by the corporate attorney–client privilege. The court would


\textsuperscript{203} Counsel may still face situations where an employee(s) is the clear wrongdoers and it is in the best interest of the corporation to distance themselves from that employee(s) or turn him over to the government. But, the us (employees) versus them (corporation) mentality will be greatly diminished.
have to examine the facts of those situations and determine whether the prosecutor acted inappropriately by knowingly requesting privileged documents. The distinction between appropriate and inappropriate requests is unclear because factual documents may contain attorney–client privileged communications. Further, the court would have to decide whether the prosecutor acted inappropriately after learning the requested information was privileged. Specifically, the question would be whether the prosecutor either threatened to base or actually did base her charging decision on the corporation’s refusal to disclose privileged communications. The additional evidence necessary to resolve these questions may require prosecutors to create lengthy records documenting their dealings with corporate counsel, including any requests for cooperation and the corporation’s response. It may also require prosecutors to document their decisionmaking process for charging corporations, especially if the charging decision hinges on the prosecutor’s judgment that the corporation was uncooperative. Even with this additional evidence, the court’s decision would largely be based on inferences and credibility determinations. Also problematic is the possibility that corporate defendants may attempt to use the waiver hearing to derail the prosecution, such that the additional litigation over waiver drains judicial resources and lessens efficiency.

While these concerns are legitimate, there is also good reason to believe that the waiver hearing would not cause severe administrative problems and that some of the burdens on the prosecutor could actually benefit the administration of justice. First, using a process where the judge has discretion to dismiss frivolous claims at various stages in the litigation will take care of some cases by itself. Second, judges are experienced at making credibility determinations and at determining the applicability of the attorney–client privilege. Although the inquiry will not be easy, there is no reason to believe that it is beyond the competency of district or magistrate judges.

Third, this hearing may actually lead to prosecutors keeping more records documenting their charging decisions. While that will create a burden for prosecutors, it could lead to more fairness and consistency in prosecutorial decisionmaking. It could also lead to more collaboration between prosecutors and corporations. If prosecutors document their requests for cooperation, along with the corporation’s responses, and then put their reasoning for finding a corporation cooperative or uncooperative in writing, it could give the corporation an opportunity to work with prosecutors to remedy any deficiencies in its cooperation. Corporate counsel would be in a position to have a frank conversation with the prosecutors about any remaining information that the
prosecutors are seeking and whether that information is protected by the privilege. If the prosecutors are seeking information that is privileged, the corporation can attempt to find some way to satisfy the government’s needs without waiving the privilege. Conversely, if the corporation refuses an appropriate request for cooperation, the prosecutors would have a paper trail to defend themselves against any claim that they acted improperly.

Professor Michael Seigel argues the balance of power between prosecutors and corporations will shift to corporations if a provision banning prosecutors from requesting waiver of the privilege is written into law. He believes corporations will have an unfair advantage because they could do little to cooperate and then move for dismissal of the charges if the prosecutor indicts the corporation. This is certainly possible, but the risk of such behavior is lessened by the threat of sanctions, the potential payment of attorneys’ fees to the government, and the clear and convincing evidence burden on the corporation. All of these measures would likely deter many attorneys from bringing an unfounded claim. In addition, the remedy is meant to account for the dramatic imbalance of power between prosecutors and corporations. It is precisely that imbalance that enabled prosecutors to coerce corporate defendants to waive their attorney–client privilege to stave off prosecution.

This proposal could protect the corporate attorney–client privilege. It could restore the lines of communications and the trust between employer and employee. It could also enable corporations to receive better advice from their attorneys. Importantly, it would deter prosecutors from forcing corporations to waive their attorney–client privilege to demonstrate cooperation and avoid indictment. The costs to the judiciary, while real, are not substantial enough to outweigh the benefits of the proposal. It is the judiciary’s duty to make privilege


If a prohibition against asking for or using waiver were written into law, the balance of power between prosecutors and corporations would undergo a fundamental shift. Far more corporations would choose to exercise their privilege even if it meant that they could provide only minimal assistance to a criminal investigation as a result. If a prosecutor decided to bring charges against a corporation under such circumstances, the corporation could move for dismissal of the indictment based upon the statute, claiming that it was being penalized for failing to waive privilege. This would be a powerful argument. If the court refused to dismiss the charges, the same issue would arise at sentencing. The corporation would want (and presumably would be entitled to receive) the full benefit of cooperation, even if that cooperation were of little use.

Id. at 52 (footnote omitted).

205. Id.
determinations. Thus, only the judiciary can properly safeguard the sanctity of our legal system’s oldest privilege.

C. Judicial Oversight Versus the Alternatives

One alternative to the procedure proposed here is to permit the DOJ to police its own prosecutors as alluded to in the Filip Guidelines.\(^\text{206}\) The Filip Guidelines explain that corporate counsel should raise their concerns regarding a prosecutor’s compliance with the Filip Guidelines with the prosecutor’s supervisor and that “such allegations are subject to potential investigation through established mechanisms.”\(^\text{207}\) Presumably, the DOJ Office of Professional Responsibility (OPR)\(^\text{208}\) has jurisdiction to handle these allegations of misconduct.\(^\text{209}\) OPR receives complaints of attorney misconduct from many sources, including private attorneys. OPR reviews each allegation of misconduct upon receipt and “determines whether further investigation is warranted.”\(^\text{210}\) OPR has discretion as to whether to conduct an inquiry or full investigation in a particular case.\(^\text{211}\) If OPR conducts an investigation, it typically interviews the DOJ attorney late in the investigation, after all of the allegations are fully developed. OPR then makes findings of fact and reaches a conclusion as to whether the DOJ attorney committed professional misconduct.\(^\text{212}\) If OPR finds that the DOJ attorney committed professional misconduct, it provides a report to the Deputy Attorney General outlining its findings, conclusions, and recommendation for disciplinary action.\(^\text{213}\) The attorney’s supervisor

\(^{206}\) U.S. ATTORNEYS’ MANUAL, supra note 5, § 9-28.760.

\(^{207}\) Id. (emphasis added).


\(^{209}\) Id. ¶ 2 (explaining that “OPR has jurisdiction to investigate allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate or provide legal advice”).

\(^{210}\) Id. ¶ 4.

\(^{211}\) See id. (explaining that the determination whether to conduct an investigation is a matter of “investigative judgment,” turning on “the nature of the allegation, its apparent credibility, its specificity, its susceptibility to verification, and the source of the allegation”).

\(^{212}\) OPR may find professional misconduct in two types of cases: “(1) where an attorney intentionally violated . . . Department regulation or policy [such as the USAM], or (2) where an attorney acted in reckless disregard of his or her obligation to comply with that obligation or standard.” Id. ¶ 9. OPR may also find that the attorney used poor judgment or made a mistake, but this type of finding does not constitute professional misconduct. See id.

\(^{213}\) Id. The range of potential discipline for a DOJ attorney includes written reprimand, suspension, demotion, or removal. Id. ¶ 10
makes the ultimate decision whether to impose discipline.\textsuperscript{214} Thus, OPR’s influence on the outcome of these cases is limited.

The DOJ OPR receives about a thousand complaints a year, but has not made reports on its activities public from the years 2005 to 2009.\textsuperscript{215} Some judges have described OPR as a “vacuum” or “black hole” where complaints of prosecutorial abuse go to die.\textsuperscript{216} If OPR is the sole avenue for exploring prosecutorial misconduct in this context, there is a great risk that there will be little public confidence in the outcome of these investigations given OPR’s recent history.\textsuperscript{217} Although Attorney General Holder appears committed to reforms OPR,\textsuperscript{218} there is likely a backlog of complaints as well as several high profile cases that will command OPR’s attention.\textsuperscript{219}

Even assuming that the OPR has the time and resources to handle complaints alleging that prosecutors have violated the Filip Guidelines, there are still procedural problems with the OPR review process. First, a supervisor who receives a report from a corporation that an Assistant U.S. Attorney has acted improperly has the discretion to decide whether to report that misconduct to the OPR.\textsuperscript{220} As the supervisor is not required to convey the allegation of misconduct, the supervisor may turn a blind eye to the actions of the prosecutor. Second, OPR retains “investigative judgment” and may decide not to examine the allegations of wrongdoing.\textsuperscript{221} Quite simply, there is no accountability for OPR’s acts or omissions. Third, even if OPR finds a transgression, OPR has no

\begin{footnotes}
\item[214] Id.
\item[216] See United States v. Stevens, No. 08-CR-231 (EGS), 2009 U.S. Dist. LEXIS 39046 (D.D.C. Apr. 7, 2009) (setting aside a verdict against Sen. Ted Stevens following a hearing at which the government conceded that it failed to turn over exculpatory information to the defense in spite of the court’s “repeated admonishments” and appointing a special prosecutor in the case); see also Neil A. Lewis, \textit{Tables Turned on Prosecution in Stevens Case}, N.Y. TIMES, Apr. 8, 2009, at A1 (reporting Judge Emmet G. Sullivan took the “highly unusual” step of appointing a private attorney, Henry Schuelke, to investigate the six prosecutors to determine whether they had committed criminal contempt).
\item[217] Historically, critics have regarded OPR as inept at policing prosecutors. See John Gibeaut, \textit{The ‘Roach Motel,’} ABA JOURNAL, July 2009, available at http://www.abajournal.com/magazine/the_roach_motel/ (quoting Professor Bruce Green calling the OPR “the Roach Motel of the Justice Department” because “[c]ases check in, but they don’t check out.”).
\item[219] See, e.g., supra note 216.
\item[220] U.S. ATTORNEYS’ MANUAL, supra note 5, § 1-4.100.
\item[221] See OPR Policies and Procedures, supra note 208, ¶ 4.
\end{footnotes}
power to enforce its decisions.\footnote{222 See id. ¶ 10 (explaining that upon a finding of professional misconduct OPR is only empowered to issue a report and recommend sanction to the attorney's superior).} It can only recommend a disciplinary action.\footnote{223 See id.} It cannot require that the prosecutor's supervisor impose that discipline. Ordinarily, OPR does not make its findings public. Therefore, there is no way to put outside pressure on the prosecutor's supervisor to impose the recommended discipline. Fourth, even if the supervisor decides to reprimand, suspend, demote, or remove the prosecutor, the harm to the corporation may already be done. The act of filing a complaint with a supervisor that eventually makes its way to the OPR does not halt the proceedings. Thus, by the time the OPR process is complete and the supervisor disciplines the prosecutor, the corporation could have already been indicted, facing the loss of consumer confidence, and a decrease in its stock price. It could also be facing civil litigation.

The advantage of OPR over this Article's proposal is that there would be no cost to the judiciary. If there is no court proceeding, then the time and resources of the judicial department will not be used. As the OPR is a government office, however, government resources will still be utilized. Some of the costs to using the OPR are similar to the proposal in this Article. Assuming that OPR fully investigates the complaints in a timely manner, the infringement on the prosecutor's discretion in the OPR context would be indistinguishable from the infringement in the judicial context. OPR would be second guessing the prosecutor in the same way that a court would be second guessing the prosecutor. Any chilling effect on the prosecutor due to the oversight would be nearly identical.

Unlike the proposal in this Article, using the OPR to adjudicate claims of prosecutorial misconduct may reduce confidence in our system of justice. Because of the OPR's poor reputation, it lacks the credibility needed to effectively deter and punish prosecutors for violating the Filip Guidelines.\footnote{224 Angela J. Davis, The Legal Profession's Failure to Discipline Unethical Prosecutors, 36 Hofstra L. Rev. 275, 295 (2007).} As Professor Angela Davis noted, "[t]here is a great risk of actual and perceived bias in the decision-making process since the Justice Department has a vested interest in demonstrating that its prosecutors do not engage in misconduct."\footnote{225 Id. (explaining that the fact that OPR dismisses the majority of complaints as frivolous, outside OPR's jurisdiction, or vague and unsupported by the evidence does not prove bias, but the perception of bias is present).} Judges, on the other hand, would not need to validate prosecutors' actions. Instead, judges would review prosecutors' actions impartially and make a fair and just decision.
regarding their conduct and any needed discipline. Prosecutors are more likely to be deterred from improper conduct if they know that a judge will be reviewing how they handled the charging decision. As there is little public confidence in OPR's process for reviewing and disciplining prosecutors, OPR is not a viable alternative for reviewing complaints that prosecutors are abusing the legal system's most sacred privilege.

Another alternative would be to permit corporations to raise their claims as part of a motion to dismiss the charges. The benefit to this alternative is that it would save judicial resources because the overwhelming majority of these cases settle and would never reach the court. But the supposed benefit is the cost in this situation; prosecutors have not been held accountable for eviscerating the corporate attorney-client privilege because their conduct occurs preindictment. This alternative would permit most prosecutors' charging decisions to continue to escape judicial scrutiny except in the few cases where there is actually a trial rather than a preindictment settlement. Further, the harm to both the corporation and the attorney-client privilege has already occurred if the prosecutor has used the corporation's refusal to waive the privilege as a reason for charging the corporation. The corporation will already be suffering from the collateral consequences of indictment. Thus, this alternative would not serve the interests of corporations that have already been harmed by the DOJ's charging policy.

The alternatives to the proposal in this Article are both appealing in their own right, but they do not fully repair the damage that the DOJ has done to the corporate attorney-client privilege. Neither alternative addresses prosecutors' preindictment conduct that lead to the uproar in the legal community. Nor do the alternatives restore the certainty of the privilege or reduce corporate counsel's ethical dilemmas. It is only through judicial oversight that these concerns can be addressed. Thus, judicial oversight is necessary so that corporations may finally regain the protection of the corporate attorney-client privilege in criminal investigations.

V. CONCLUSION

Under the guise of seeking cooperation in criminal investigations, the DOJ permitted its prosecutors to condition leniency on a corporation's willingness to disclose communications protected by the attorney-client privilege. This practice enabled prosecutors to obtain more convictions of corporations, their employees, and agents because prosecutors had access to the results of corporations' attorney-conducted internal
investigations. Thus, corporate attorneys had to balance zealously representing their clients and accurately reporting their findings to the government. The end result was that the corporate attorney–client privilege was weakened in criminal investigations.

Opponents of the DOJ’s policy were unsuccessful at convincing the DOJ to amend the policy. It was only after Congress got involved that the DOJ adjusted its policy. The initial adjustments to the policy, however, were mere window dressing. Prosecutors were still free to hold a corporation’s refusal to turn over attorney–client privileged communications against the corporation when making a charging decision. As the threat of legislation loomed over the DOJ, the DOJ made more significant changes to the policy. Under the current policy, prosecutors are no longer authorized to demand that corporations waive the attorney–client privilege. But, prosecutors can request information that is most likely privileged and use the corporation’s refusal to provide the information against the corporation so long as they characterize their request as seeking factual information. After several bites at the apple, it is evident that the DOJ will not voluntarily rein in prosecutorial discretion.

The proposed legislation in Congress is an important step in restoring the protections of the corporate attorney–client privilege. But, the legislation falls short because it does not provide a remedy for aggrieved corporations. Congress cannot leave it to prosecutors to police themselves. Nor can Congress be satisfied with being the catalyst for incremental change at the DOJ. If Congress is serious about reforming the DOJ’s practices, its legislation must include judicial oversight. Any alternative that does not include judicial oversight would fail to curb prosecutorial abuse of the corporate attorney–client privilege. The time has come for Congress to pass legislation that preserves the corporate attorney–client privilege.