

FEDERALIZING CORPORATE INTERNAL INVESTIGATIONS AND THE EROSION OF EMPLOYEES' FIFTH AMENDMENT RIGHTS

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Although it is understandable and even beneficial for society that corporations assist the United States government with its investigation of corporate crime, the manner in which that cooperation now occurs has eroded the Fifth Amendment rights of corporate employees. The tremendous pressure the United States government places on corporations to cooperate or face indictment—which in many cases is tantamount to a corporate death sentence¹—has fostered a regime where the government has corporations conduct internal investigations and then turn the results of those investigations over to the government for it to use as road maps for its prosecutions.² Corporations often complain that their internal investigators have been “deputized,” while the companies have been left paying the bills,³ but it is often the corporate employees who end up paying the greatest price. Too often, government

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1. See, e.g., *United States v. Stein*, 541 F.3d 130, 142 (2d Cir. 2008) (describing the possibility of a corporate indictment as a “fatal prospect”); *United States v. Stein*, 440 F. Supp. 2d 315, 319 (S.D.N.Y. 2006) (describing indictment as “the corporate equivalent of capital punishment”).

2. See, e.g., Benjamin E. Rosenberg, “Kozlowski”: *Using Internal Probes Against Employees?*, N.Y.L.J. at 4 (Oct. 27, 2008) (“The corporate internal investigation is a boon for the government because it does the government’s work for it: Not only is the wrongdoing stopped, but if the corporation provides the government with the results of its internal investigation, then the government has a road map for prosecution.”). The government makes no secret that this is its preferred means for conducting an investigation. As Deputy Attorney General McNulty told Congress: “[T]here are many ways for Government investigators to get the facts in a corporate fraud investigation, to find out who did what when. Some ways are faster and more productive than others. One of the most productive ways to get the facts is for a cooperating corporation to tell the Government what it knows. It is not the only way for the Government to learn the truth, but, generally speaking, disclosing the results of the company’s internal investigation is one of the best ways. Let’s face it. Searching for hot documents in rooms full of paper or on servers filled with computer files is much slower than looking through a three-ring binder or a CD-ROM identifying the most relevant evidence.” *The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Criminal Investigations: Hearing Before the Comm. on the Judiciary*, 109th Cong., S. Hrg. 109–835, at 3 (2007) [hereinafter *Thompson Hearing*]. See also DEP’T OF JUSTICE, UNITED STATES ATTORNEYS MANUAL § 9.28.700 (2009) (“[A] corporation’s cooperation may be critical in identifying potentially relevant actors and locating relevant evidence, among other things, and in doing so expeditiously.”).

3. See, e.g., Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. TEX. L. REV. 111, 117 (2003) (Companies “should acknowledge upfront that cooperation will effectively deputize it into becoming a de facto agent of the government.”); Colin P. Marks, *Thompson/McNulty Memo Internal Investigations: Ethical Concerns of the “Deputized” Counsel*, 38 ST. MARY’S L.J. 1065, 1080 (2007) (“[C]ooperation essentially deputizes the corporation, and corporate counsel, as de facto agents of the government.”); Marvin G. Pickholz and Jason R. Pickholz, *Investigations Put Employees In Tough Spot*, N.Y. L.J., July 24, 2006 at 10 (“[I]n this environment, the corporation and its private lawyers become ‘deputies’ of the government”); David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 147 (2000) (“[T]he government effectively is deputizing ‘Corporate America’ as an arm of law enforcement at the expense of principles that lie at the core of our adversarial system of justice.”).

pressure has forced companies to take action against its employees that the Constitution would prevent the government from taking directly, with the result being that the rights the Constitution was designed to secure have been eroded.

In various investigations, the government has glossed over this issue when it has been raised, arguing that there is no constitutional problem because the rights secured by the Constitution are protections against conduct by the government, not by employers or other third-parties,⁴ but this is too convenient an excuse when it may be a corporate car that is running over the corporate employee but it is the government at the steering wheel. The reality is that corporations are not mere volunteers in these exercises,⁵ they are being compelled, and the government often is giving the corporations direction or is otherwise intertwined in how the corporate internal investigation commences. In a literal sense and at least in spirit, the corporations are acting as agents of the government.

In highlighting the constitutional ramifications of this process to Congress, former Attorney General Meese explained: “When an individual’s constitutional rights are implicated, the government may not do indirectly—through others—what it is forbidden to do directly.”⁶ Courts only recently have begun to examine the constitutional ramifications of what often has been the government’s heavy-handed involvement in corporate internal investigations. Already courts have made clear that when the government coerces corporations to take actions against their employees that conduct will be viewed as state action in analyzing whether the employees’ constitutional rights have been violated.⁷ This is a significant development because a finding that

4. *Thompson Hearing*, *supra* note 2, at 45 (written response of Deputy General McNulty to questions from Sen. Leahy explaining that there are no constitutional problems because “[i]nternal corporate fraud investigations conducted by corporations are private in nature and thus do not involve state (government) action.”).

5. Absent governmental compulsion or involvement, the collection of evidence by private parties typically does not implicate constitutional rights. *See, e.g.*, *Colorado v. Connelly*, 479 U.S. 157, 166 (1986) (“The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause.”); *Burdeau v. McDowell*, 256 U.S. 465, 475–76 (1921) (evidence stolen by private parties without government knowledge or encouragement did not violate the Fourth Amendment); *see also* *Couch v. United States*, 409 U.S. 322, 331 n. 14 (1973) (noting that *Burdeau* depended upon the “absence of any governmental compulsion”); *United States v. Mekjian*, 505 F.2d 1320, 1325 (5th Cir. 1975) (excluding stolen evidence under the Fourth Amendment when the government was aware the records were being stolen). The Constitution does not “discourage citizens from aiding to the utmost of their ability in the apprehension of criminals,” although constitutional rights are implicated if the private citizens are acting as agents of the state. *See, e.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443, 487–90 (1971). In *Coolidge*, for example, the police questioned a defendant’s wife what her husband was wearing on the night of the alleged offense, and she voluntarily gathered up the clothes and gave them to the police. The police did not ask her to produce the clothes or exert any coercion over her. Instead, she voluntarily produced the clothes, believing the evidence would help exonerate her husband. *Id.* The Court did not doubt that there always are pressures to cooperate, including the desire to be open and honest, and a fear that secretive behavior will invite increased suspicion, but the Court held that additional incentives must be offered to private parties to cooperate in evidence-gathering before the actions of private parties will be attributable to the government. *Id.* at 488. As in *Coolidge*, companies that gather evidence completely voluntarily through internal investigations would not implicate the constitutional rights of its employees. Internal investigations of that sort commonly occur when the company investigates wrongdoing by employees that victimizes the company, such as an employee stealing corporate property. This article focuses on corporate internal investigations where the company itself runs the risk of indictment, and where the government places substantial pressure on the company to cooperate in its investigation.

6. *See Thompson Hearing*, *supra* note 2, at 126.

7. *Stein*, 541 F.3d at 136 (affirming dismissal of an indictment against 13 corporate employees because the company’s deprivation of their constitutional rights “followed as a direct consequence of the government’s overwhelming influence, and that [the company’s] conduct therefore amounted to state action”); *Rosen*, 487 F. Supp. 2d at 731 (finding state action in DOJ persuading a corporation to cut-off its former employee’s attorneys’ fees).

corporate internal investigators are acting as agents of the government entitles employees to the full panoply of constitutional rights that they would enjoy if the government was conducting the investigation directly.⁸ Unfortunately, the government has yet to recognize the breadth of the problem and instead has reacted only on a case-by-case basis as particular conduct has been challenged and found unlawful in the courts.⁹ Consequently, more litigation is sure to follow, and the result may be inconsistent decisions, patchwork law and an uneven application of important rights.

Among the more likely problems courts will face is the government's pressuring corporations to pressure their employees to waive their Fifth Amendment right to remain silent and not to make self-incriminatory statements. At the government's urging, corporations often compel their employees to speak by overtly or covertly threatening to fire them if they do not.¹⁰

Fortunately, the solution to this constitutional problem is fairly simple. Rather than get drawn into thorny litigation over the degree of government involvement in corporate internal investigations that would trigger state action, the government should make clear that it expects corporations that conduct internal investigations to respect the constitutional rights of its employees. No government pressure should be placed on corporations to take actions that the government could not take itself, and the government should make clear that corporations who do transgress those boundaries—even voluntarily—will not be rewarded. Through such a process, the government would continue to enjoy all the synergies of coordinating its investigations with corporate internal investigations, but the process would be one that is much more respectful of constitutional values.¹¹

8. See, e.g., Julie Rose O'Sullivan, *The DOJ Risks Killing the Golden Goose Through Computer Associates/Singleton Theories of Obstruction*, 44 AM. CRIM. L. REV. 1447, 1451 (2007) ("[I]f corporate lawyers are indeed acting as 'arms of the government,' they must abide by the same constitutional restraints that bind state actors.").

9. See, e.g., Preet Bharara, *Corporations Cry Uncle and their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 105 (2007) (noting that the government has only modified its policies in response to specific adverse court decisions, rather than modify its policy as a whole). See also O'Sullivan, *supra* note 8, at 1448 (explaining that DOJ's policies have transformed corporate defense counsel from "zealous advocates to junior G-men," and has "either ignored the implications of its 'deputization' of corporate counsel, or hopes that courts in [the] future will do so.").

10. In *Stein*, the district court found the government's coercion of a company forcing its employees to give statements to internal investigators of face termination compelled statements in violation of the Fifth Amendment. 440 F. Supp. 2d at 328. Because the Second Circuit affirmed the district court's dismissal of the indictment due to the government's interference with the defendants' right to counsel, it found that the issues concerning the suppression of statements made in violation of the Fifth Amendment moot. *Stein*, 541 F.3d at 136 n.2. This problem remains substantial, notwithstanding government modifications to its enforcement policies post-*Stein*. See Bharara, *supra* note 9, at 96–97.

11. Some commentators have argued that the true source of the problem is in the substantive breadth of corporate criminal liability, which leaves corporations facing the prospect of an indictment virtually powerless to defend themselves and having to cooperate with the government in any way it can to avoid indictment. See Bharara, *supra* note 9, at 96–97. They have criticized reforms which target only prosecutorial conduct, rather than seeking to reform the corporate criminal liability rules, as "inadequate" and representing a "defeatist view" that the broader reforms are unlikely. *Id.* at 56. The authors agree with this criticism, but maintain that however inadequate the reform they advance admittedly would be, it still would be a step in the right direction and a step that would not be difficult to make. Moreover, it is a step that would be needed even if a broader reform of the corporate criminal liability rules were to occur. Even if corporate criminal liability doctrines were narrowed, some companies would face a substantial threat of indictment and conviction, and that would pose the same risk that the government could pressure those companies to "cooperate" by threatening to fire employees who do not waive their Fifth Amendment rights. Consequently, the authors believe that reform should proceed down both tracks—reform of both the substantive law and prosecutorial conduct—and that progress on one track would not alleviate the need for progress on the other.

I. THE UNITED STATES GOVERNMENT'S INVOLVEMENT IN INTERNAL INVESTIGATIONS IS EXTENSIVE

A. CORPORATIONS FACING THE PROSPECT OF INDICTMENT ARE UNDER TREMENDOUS PRESSURE TO COOPERATE WITH THE GOVERNMENT

Because the prospect of a criminal indictment is a threat to a company's well-being and even survival, there is an inherent pressure upon every corporation to do all that it can to avoid indictment.¹² The mere fact that a company is under investigation can itself be devastating. As Deputy Attorney General McNulty told Congress, "[t]he moment it becomes known that a corporation could be facing a criminal investigation and potential prosecution, the value of that company's stock begins to plummet, [and] its shareholders lose money"¹³ The government also acknowledges that a company under investigation has a strong incentive to help the government wind down its investigation quickly because prolonged investigations "disrupt the corporation's business operations or even depress its stock price."¹⁴

As damaging as the disclosure that a company is under investigation is, the situation is far worse—and often fatal—if that investigation leads to an indictment.¹⁵ Even when not a corporate death sentence, "being named in a criminal indictment has many immediate and negative effects, including negative publicity and reputational damage, a drop in the corporation's stock price, a negative effect on credit rating, debarment or exclusion from certain kinds of business, increased legal fees and expenses, pressure to remove certain employees before there has been any determination of guilt, and problems with regulators."¹⁶

While it is true that a corporation, just like any natural person charged with a crime, has the right to challenge an indictment at trial, companies are well aware of the fact that it may face a fatal punishment in the process of litigating regardless of whether or not it prevails in those legal proceedings. The lesson of Arthur Andersen LLP's demise while fighting the government and ultimately prevailing before a unanimous Supreme Court has been a powerful reminder to corporate America that it cannot afford to get cross-wise with the government.¹⁷ Corporations have little alternative but to cooperate.¹⁸ As one commentator noted, "[s]ince an indicted firm is

12. See *supra* note 1.

13. *Thompson Hearing*, *supra* note 2, at 2.

14. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-28.700 (2008).

15. See *supra* note 1. Moreover, given the breadth of corporate criminal liability, the government's "criminal case against a corporation, once there is evidence that even a single low-level employee engaged in criminal activity on the job, is virtually bulletproof." Bharara, *supra* note 9, at 76. As the current U.S. Attorney for the Southern District of New York once explained: "[W]hether or not the government has the facts on its side, it *always* has the law on its side. 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." *Id.* at 86–87.

16. Earl J. Silbert & Demme D. Joannou, *Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System*, 43 AM. CRIM. L. REV. 1225, 1229 (2006).

17. See, e.g., *id.* at 1229 ("Not even the reversal of Andersen's conviction by a unanimous Supreme Court in 2005 could resurrect the once giant firm.").

18. See, e.g., Bharara, *supra* note 9, at 88 ("[G]iven the broad liability rule and the typical corporation's vulnerability, no reasonable evaluation of risk can lead to a decision other than to cooperate."); O'Sullivan, *supra* note 8, at 1448 (explaining it is "virtually impossible for many or even most public companies" not to conduct an internal investigation and share its results with the government); *Thompson Hearing*, *supra* note 2, at 20 (statement of Thomas J. Donohue, President and CEO of the U.S. Chamber of Commerce) ("Being labeled 'uncooperative' also drastically increases the likelihood that a company will be indicted, and one need only look to the case of Arthur Andersen to see what happens to a business

a dead firm, a decision to defend an indictment is suicide.”¹⁹

B. OFFICIAL UNITED STATES GOVERNMENT CHARGING GUIDANCE PLACES ENORMOUS PRESSURE ON COMPANIES TO COOPERATE BY DOING THE GOVERNMENT’S BIDDING

The government often will often respond to criticism or actual motions by stating that it does not coerce companies to cooperate with its investigations because the inherent pressure to cooperate exists as a reality of the marketplace,²⁰ but the fact is that the government exploits that leverage to cause corporations to do its bidding. The government has very specific ideas about what it means for a company to “cooperate,” and has been less than ambiguous in conveying to corporate America what it must do if it wants to better its chances for avoiding an indictment. The United States Department of Justice (“DOJ”) has made its position known on what “cooperation” means by issuing a memorandum containing guidance called the *Principles of Federal Prosecution of Business Organizations* and its requirements are reiterated in the *United States Attorneys Manual*.²¹

This guidance was first issued by then-Deputy Attorney General, now-Attorney General, Holder in 1999,²² but it has been revised somewhat by subsequent Deputy Attorneys General through what came to be known as the Thompson Memorandum in 2003,²³ the McNulty Memorandum in 2006,²⁴ and the now-current Filip Memorandum of 2008.²⁵ To appreciate the current climate of “cooperation,” a brief understanding of the evolution of DOJ’s view of “cooperation” is needed.

The Holder Memorandum raised considerable concern that the government was seeking the results of corporate internal investigations because it emphasized that, in deciding whether to indict a company, prosecutors should consider “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate

that faced the death blow—notwithstanding the fact that the Supreme Court found later on that it was all handled badly.”). The Serious Fraud Office in the United Kingdom recently emphasized this point to a court in the United Kingdom. It explained: “Any criminal investigation into a company has a damaging effect on its business affairs—typically the longer the investigation, the more damaging the effect.” *Regina v. Innospec Limited*, No. 20107157, Opening Note at ¶ 35 (Southwark Crown Court 2010). The Serious Fraud Office noted that it does not want to conduct its investigations in a manner that would “unnecessarily damage” a company’s business, but that “objective can only be fully discharged . . . where the Company fully co-operates with the investigating and prosecuting authority. *Id.* at ¶ 36.

19. Dale A. Oesterle, *Early Observations on the Prosecutions of the Business Scandals of 2002–03: On Sideshow Prosecutions, Spitzer’s Clash with Donaldson over Turf, the Choice of Civil or Criminal Actions, and the Tough Tactic of Coerced Cooperation*, 1 OHIO ST. J. CRIM. L. 443, 476 (2004).

20. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-28.720(a) (2009) (claiming that “the government cannot compel, and the corporation has no obligation to make,” disclosures of its privileged internal investigations).

21. Memorandum from Mark Filip to All Heads of Department Components and United States Attorneys, Deputy Attorney General, U.S. DEP’T OF JUSTICE, *Principles of Federal Prosecution of Business Organizations* (Aug. 28, 2008) [hereinafter “Filip Memorandum”]; DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL §§ 9-28.700–9-28.1300 (2008).

22. Memorandum from Eric Holder, Jr. to All Heads of Department Components and United States Attorneys, Deputy Attorney Gen., U.S. DEP’T OF JUSTICE, *Principles of Federal Prosecution of Business Organizations* (June 16, 1999) [hereinafter “Holder Memorandum”].

23. See Memorandum from Larry D. Thompson to All Heads of Department Components and United States Attorneys, Deputy Attorney Gen., U.S. DEP’T OF JUSTICE, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003) [hereinafter “Thompson Memorandum”].

24. See Memorandum from Paul J. McNulty to All Heads of Department Components and United States Attorneys, Deputy Attorney Gen., U.S. DEP’T OF JUSTICE, *Principles of Federal Prosecution of Business Organizations* (Dec. 12, 2006) [hereinafter “McNulty Memorandum”].

25. See Filip Memorandum, *supra* note 21.

attorney-client and work product privileges.”²⁶ It also made clear that the government was seeking to coerce companies into leaving its employees vulnerable by also considering such factors as whether the company was indemnifying its employees’ legal fees or participating in joint defense agreements with them.²⁷

Following the massive corporate scandals that brought down companies like Enron, WorldCom, Adelphia, Global Crossing, HealthSouth and Tyco International, the principles were revised by the Thompson Memorandum in 1999, where “the main focus of the revisions [was] increased emphasis on scrutiny of the authenticity of a corporation’s cooperation.”²⁸ The Thompson Memorandum more clearly emphasized that what DOJ was seeking from companies that wished to “cooperate” were the results of internal investigations. The Thompson Memorandum kept the language that noted that cooperation may require, “if necessary, a waiver of the attorney-client and work product protections,” but added that this waiver applied “both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements.”²⁹ Although the Thompson Memorandum added that this waiver was not “an absolute requirement,”³⁰ the Thompson Memorandum “created an atmosphere where corporations believed that the only way they could avoid indictment—and, perhaps a corporate death sentence—would be for them to cooperate fully and waive the attorney-client privilege and work product protections.”³¹ And although the Thompson Memorandum’s language concerning cooperation and the advancement of legal fees remained the same,³² Deputy Attorney General Thompson’s statement that innocent employees “don’t need fancy legal representation” reflected the hostility with which DOJ viewed corporate assistance to its employees.³³

Other developments in this time frame compounded the concern that the United States government expected a privilege waiver. In October of 2001, the Securities and Exchange Commission published its Seaboard Report, which tracked the Thompson Memorandum in noting that it would consider whether a company had waived its privilege in making charging decisions.³⁴ Then, in 2004, the United States Sentencing

26. See Holder Memorandum, *supra* note 22, at § II-A-4.

27. See *id.* at § VI-B (Prosecutors should weigh “whether the corporation appears to be protecting its culpable employees . . . through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government’s investigation pursuant to a joint defense agreement.”) (footnote omitted).

28. See Thompson Memorandum, *supra* note 23; see also Carol Poindexter, *Recent Developments in Corporate “Cooperation” Credit: Opening Pandora’s Box or Slamming the Privilege Waiver Lid Shut?*, 22 HEALTH L. 48, 52 (2010) (explaining that the Thompson Memorandum “put greater emphasis on the need for voluntary cooperation by companies if they wished to avoid indictment”).

29. See Thompson Memorandum, *supra* note 23.

30. *Id.*

31. Don Berthiaume, “*Just the Facts*”: *Solving the Corporate Privilege Waiver Dilemma*, 46 CRIM. L. BULL. 1, 2 (2010).

32. *United States v. Stein*, 435 F. Supp. 2d 330, 338 (S.D.N.Y. 2006) (The Thompson Memorandum’s “language concerning cooperation and advancing of legal fees was carried forward without change” from the Holder Memorandum.).

33. *Id.* at 338 n.13 (quoting Laurie P. Cohen, *In the Crossfire: Prosecutors’ Tough New Tactics Turn Firms Against Employees*, WALL ST. J., June 4, 2004, at A1). Judge Kaplan made clear that this view “would be misguided, to say the least,” because “[t]he innocent need able legal representation in criminal matters perhaps even more than the guilty” and “even the innocent need substantial resources to minimize the chance of an unjust indictment and conviction.” *Id.*

34. SEC, Exchange Act Release No. 44-969, REPORT OF INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934 AND COMMISSION STATEMENT ON THE RELATIONSHIP OF COOPERATION TO AGENCY ENFORCEMENT DECISIONS (2001).

Commission modified its Sentencing Guidelines to make clear that a corporation would not receive a sentence reduction for cooperation unless it waived its privilege claims if “such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.”³⁵

The opposition to the government’s tactics grew steadily stronger in response to these developments, with opposition coming from virtually everyone outside DOJ—former Attorneys General, members of Congress, the American Bar Association, the American Civil Liberties Union, the United States Chamber of Commerce and the courts.³⁶ It often was remarked that DOJ’s policies had fostered a “culture of waiver,” which had undermined the attorney-client privilege and work product protection, and damaged the relationship between companies and their employees.³⁷

In June 2006, Judge Kaplan issued his landmark decision in *United States v. Stein*,³⁸ holding that the pressure the Thompson Memorandum and DOJ prosecutors placed on a company, KPMG, to cut off its employees attorneys’ fees violated the Fifth and Sixth Amendments.³⁹ By July 25, 2006, Judge Kaplan also found that DOJ’s pressure on KPMG to require its employees to make statements or face termination resulted in compelled statements that required suppression under the Fifth Amendment.⁴⁰ Eventually, Judge Kaplan would conclude that the only remedy for these constitutional violations would be to dismiss the indictment.⁴¹

The *Stein* decisions—lengthy, well-thought out opinions from a highly respected judge—demonstrated that the Thompson Memorandum was untenable, and a Congress that appeared to lack confidence in DOJ appeared poised to intervene. The Senate Judiciary Committee held a hearing on September 12, 2006, in which Deputy Attorney General McNulty found himself under attack by Senators Specter and Leahy, and numerous other witnesses, including Former Attorneys General Meese and Thornburg. No witness or member of Congress came to his defense.⁴² Then, on December 7, 2006, Senator Specter introduced legislation—The Attorney-Client Privilege Protection Act—that would override the Thompson Memorandum by preventing DOJ or any other arm of the federal government from considering privilege waivers in making charging decisions.⁴³

In response to this fierce criticism and with the hope of preventing passage of the Privilege Act, DOJ revised the Thompson memorandum by issuing the McNulty Memorandum on December 12, 2006.⁴⁴ The McNulty Memorandum addressed the attorneys’ fees issue in *Stein* by prohibiting prosecutors from considering whether a company had indemnified its employees in making charging decisions, unless it could be shown that this was done to thwart a criminal investigation.⁴⁵ It created a process

35. UNITED STATES SENTENCING COMM’N, U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 App. (2004).

36. See, e.g., *Thompson Hearing*, *supra* note 2, *passim*. See also Bharara, *supra* note 9, at 83 (describing this as an “unprecedented coalition”).

37. See, e.g., Marcia Coyle, *Lawyers Fear a DOJ “Culture of Waiver,”* NAT’L L. J. (March 24, 2006). An impressive letter from three former Attorneys General, three former Deputy Attorneys General and four former Solicitors General noted that a survey of 1,200 in-house and outside counsel found that nearly 75% believed a “culture of waiver” had emerged where they believed DOJ thought it reasonable to expect companies under investigation to waive privilege. *Thompson Hearing*, *supra* note 2, at 107.

38. 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

39. *Id.* at 382.

40. *United States v. Stein*, 440 F. Supp. 2d 315, 337 (S.D.N.Y. 2006).

41. *United States v. Stein*, 495 F. Supp. 2d 390, 427 (S.D.N.Y. 2007), *aff’d*, 541 F.3d 130 (2d Cir. 2008).

42. Press Release, U.S. Senate Judiciary Comm., *Specter Introduces Attorney-Client Privilege Protection Act of 2006* (Dec. 7, 2006).

43. *Id.*

44. See, e.g., Poindexter, *supra* note 28, at 52.

45. See McNulty Memorandum, *supra* note 24.

for seeking high-level approval for seeking a privilege waiver, and created two categories of privileged information. Prosecutors were to seek Category I privileged materials, “purely factual information . . . relating to the underlying misconduct,” first, and only later and in “rare” situations, seek Category II privileged materials, which would include attorney-client communications and nonfactual work product.⁴⁶

While the McNulty Memorandum was seen as progress, it was not clear how corporations could give DOJ what it wanted without waiving privilege, whether line-prosecutors would respect the new guidance, or whether the Administration really intended to make a change that was, in reality, forced upon it. Consequently, “corporations still felt compelled to waive privilege to gain prosecutors’ favor.”⁴⁷

In May 2007, the government, which had appealed its loss in *Stein* to the Second Circuit, received another blow to its legal theory in *United States v. Rosen*.⁴⁸ Judge Ellis heard a challenge brought by former employees of the American Israel Political Action Committee (“AIPAC”) charged with espionage that DOJ had violated the defendants’ right to counsel by pressuring DOJ to cut off their right to attorneys’ fees.⁴⁹ Although Judge Ellis concluded that their rights were not violated because they had suffered no prejudice because the defendants’ lawyers continued working without payment,⁵⁰ he made clear that the defendants had a right to have AIPAC pay their legal fees, and that AIPAC’s termination of fees was attributable to the government. But Judge Ellis made clear that his opinion was “in no way an endorsement of the Thompson Memorandum policy directive with respect to an organization’s payment or advancement of attorney fees for employees who are targets or subjects of criminal investigation.”⁵¹ To the contrary, Judge Ellis concluded “that policy is unquestionably obnoxious in general and is fraught with the risk of constitutional harm in specific cases.”⁵²

Senator Specter remained unimpressed by DOJ’s reforms, and reintroduced his Privilege Act in June 2008.⁵³ Hoping to stave off that legislation yet again,⁵⁴ the new Deputy Attorney General sent Senator Specter a letter in July 2008 identifying

46. *Id.*

47. Poindexter, *supra* note 28, at 53.

48. 487 F. Supp. 2d 721, 737 (E.D. Va. 2007).

49. *United States v. Rosen*, 487 F. Supp. 2d 721, 722–23 (E.D. Va. 2007).

50. *Id.* at 734–36. The district court found that there was no prejudice because, despite AIPAC cutting-off the attorneys’ fees, the attorneys continued working and “defense counsel have fully and energetically engaged the complex issues in this case.” *Id.* at 735. The court noted that there was “a mountain of evidence testifying to the vigor of the defense being mounted on behalf of these defendants” in a case with more than 500 docket entries and “over two dozen substantive motions have been filed on defendants’ behalf.” *Id.* As counsel to Mr. Rosen in that case, the authors, of course, appreciate Judge Ellis’ compliment as to the quality of our work, but the court’s requirement that the defendant prove actual prejudice only highlights the chilling effect the Thompson Memorandum had on the right to counsel. After four years of extensive litigation and defense wins that would have made it difficult for the government to prevail at trial, the government did something that is virtually unprecedented: It chose to dismiss the indictment. From the clients’ perspective, that is a tremendous victory, and it would not have happened without some defense lawyers investing a great deal of time and resources into mounting the defense. In that case, defense counsel were fortunate to have been working for law firms that generously supported our work, even though payment of our legal fees had been terminated. Many law firms would not have been as understanding, and many in the defense bar simply could not afford to undertake such a representation. *Rosen* created genuine concern that future corporate employees who find themselves defendants would not be able to retain counsel for fear that a company could terminate their attorneys’ fees, leaving defense counsel with the difficult choice of attempting to withdraw from the representation mid-way through the case or having to work for free.

51. *Id.* at 737.

52. *Id.*

53. Poindexter, *supra* note 28, at 53.

54. Audrey Strauss, *Justice Reverses Opposition to Joint Defense Agreements*, N.Y. L.J., Nov. 6, 2008, at 5.

several changes DOJ was preparing to make to the McNulty Memorandum.⁵⁵ Those changes were made in the Filip Memorandum, issued on August 28, 2009⁵⁶—the same day the Second Circuit coincidentally affirmed Judge Kaplan’s decision to dismiss the indictment in *Stein*.⁵⁷

The Filip Memorandum, which remains in effect, represents progress in the protection of the rights of corporate employees. The attorneys’ fee issue the government was criticized for in *Stein* and *Rosen* is hopefully put to rest through much more explicit language: “In evaluating cooperation, however, 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. Likewise, prosecutors may not request that a corporation refrain from taking such action.”⁵⁸

This is a marked improvement from the McNulty Memorandum, which had left open the possibility that the payment of attorneys’ fees could be a relevant factor in some cases. The McNulty Memorandum did not tell prosecutors they “should not” take such matters into account, only that they “generally should not.”⁵⁹ It also more explicitly stated that it was “a corporation’s compliance with governing state law and its contractual obligations [that] cannot be considered a failure to cooperate,” which seemed to leave open the possibility that companies could have issues with prosecutors as to whether they were going beyond what they were required to do in advancing fees.⁶⁰ The Filip Memorandum appears to be a flat ban on the consideration of whether attorneys’ fees are being paid, regardless of whether the corporation was legally obligated to pay them or not.

The Filip Memorandum also is a step forward with respect to joint defense agreements between the corporation and its employees, but it does not seem to go as far as Deputy Attorney General Filip suggested it would go in his letter to Senator Specter.⁶¹ That letter provided that “[f]ederal prosecutors will not consider whether the corporation has entered into a joint defense agreement in evaluating coopera-

55. Letter from Deputy Attorney General Filip to Sen. Specter (July 9, 2008) [hereinafter Filip Letter].

56. See Thompson Hearing *supra* note 2. Unlike his predecessors, Deputy Attorney General Filip did not provide a memorandum which explained the nature of the changes that he was making, but merely issued a short memorandum attaching the revisions to the United States Attorneys’ Manual.

57. *Stein*, 541 F.3d 130 (2d Cir. 2008).

58. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-28.730 (2009); see Mark L. Rotert & Bradley E. Lerman, *New Ethical Challenges in Internal Investigations*, 1745 PLI/Corp 857, 859 (2009) (“In theory at least, the Sixth Amendment problems found in *Stein* should not recur.”). The McNulty Memorandum held out an exception in “extremely rare cases” where the payment of attorneys’ fees “was intended to impede a criminal investigation” in a manner in which the “corporation is acting improperly to shield itself and its culpable employees from government scrutiny.” *McNulty Memorandum*, *supra* note 24, at 11 n.3. The Filip Memorandum preserves this exception, but uses language that is more clear and which probably better reflects the intentions of the McNulty Memorandum. Instead of the more open-ended terms “impede” and “improperly,” the Filip Memorandum explains that this exception concerns conduct that would “constitute criminal obstruction of justice,” and offers an example of fees being paid in exchange for an employee adhering to a version of the facts the employee knew to be false. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-28.730 (2009).

59. *McNulty Memorandum*, *supra* note 24, at 11.

60. *Id.* In prior cases, evaluation was required into the nuances of the source of the duty to pay attorneys’ fees and under what circumstances that duty applied. *Stein*, 541 F.3d at 137 (describing pressure placed on corporate counsel to do no more than was legally required). See also *Rosen*, 487 F. Supp. 2d at 727–730 (addressing the complicated analysis as to the source and scope of the obligation).

61. Strauss, *supra* note 54, at 5. Perhaps the Filip Memorandum and the Filip letter reflect the same intention, but the letter’s direction that prosecutors “will not consider” such agreements more clearly directs that no consideration should be given than the Memorandum’s statement that the “mere existence” of such an agreement will not make a corporation “ineligible” for cooperation credit. *Id.*

tion,”⁶² but the Filip Memorandum is more limited in saying that “mere participation” in a joint defense agreement will not preclude cooperation credit and that “prosecutors may not request that a corporation refrain from entering into such agreements.”⁶³ Some have questioned whether that means that the existence of a joint defense agreement can be a weight on the scale against a finding of cooperation, even though it cannot be a decisive factor by itself.⁶⁴ The Filip Memorandum also suggests that a “corporation may wish to avoid putting itself in the position of being disabled” from cooperating by entering into joint defense agreements, which may allow an employee to prevent disclosure to the government of facts that the employee had shared with the company pursuant to such an agreement.⁶⁵ In other words, the government’s focus is on the corporation sharing all the facts it is aware of with the government to obtain cooperation credit and joint defense agreements are fine, so long as they do not impair the corporation’s ability to do so.

It is doubtful this caveat does more than place a burden on the corporation and its employees in structuring their relationship. Joint defense agreements can be structured in any number of ways, and it may very well be that many companies and employees would prefer to structure agreements that would allow either party to later disclose what they learned from the other. As a practical matter, parties are more willing to share facts with one another pursuant to agreements where they can prevent such disclosures than they would under agreements that would allow unilateral disclosures by one party. Consequently, although the more flexible joint defense agreements the government favors would mean that the corporation would be free to share all it knows, that may not lead to the government obtaining more information because those sorts of agreements may prevent the corporation from learning more facts.

The Filip Memorandum also made substantial revisions addressing privilege waivers and, although the language of the new memorandum sounds much better, it is not entirely clear that anything has changed at all. The Filip Memorandum makes clear that corporations are free to waive privilege, but “prosecutors should not ask for such waivers and are directed not to do so.”⁶⁶ All that the corporation is required to disclose for the sake of “cooperation” are “the facts known to the corporation about the putative criminal misconduct under review.”⁶⁷ The government wants to know: “[H]ow and when did the alleged misconduct occur? Who promoted or approved it? Who was responsible for committing it?”⁶⁸ The Filip Memorandum sounds good in theory, but it raises a practical question: “[H]ow does a corporation turn over just the ‘facts’ without waiving the very privileges and protections it needs to survive?”⁶⁹

The Filip Memorandum acknowledges that corporations typically learn the facts by conducting internal investigations conducted by lawyers and that many of the facts are uncovered through interviews with corporate personnel.⁷⁰ The government

62. Filip Letter, *supra* note 55.

63. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-28.730 (2009).

64. Strauss, *supra* note 54, at 5.

65. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-28.730 (2009).

66. *Id.* § 9-28.710.

67. *Id.* More than disclosure of facts is required, however, including “providing non-privileged documents and other evidence, making witnesses available for interviews, and assisting in the interpretation of complex business records.” *Id.* § 9-28.720 n.2.

68. *Id.* § 9-28.720.

69. Berthiaume, *supra* note 31.

70. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-28.720(a) (2009). The government offers a peculiar solution to this problem—having corporations conduct internal investigations without the benefit of counsel so that no privilege is created. *Id.* The fact that DOJ would even make this suggestion is disturbing. Although the government may view lawyers as the problem and the privileged nature of

states that “the corporation need not produce, and prosecutors may not request, protected notes or memoranda generated by the lawyers’ interviews.”⁷¹ But “the corporation does need to produce, and prosecutors may request, relevant factual information—including factual information acquired through those interviews”⁷² The problem, as former Deputy Attorney General McNulty now acknowledges, is that “quite a bit of ‘relevant factual information’ is subject to privilege claims,” so “[t]he key problem is when you have factual information that can only be provided by waiving [privilege]—what happens then?”⁷³ Consequently, he explains “there is still a pressure to waive attorney-client privilege if you have ‘relevant factual information’ covered by attorney-client privilege that the government wants to get.”⁷⁴

Interviews of company employees are likely to be an area where privilege waivers are required.⁷⁵ These interviews are particularly valuable to prosecutors because “[e]mployees are often interviewed shortly after a situation ‘breaks,’ and these interviews are likely to provide unvarnished versions of events, as they occur closer in time to relevant events and frequently are conducted prior to the employee’s representation by individual counsel.”⁷⁶ In addition, with “employees interviewed multiple times, inconsistencies in their statements provide useful fodder for prosecutors. Statements from interviews with putative defendants are particularly useful because the government is rarely able to interview defendants, and the interviews afford prosecutors the flexibility to call corporate counsel as witnesses to a defen-

their work as an impediment, both are necessary for an internal investigation to serve its purposes. Companies undertake internal investigations for their own purposes, and not simply to supply manpower to the government’s investigation. Companies typically strive to ensure that their employees comply with all applicable laws and company policies, and do so in a way that is ethical and would positively reflect the companies’ values. Allowing lawyers to conduct internal investigations and convey their recommendations to corporate decision-makers subject to privilege, allows them the freedom of critical self-examination to craft better corporate policies, develop practices that better ensure compliance and ensure that misconduct is appropriately remedied. *See, e.g.,* Zornow & Krakaur, *supra* note 3, at 152 (explaining that the role of lawyers and the related privileges “are vital components of the investigative process”). Eliminating the role of trained lawyers and exposing internal investigations of this sort to inspection by outsiders, without the benefit of privilege, would retard advances in corporate governance and the ability to prevent the very kinds of misconduct the government seeks to deter. *See, e.g.,* Upjohn Co. v. United States, 449 U.S. 383, 392 (1981) (refusing to diminish a corporation’s claim to the attorney-client privilege because that would “limit the valuable efforts of corporate counsel to ensure their client’s compliance with the law”); Mark J. Stein & Joshua A. Levine, *The Filip Memorandum: Does It Go Far Enough?*, N.Y. L.J., Sept. 10, 2008, at 4 (discussing the importance of free and open communication between counsel and client, regardless of government investigation).

71. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-28.720(a) n.3 (2009). Requesting such notes and memoranda is “something prosecutors have frequently done in the past.” Stein & Levine, *supra* note 70, at 4.

72. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-28.720(a) n.3 (2009).

73. Brian Baxter, *With Thompson Trashed and McNulty Moot, Filip Memo’s Time Has Come*, THE AM. L. DAILY (Aug. 28, 2008) (alteration in original).

74. *Id.*

75. As a practical matter, companies “customarily” have outside counsel conduct interviews of its employees as part of an internal investigation. *See, e.g.,* William R. McLucas, Howard M. Shapiro & Julie J. Song, *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 1635 PLI/Corp. 287, 304–05 (2007); Zornow & Krakaur, *supra* note 3, at 152. Rather than negotiate immunity or plea agreements so that they can speak with corporate employees directly, the government often will defer its interviews of the witnesses until after the corporate internal investigators can conduct their own interviews. Given the employees’ fear of termination by their employer, the government knows that the corporation can be more effective in persuading its employees to speak than it could be, and the government knows all too well that it can then use its leverage over the company to compel the company to tell it what the employees say, even if that requires the waiver of the attorney-client privilege or work product doctrine. *Id.*

76. John A. Nathanson, *Walking the Privilege Line: “Cooperative” Disclosure and Waiver Must Still Be Grappled with in Government Investigations*, N.Y. L.J., July 13, 2009, at S8.

dant's prior statements."⁷⁷ Consequently, "[c]ounsel will be hard-pressed to persuade government attorneys that they have produced the desired facts from other sources if they withhold witness interviews."⁷⁸ As former Deputy Attorney General McNulty explains, "Sure, you can tell the government what the person said, but the government is often interested in seeing the notes of the interview and other material memoranda that would be subject to privilege."⁷⁹ Even if corporations provide only detailed oral summaries of a witness's statements, courts may very well hold this action to be a waiver of the privilege and make lawyer-prepared interview notes and memoranda discoverable.⁸⁰ The consensus among the defense bar is that "[c]ounsel will . . . frequently find themselves where they did prior to the Filip memorandum: forced to decide whether to risk waiver in order to avoid an adverse governmental action."⁸¹

DOJ's position toward privilege waivers embodied in the Filip Memorandum has been adopted by other federal agencies and commissions. In October 2008, the SEC created a new Enforcement Manual, which deviates from the Seaboard Report and tracks the approach of the Filip Memorandum, explaining that the SEC, like DOJ, will not ask for a privilege waiver but will ask companies who cooperate for all the facts known to it.⁸² Similarly, the United States Sentencing Commission abandoned its language concerning the need for a corporate waiver of the attorney-client privilege for a company to receive cooperation credit,⁸³ but—like the Filip Memorandum—it continues to provide that cooperation credit requires "the disclosure of all pertinent information known to the organization."⁸⁴

Senator Specter remained unimpressed with DOJ's modifications under the Filip Memorandum and reintroduced his Attorney-Client Privilege Protection Act.⁸⁵ One advantage he notes to his approach is that it would be binding on all federal

77. *Id.* See Stein & Levine, *supra* note 77, at 4 ("The obvious problem is that the 'facts' uncovered in an internal investigation are actually an attorney's distillation of numerous interviews and documents and therefore work product. Moreover, in many instances, such as where different witnesses have provided contradictory accounts, any discussion of the 'facts' will involve disclosing what the various witnesses said—i.e., revealing attorney-client communications. Thus, under the Filip Memo, in many instances corporations will still need to waive privilege in order to provide the facts and receive cooperation credit.")

78. Nathanson, *supra* note 76, at S8.

79. Baxter, *supra* note 73.

80. See, e.g., *United States v. Treacy*, No. S2 08 CR 366, 2009 WL 812033, at *3 (S.D.N.Y. Mar. 24, 2009) (detailed oral summary results in waiver as to written summaries); *SEC v. Roberts*, 254 F.R.D. 371, 379 n.6 (finding it "irrelevant that the physical notes were never handed over if the attorneys' mental impressions and conclusions were made known to third parties"); *United States v. Reyes*, 239 F.R.D. 591, 604 (N.D. Cal. 2006) ("[I]t makes no difference whether a privilege-holder copies a written text, reads from a written text, or describes a written text to an outside party. The purpose and effect is the same . . ."); Nathanson, *supra* note 76.

81. Nathanson, *supra* note 76. See also Poindexter, *supra* note 28, at 55 ("Given the 'relevant facts' language, . . . one may speculate that 'cooperation' will still mean a voluntary waiver by the corporation of privileged communications.")

82. SEC, SEC ENFORCEMENT MANUAL § 4.3 (2008).

83. UNITED STATES SENTENCING COMM'N, AMENDMENTS TO THE UNITED STATES SENTENCING GUIDELINES 45 (2006) (striking waiver language from Section 8C2.5, app. note 12 because it "could be misinterpreted to encourage waivers").

84. UNITED STATES SENTENCING COMM'N, U.S. SENTENCING GUIDELINES MANUAL § 8C2.5, app. note 12 (2009).

85. See, e.g., Poindexter, *supra* note 28, at 54 (noting the bill was reintroduced in February 1999); Press Release of Sen. Arlen Specter, *Specter Responds to DOJ's Revisions of Attorney-Client Privilege Guidelines* (Aug. 28, 2008). A House version of the bill, H.R. 436, was introduced in December 2009. See Press Release of Rep. Bobby Scott, *Rep. Scott Introduces Attorney-Client Privilege Protection Act* (Dec. 17, 2009). With Senator Specter's defeat, it is not known who, if anyone, may champion this cause in the new Senate.

enforcement agencies, not just DOJ.⁸⁶

One thing that remains clear is that whether companies conduct an internal investigation and then waive the privilege or simply provide the facts learned to the government, companies remain under a great deal of pressure to gather information about the subject of the investigation and then provide that information to the government. In response to the pressure the government places on the company to get answers, the company is expected to exert great pressure on its employees to answer the questions the government wants answered. The disclosure of what employees tell corporate investigators to the government—whether through the disclosure of privileged interview notes or merely a recitation of facts—may very well put those employees in criminal jeopardy.⁸⁷

C. GOVERNMENT POLICY ENCOURAGES COMPANIES TO ESTABLISH COMPLIANCE PLANS THAT WILL ENABLE THE GOVERNMENT TO HAVE LEVERAGE OVER COMPANY EMPLOYEES

The government will consider as part of its charging decision “the existence and effectiveness of the corporation’s pre-existing compliance program,”⁸⁸ and the existence of such a program will be considered a mitigating factor in any sentencing of the company as well.⁸⁹ In considering the effectiveness of the compliance program, the government’s focus is on whether the program is “designed for maximum effectiveness in preventing and detecting wrongdoing by employees,” but—according to official policy—there are “no formulaic requirements” imposed by the government.⁹⁰ Nevertheless, the government has made it clear that, to be considered effective, the company must be able to fire employees who refuse to cooperate with an investigation, even if that compels the employees to make self-incriminating statements.⁹¹ In the government’s view, “a corporation that does not fire an employee who refuses to be interviewed is not ‘acting in its shareholders’ interests.”⁹²

86. Press Release by Sen. Arlen Specter, *Specter Responds to DOJ’s Revisions of Attorney-Client Privilege Guidelines* (Aug. 28, 2008).

87. See, e.g., Zornow & Krakaur, *supra* note 3, at 153 (“The Fifth Amendment privilege against self-incrimination is also implicated whenever criminal issues arise in a corporate investigation. The investigating attorney will often ask questions of a corporate employee which, if answered, might tend to incriminate the employee.”).

88. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-28.300 (2009).

89. UNITED STATES SENTENCING COMM’N, U.S. SENTENCING GUIDELINES MANUAL §§ 8B2.1, 8C2.5(f) (2009).

90. UNITED STATES ATTORNEYS’ MANUAL § 9-28.300 (2009).

91. In reaching a civil settlement with AIG, for example, the government applauded AIG for its cooperation, because it “sent a clear message to its employees that they should cooperate in the staff’s investigation by terminating those employees, including members of AIG’s former senior management, who chose not to cooperate in the staff’s investigation.” SEC Release No 2371 at 2 (Feb. 9, 2006). Likewise, in the KPMG dispute at issue in *Stein*, if the government ever expressed concern to KPMG that one of its employees was not providing “prompt, complete and truthful cooperation,” KPMG threatened to terminate those employees. *Stein*, 440 F. Supp. 2d. at 323–24. “[M]aking witnesses available for interviews” is one of the factors DOJ considers in deciding whether a company has been “cooperative.” UNITED STATES ATTORNEYS’ MANUAL § 9-28.720 n.2 (2009). Even if the government does not expressly state that such employees must be threatened with termination, “the government allows companies to operate under the assumption that the threat of termination for any employee who declines to be interviewed or asserts their Fifth Amendment right is necessary in order for the company’s cooperation to be deemed ‘authentic.’” Silbert & Joannou, *supra* note 16, at 1233.

92. Silbert & Joannou, *supra* note 16, at 1228 (“The Department, completely disregarding an employee’s essential Fifth Amendment right when being interviewed by an ‘agent’ of the Government, explained that a corporation that does not fire an employee who refuses to be interviewed is not ‘acting in its shareholders’ interests.”) (quoting *Interview with United States Attorney James B. Comey Regarding Department of Justice’s Policy on Requesting Corporations Under Criminal Investigations To Waive The*

As Deputy Attorney General McNulty told Congress, DOJ does consider the existence of an effective compliance plan as part of its charging decision, and “anyone responsible for drafting a compliance program that would pass the straight-face test includes a discipline procedure” that requires employees “to comply with an internal investigation.”⁹³ In a memorandum following up on questions submitted at the Senate hearing, McNulty claimed that employees are still left a choice as to whether to make self-incriminating statements to corporate investigators, but acknowledged “they risk discipline or termination” if they do not do so.⁹⁴ Nevertheless, McNulty stated, inexplicably, that “[t]hose adverse consequences are far from coercive.”⁹⁵

The American Bar Association rightfully claims that this policy “violates employees’ legal rights” by allowing the government to withhold corporate cooperation credit for “declining to fire or sanction [the employees] for exercising their Fifth Amendment rights,”⁹⁶ and the policy has come under criticism by former Attorney General Meese and others.⁹⁷ For more than forty years, the United States government has been prohibited from threatening its employees with termination if they do not make self-incriminating statements in internal investigations.⁹⁸ Many corporations would likely prefer to afford their employees the same rights as federal employees, and the government can hardly justify taking punitive action against a corporation for not taking disciplinary action against its employees if the government would not take disciplinary action against its own employees under the same circumstances.⁹⁹

Attorney Client Privilege and Work Product Protection, UNITED STATES ATTORNEYS’ BULL. at 4 (Nov. 2003) (explaining that a corporation that does “not have a policy of firing an employee who won’t consent to be interviewed by the corporation about possible misconduct [is not] . . . acting in the shareholder’s interests.”)).

93. *Thompson Hearings*, *supra* note 2, at 9. McNulty also claimed that companies would impose such a requirement, regardless of whether the government required it. *Id.* at 16.

94. *Id.* at 46.

95. *Id.* He justified the remark by claiming that “rooting out misconduct is fundamental to the operation of our nation’s securities markets and to the operation of the corporation,” which is true but has no bearing on the fact that threatening to fire employees for refusing to make self-incriminating statements is a coercive way to root out misconduct. *Id.*

96. *Id.* at 23 (statement of Karen Mathis, President of the American Bar Association) (calling for DOJ to eliminate this consideration).

97. *Id.* at 30 (Senator Leahy, Former Attorney General Meese, the President of the U.S. Chamber of Commerce, and other witnesses voice same concerns).

98. *See, e.g.*, *Garrity v. New Jersey*, 385 U.S. 493 (1967).

99. While some companies may chose to adopt a termination policy for employees who do not cooperate with the government or who waive their Fifth Amendment rights, it was the Thompson Memorandum and DOJ’s emphasis on having such provisions that led corporations across the country to implement such policies. Robert G. Morvillo & Robert J. Anello, *Preserving Your Job While Asserting The Fifth Amendment*, N.Y. L.J., Dec. 5, 2006, at 3. Most companies, of course, do not want their employees to commit crimes or engage in misconduct, but they also want to be able to attract and retain talented employees and to preserve employee morale. Providing attorneys’ fees and respecting the rights of employees during internal investigations furthers these goals. *See, e.g.*, Bharara, *supra* note 9, at 83 (noting that DOJ’s policies “ensured recurring battles between corporations and their employees”); McLucas et al., *supra* note 75, at 290 (“[T]hese internal investigations often turn companies against the very executives and employees who are paid to act in the company’s best interest Over time, this process may well drive a wedge between the corporate entity and the executives and employees the company relies upon for the shareholders’ benefit, even when these individuals have done nothing wrong.”); Zornow & Krakaur, *supra* note 3, at 160 (noting that “a wedge has been driven between senior management and other employees as corporations rush to meet the requests of federal prosecutors for ‘cooperation’”); N. Richard Janis, *Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice Is Being Destroyed*, WASH. LAW., Mar. 2005, at 36 (explaining that corporations “are extracting waivers of constitutional rights as a condition of employment” and “prejudicing the employees’ ability to defend themselves and to protect their families,” which leads to a “sense of abandonment felt by the employees of [the] organizations”). Historically, this was not a problem before

Nevertheless, the government has not modified its policy.¹⁰⁰

D. IN PRACTICE, THE GOVERNMENT IS IMMERSSED IN A CORPORATE INTERNAL INVESTIGATION

Although they are nominally labeled corporate “internal” investigations, the government often has a very large say in how those investigations are conducted.¹⁰¹ To be sure, every internal investigation is different and the dynamic between corporate investigators and the government varies, but—as a general rule—companies who express a desire to “cooperate” typically find the government looking for assurances that an internal investigation is being conducted in a manner that will serve its interests.

To some extent, the government’s involvement is warranted. Once the government is aware of potential wrongdoing, it has an obligation to see that the matter is investigated and that any wrongdoing is remedied. The government can conduct the investigation itself. It can obtain the documents and evidentiary materials it needs by executing search warrants, and it can invite corporate officers and employees in for questioning or have them subpoenaed to testify before a grand jury. Companies offer to “cooperate” because the government’s approach is disruptive to the business and can cause embarrassment. No company, for example, wants television crews broadcasting images of law enforcement officers hauling documents, computers and other materials out of their offices, particularly when the company needs such materials to operate effectively. Companies would rather make the government copies of the materials that it needs and interview its employees for itself, according to a schedule that serves the company’s needs. An internal investigation also allows the company to avoid a potentially dangerous situation in which the government understands what occurred within the company better than the company itself does. If the government is going to, in effect, defer some portion of its investigation to the corporation,¹⁰² it is

the emergence of the Thompson Memorandum because the internal interview “would typically remain a private inquiry among a corporate employer, its counsel, and its employees” and the disclosure of what was said to the government “would have been unusual.” Zornow & Krakaur, *supra* note 3, at 153.

100. *See, e.g.*, Bharara, *supra* note 9, at 93 (noting that “the McNulty Memorandum, by maintaining the focus on cooperation considerations, apparently continues to allow a reward for the sanction or termination of uncooperative employees (so long as the sanction is not the termination of legal fee payments).”).

101. Internal investigations may be triggered by the government, a third-party’s notifying the company of a problem, or the company discovering a problem on its own. Rotert & Lerman, *supra* note 58, at 860–61. In any case, the government typically is approached by the company very quickly because the government and the Sentencing Guidelines place a premium upon prompt disclosure. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-28.300 (2009) (including among factors to consider in making a charging decision, “the corporation’s timely and voluntary disclosure of wrongdoing”); UNITED STATES SENTENCING COMM’N, U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g)(1) (2009) (requiring “reasonably prompt” disclosure for full cooperation credit).

102. The government often does not halt its investigation, but when it does defer some portion of its investigation it will expect frequent updates on the progress of the internal investigation. *See, e.g.*, Albert P. Lilienfeld, *SEC Enforcement Activities and Trends; What If Your Company Is Next?*, 1747 *PLI/Corp.* 507, 514 (2009) (“If the SEC staff holds off on conducting its own investigation until the internal investigation is completed, more frequent reports may be necessary.”); Douglas R. Young, *American College of Trial Lawyers: Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations*, 1737 *PLI/Corp.* 459 (2009) (explaining that there is “a reasonable likelihood that any major internal investigation will be followed by, or conducted parallel to,” a government investigation). In many instances, the government may defer to the corporation in its investigation internally but continue to take the lead in investigating leads outside the company. The government, for example, may be in a better position than the company to investigate former employees, outside agents, customers, or competitors. For example, a relatively recent development is that the government is having to get more involved in obtaining emails that company employees may have sent or received through a web-based

only reasonable that the government receive some assurances that corporation's internal investigation will be adequate.¹⁰³

The government also is not going to just accept whatever conclusions are presented to it by corporate investigators upon completion of an internal investigation, and they should not be expected to do so.¹⁰⁴ The government will justifiably want to understand the scope of the investigation and how thoroughly it was conducted so that it can gauge how much credibility it should afford the findings of the corporate investigators. And the government will want the corporate investigators to walk them through the evidence that supports their findings, including a review of the relevant documents and the statements made by knowledgeable persons.¹⁰⁵

It is in the interest of the corporation, as well as the government, that they coordinate as to how the internal investigation will be conducted early in the process. The internal investigation could prove to be an expensive waste of time or at least highly inefficient if conducted in a manner that will not satisfy the government. For example, if the government concludes that the scope of the investigation was too narrow because it did not look at a particular subject, the company may need to go back and re-review virtually every document and re-interview countless employees to fill in the gap. Consequently, it is in everybody's interest that corporate investigators and the government coordinate up front.

The government also typically wants to be updated on the progress being made in the investigation,¹⁰⁶ often requesting "real time" updates,¹⁰⁷ and "the government

email provider because the employer's ability to do so may be more limited. Marjore J. Pearce & Daniel V. Shapiro, *The Increasing Privacy Expectations in Employees' Email*, 13 J. INTERNET L. 1, 14–15 (2010) (explaining that the government now is using subpoenas and search warrants to obtain such email).

103. Because "cooperation" includes "providing non-privileged documents and other evidence" and "assisting in the interpretation of complex business records," DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-28.720 n.2 (2009), corporate investigators should expect the government to be interested in what areas are being searched for documents, the criteria being used to evaluate documents that are reviewed, and to assist the government in interpreting those documents. It is not uncommon for the government to see a work plan that identifies the schedule for collecting documents from various locations, and even negotiating with corporate investigators as to what search terms should be used in conducting searches of email and other electronic documents. Often, there will be a subpoena for the documents and agreement as to search terms and production dates is made to satisfy the subpoena.

104. See, e.g., William M. Hannay & Patricia B. Holmes, *The Nuts and Bolts of Conducting an FCPA Internal Investigation*, 1665 PLI/Corp. 343, 351 (2008) ("Prosecutors and agency officials have made very clear that a purported internal 'investigation' that is slipshod or otherwise inadequate will not be viewed favorably and, in fact, might suggest that the company has something to hide, prompting the government to investigate even more thoroughly and to view with skepticism any representations made by the company or its counsel.").

105. As noted above, see *supra* notes 67–69 and accompanying text, the basic questions the government will want answered are identified in its guidance documents. See DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-28.710 (2009).

106. See, e.g., Michael D. Trager et al., *Handling Securities Problems and Responding to U.S. Regulatory Inquiries: The Use of Internal Investigations in the Current Regulatory Environment*, 1737 PLI/Corp. 381, 398–99 (2009) (explaining that it is more likely that the government will request information from a company while the internal investigation is ongoing).

107. See, e.g., *id.* at 398 ("Self-reporting upon discovery of a potential problem and continued communication with the government throughout the internal investigation are essential. As an Assistant Director in the SEC's Enforcement Division stated in May 2007, the staff will want to monitor an internal investigation, look at the work plan, and receive 'real time' briefings."); Liesa L. Richter, *The Power of Privilege and the Attorney-Client Privilege Protection Act: How Corporate America Has Everyone Excited About the Emperor's New Clothes*, 43 WAKE FORREST L. REV. 979, 1031 (2008) (Federal authorities "have asked companies to partner with the government by conducting internal investigations of corporate wrongdoing to be fed in a 'real time' manner to the government."); Michael E. Horowitz & April Oliver, *Foreword: The State of Federal Prosecution*, 43 AM. CRIM. L. REV. 1033, 1038 (2006) ("Indeed, the SEC's Enforcement Division has widely proclaimed that it expects 'real time disclosures' from counsel conducting internal investigations.").

may threaten to take a more direct role in the investigation if they suspect it is not progressing well.”¹⁰⁸ The government typically will want to know where the company will search for documents and other evidence, the search terms used in reviewing documents, which corporate employees, former employees or other persons the company will interview, and what the subjects of those interviews will be. And as the company’s internal investigation learns relevant facts or runs into any potential snags in gathering information, the government will want to be told.

It also is particularly noteworthy that the government seems to treat corporate internal investigators as its agents. 18 U.S.C. § 1512(c)(2) makes it a crime to obstruct justice by obstructing an “official proceeding,” which the government has interpreted to mean that a corporate employee who makes misstatements or omissions to corporate internal investigators may violate this statute.¹⁰⁹ The basis for the charge is that the corporate internal investigators were working “as an arm of the investigating agencies.”¹¹⁰ As Judge Kaplan noted: “There is more than a little tension between [the government’s] assertion that the acts of companies cooperating with it are not state action when the cooperator is induced to coerce third parties for the government’s benefit but are sufficiently related to government action that obstruction of the cooperator obstructs the government.”¹¹¹

II. THE GOVERNMENT’S INVOLVEMENT IN CORPORATE INTERNAL INVESTIGATIONS OFTEN WILL BE SUFFICIENT TO TRANSFORM THE INTERNAL INVESTIGATION INTO STATE ACTION

The Second Circuit’s decision in *Stein* makes clear that the government’s influence over the conduct of a corporate internal investigation is sufficient to transform the internal investigation into state action, subjecting it to constitutional limitations.¹¹² Because state action triggers a host of constitutional limitations, a finding of state action will have ramifications beyond the particular facts of *Stein*, which involved government pressure for corporations to terminate attorneys fees for employees. The same type of concerns will be triggered if the government exerts the same sort of pressure to have employees fired or disciplined for exercising their Fifth Amendment rights not to incriminate themselves, which could lead to the suppression of any statements that are made.¹¹³

108. Rotert & Lerman, *supra* note 58, at 866.

109. See, e.g., *United States v. Ring*, 628 F. Supp. 2d 195, 219–20 (D.D.C. 2009) (refusing to dismiss obstruction of justice charge); *United States v. Singleton*, 2006 WL 1984467, at *4–5 (S.D. Tex. July 14, 2006) (same); *United States v. Kumar*, 2006 U.S. Dist. LEXIS 96142, at *13–15 (E.D.N.Y. Feb. 21, 2006) (same).

110. *Singleton*, 2006 WL 1984467, at *6.

111. *Stein*, 440 F. Supp. 2d at 337 n.114. See also Sarah H. Duggin, *The McNulty Memorandum, The KPMG Decision and Corporate Cooperation: Individual Rights and Legal Ethics*, 21 GEO. J. LEGAL ETHICS 341, 385–86 (2008) (“The argument for extension of the *Garrity* doctrine is underscored by the indictments in recent years of employees on obstruction of justice charges on the basis of statements made to corporate counsel in internal investigative interviews. . .”).

112. *Stein*, 541 F.3d at 136 (“We hold that KPMG’s adoption and enforcement of a policy under which it conditioned, capped and ultimately ceased advancing legal fees to defendants followed as a direct consequence of the government’s overwhelming influence, and that KPMG’s conduct therefore amounted to state action.”).

113. Judge Kaplan, in fact, found that the statements made by two defendants were involuntary and ordered the statements suppressed. *Stein*, 440 F. Supp. 2d 315 (S.D.N.Y. 2006). Because the Second Circuit dismissed the entire indictment based on the Sixth Amendment right to counsel, it did not reach the Fifth Amendment suppression issue because it was moot. *Stein*, 541 F.3d at 136 n.2.

A. THE GOVERNMENT'S INVOLVEMENT IN CORPORATE
INTERNAL INVESTIGATIONS OFTEN IS ADEQUATE TO
CONSTITUTE STATE ACTION

The government's involvement with corporate internal investigations often is sufficient to trigger a judicial finding that the actions by corporate internal investigators constitute state action. The Supreme Court has long recognized that the actions of private parties should be attributed to the government if "there is a sufficiently close nexus between the State and the challenged action of the . . . entity so that the action of that latter may be fairly treated as that of the State itself."¹¹⁴ That nexus may be established in a variety of ways. As the Second Circuit explained in *Stein*:

A nexus of state action exists between a private entity and the state when the state exercises coercive power, is entwined in the management or control of the private actor or provides the private actor with *significant encouragement*, either overt or covert, or when the private actor operates as a *willful participant in joint activity* with the State or its agents, is controlled by an agency of the State, has been delegated a public function by the state, or is *entwined with governmental policies*.¹¹⁵

Moreover, a finding of state action is particularly appropriate where the government has "made plain not only its strong preference for [the private conduct], but also its desire to share the fruits of such intrusions."¹¹⁶

In *Stein*, the Second Circuit noted that "KPMG faced ruin by indictment and reasonably believed that it must do everything in its power to avoid it. The government's threat of indictment was easily sufficient to convert its adversary into its agent."¹¹⁷ That threat of indictment and a corporation's perceived need to do everything in its power to avoid routinely comes into play when companies conduct internal investigations. Consequently, the *Stein* court's finding of state action will apply to virtually every corporate internal investigation that is conducted in the shadow of a potential indictment of the company.¹¹⁸

There also is typically much more than this threat: the government provides "significant encouragement" for companies under investigation to cooperate by conducting an internal investigation, and to then "share the fruits" of its investigations with the government.¹¹⁹ In addition, the coordination between the government and the corporate internal investigators often is so entwined that it would not be

¹¹⁴ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

¹¹⁵ *Stein*, 541 F.3d at 147 (quoting *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 187 (2d Cir. 2005) (emphasis in *Stein*); see *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (State action is found where the government "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.")). In deciding whether a private party has acted as an agent of the state, courts sometimes ask "1) whether the government knew of and acquiesced in the intrusive conduct, and 2) whether the party performing the search intended to assist law enforcement efforts or to further its own ends." *Pleasant v. Lovell*, 876 F.2d 787, 797 (10th Cir. 1989) (quoting *United States v. Miller*, 688 F.2d 652, 657 (9th Cir. 1982)).

¹¹⁶ *Stein*, 541 F.3d at 147 (quoting *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 615 (1989)).

¹¹⁷ 541 F.3d at 151 (citing Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 367 (2007) ("The threat of [ruinous indictment] brings significant pressure to bear on corporations, and that threat 'provides a sufficient nexus' between a private entity's employment decision at the government's behest and the government itself.")).

¹¹⁸ The Second Circuit explained in *Stein* that "[t]he government brought home to KPMG that its survival depended on its role in a joint project with the government to advance government prosecutions." *Stein*, 541 F.3d at 147. Even without an explicit threat, it will be abundantly clear to companies and their counsel that an indictment may constitute the death of a company and, based on the government's guidance documents alone, they will know that "cooperation" may be the company's best chance for survival.

¹¹⁹ See, e.g., *id.* at 148.

difficult to characterize the internal investigation as a joint activity.¹²⁰

B. GOVERNMENT PRODDING OF THIRD-PARTY EVIDENCE GATHERING HAS BEEN SUFFICIENT TO TRIGGER STATE ACTION IN OTHER CONTEXTS

While the cases that specifically address the applicability of the state action doctrine in the context of corporate internal investigations are few, there is ample case law addressing the “federalization” of evidence gathering by non-federal actors. This case law, in conjunction with *Stein*, confirms that the federal government’s involvement in corporate internal investigations will often be more than sufficient to trigger the state action doctrine.

1. Federal and State Cooperation. Although courts have only recently started asking whether the government’s involvement with corporate investigators is sufficient to constitute state action, the law regarding state action triggered by the government enlisting the help of private parties in its investigations is fairly well established. This case law began to emerge during the Prohibition Era. At that time, most of the Bill of Rights had not yet been made applicable to the states,¹²¹ so state law enforcement officers were not subject to the constitutional restraints imposed on the federal government. Consequently, federal officers would seek to have state officers gather evidence for them—the same way they seek to have corporations gather such evidence today—when the Constitution would hamper the federal government’s ability to gather such evidence itself.

In *Byars v. United States*,¹²² state officers searched a private residence pursuant to a warrant that did not satisfy Fourth Amendment standards and a federal prohibition agent was invited to join them in the search.¹²³ Although state officers conducted the search looking for evidence of state crimes, the federal officer “did participate as a federal enforcement officer, upon the chance, which was subsequently realized, that something would be disclosed of official interest to him as such agent.”¹²⁴ The federal officer took possession of the evidence that furthered his federal investigation, and that evidence was used to convict the defendant on federal charges.¹²⁵ The unanimous Supreme Court concluded that “the search in substance and effect was a joint operation of the local and federal officers,” and reversed the conviction, holding that “the effect is the same as though [the federal agent] had engaged in the undertaking as one exclusively his own.”¹²⁶

Although the facts in *Byars* represent an extreme case of government overreaching, the Court plainly was cognizant that federal agents have many avenues open to them for attempting to circumvent constitutional rights. The Court advised the lower courts to carefully scrutinize such conduct:

While it is true that the mere participation in a state search of one who is a federal officer does not render it a federal undertaking, the court must be vigilant to

120. *See id.*

121. The Bill of Rights became applicable to the states through a piecemeal “incorporation” of those rights through the Due Process Clause of the Fourteenth Amendment beginning in the 1930s. John E. Nowak & Ronald D. Rotunda, *CONSTITUTIONAL LAW* § 11.6 at 385 (4th ed. 1991). For example, the Self-Incrimination Clause of the Fifth Amendment was not incorporated and made applicable to the states until 1964. *Malloy v. Hogan*, 378 U.S. 1 (1964).

122. 273 U.S. 28 (1927).

123. *Id.* at 29–30.

124. *Id.* at 32.

125. *Id.* at 28, 32–33.

126. *Id.* at 33.

scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods.¹²⁷

The same year *Byars* was considered, the Supreme Court also decided *Gambino v. United States*.¹²⁸ In *Gambino*, a unanimous Supreme Court again reversed a conviction by attributing conduct by state officers to the federal government, and holding that the evidence gathered by state officials violated the Fourth Amendment.¹²⁹ *Gambino*, however, was a significant extension of *Byars* because no federal officer was involved in the search or had even asked that the search be conducted. State officers had come across the defendants car along the Canadian border, and on their own suspected that the federal prohibition laws had been violated. They had no probable cause to believe any state laws were violated, consequently “[t]he wrongful arrest, search, and seizure were made solely on behalf of the United States.”¹³⁰

The Supreme Court’s decision made clear that the Court was not merely concerned with the federal government instructing others to do its bidding, but by the creation of a climate where such “cooperation” would occur. The National Prohibition Act encouraged “co-operation between the state and the federal governments in the enforcement of the [A]ct,” and state officials had encouraged state officers to “aid in the enforcement of the law.”¹³¹ Without a legal obligation for state officials to do so, this situation is little different from the Filip Memorandum encouraging corporations to “cooperate” and a corporation initiating an internal investigation to do just that. Yet, *Gambino* makes clear this very sort of “cooperation” is sufficient to trigger state action:

It is true that the troopers were not shown to have acted under the directions of the federal officials in making the arrest and seizure. But the rights guaranteed by the Fourth and Fifth Amendments may be invaded as effectively by such *co-operation* as by the state officers acting under the direction of federal officials. The prosecution thereupon instituted by the federal authorities was, as conducted, in effect a ratification of the arrest, search, and seizure made by the troopers on behalf of the United States.¹³²

A similar result occurred in *Anderson v. United States*,¹³³ where the Supreme Court suppressed coerced confessions made to state officers because they had a “working arrangement” with the federal officers, so “the fact that the federal officers themselves were not formally guilty of illegal conduct does not affect the admissibility of the evidence which they secured improperly through collaboration with state officers.”¹³⁴

If state and federal officials had an “understanding” that the state would take the

127. *Id.* at 32.

128. 275 U.S. 310 (1927).

129. *Id.*

130. *Id.* at 316.

131. *Id.* at 314–15.

132. *Id.* at 316–17. See *Marsh v. United States*, 29 F.2d 172, 173 (2d Cir. 1928) (L. Hand, J.) (“The effect of *Gambino v. U.S.* is that when, under such circumstances, the federal authorities use the evidence in a federal prosecution, they become subject to all the limitations of the Federal Constitution, regardless of whether state prosecutors might be similarly limited by the State Constitution.”); Irvin B. Nathan & Christopher D. Man, *Coordinated Criminal Investigations Between the United States and Foreign Governments and Their Implications for American Constitutional Rights*, 42 Va. J. Int’l L. 821, 828 (2002) (“Read together, *Byars* and *Gambino* hold that a search and seizure is federalized when a federal officer participates in the search and seizure, or when the search and seizure is conducted by third parties for the sole benefit of the federal government, even if the United States was completely unaware that the search was occurring.”).

133. 318 U.S. 350 (1943).

134. *Id.* at 356.

lead in collecting evidence free of constitutional restraint and its investigation would then provide the road map for a federal prosecution—virtually the same “understanding” that now exists between federal prosecutors and corporate internal investigators—the lower courts would not hesitate to attribute the actions by state actors to the federal government.¹³⁵ The Fourth Circuit in *Sutherland v. United States*,¹³⁶ for example, held:

[W]here the state and federal officers have an understanding that the latter may prosecute in the federal courts offenses which the former discover in the course of their operations, and where the federal officers adopt a prosecution originated by state officers as the result of a search made by them, the same rule as to the admissibility of evidence obtained in the course of the search should be applied as if it were made by the federal officers themselves or under their direction.¹³⁷

The Supreme Court explained the breadth of its decisions in this area in *Lustig v. United States*.¹³⁸ Justice Frankfurter’s plurality opinion in *Lustig* explained:

The crux of that doctrine is that the search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to federal authorities on a silver platter. The decisive factor in determining the applicability of the *Byars* case is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means. . . . Evidence secured through such federal participation is inadmissible¹³⁹

As Justice Frankfurter later explained, the “question has always been whether the offending search or seizure was conducted in any part by federal officials or in the interest of the Federal Government, or whether it was conducted solely by state officers acting exclusively for state purposes.”¹⁴⁰

The Supreme Court later rejected even this “silver platter” limitation suggested by Justice Frankfurter in *Lustig*. The Court reiterated that the *Byars* rule is clear: “[I]f federal agents had participated in an unreasonable search and seizure by state officers, or if the state officers had acted solely on behalf of the United States, the evidence was not admissible in a federal prosecution.”¹⁴¹ The Court rejected the “silver platter” doctrine because it would make federal officers “accomplices in the willful disobedience of a Constitution they are sworn to uphold.”¹⁴² The Court explained:

135. See, e.g., *Ward v. United States*, 96 F.2d 189, 191 (5th Cir. 1938) (suppressing fruits of a search by a state officer because a federal officer requested the search and seizure, even though the federal officer had no role in apprehending the decision and did not know when the arrest would occur).

136. 92 F.2d 305 (4th Cir. 1937).

137. *Id.* at 307; see also *Graham v. United States*, 257 F.2d 724, 728 (6th Cir. 1958); *Gilbert v. United States*, 144 F.2d 568, 570–71 (10th Cir. 1944); *Lowrey v. United States*, 128 F.2d 477, 478–79 (8th Cir. 1942); *Fowler v. United States*, 62 F.2d 656, 657 (7th Cir. 1932).

138. 338 U.S. 74 (1949).

139. *Id.* at 78–79. The issue that divided the Court in *Lustig* was not on the *Byars* rule, but whether the rule applied to the facts of that case. The justices reached different factual conclusions about what the federal officer’s involvement had been. See Nathan & Man, *supra* note 132, at 829–31 & 830 n.34 (discussing *Lustig* decision). Compare *Lustig*, 338 U.S. at 79 (Frankfurter, J., plurality opinion) (explaining that the federal officer went to the state officer’s search as an “expert in counterfeiting matters and had a vital share in sifting the evidence as the search proceeded”), with *d.* at 83 (Reed, J., dissenting) (claiming that the federal officer “did not ‘share in the critical examination of the uncovered articles as the physical search proceeded.’”) (quoting plurality opinion).

140. *Elkins v. United States*, 364 U.S. 206, 236 (1960) (Frankfurter, J., dissenting); see *Euziere v. United States*, 266 F.2d 88, 90 (10th Cir. 1959) (“The test in all cases is did the federal authorities participate in any way in the search?”), *vacated*, 364 U.S. 282 (1960).

141. *Elkins*, 364 U.S. at 213.

142. *Id.* at 223.

Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal–state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered.¹⁴³

The *Byars* principle of preventing the federal government from “cooperating” with a third-party to obtain evidence for its benefit in criminal proceedings through means that would be unlawful for the federal government to do on its own holds the same force no matter who that third-party is, be it a Prohibition Era state officer or a modern corporate internal investigator.

2. *Federal and International Cooperation.* In some instances, the *Byars* principle also has been used to find state action when the United States has enlisted the cooperation of foreign governments to gather evidence.¹⁴⁴ Perhaps the leading case on this subject is *United States v. Peterson*,¹⁴⁵ where then-Judge and now-Justice Kennedy found state action through the conduct of foreign governments. He found it significant that U.S. agents “termed their actions a ‘joint investigation,’” and that statement was well supported by the facts.¹⁴⁶ The United States had identified a ship carrying contraband into the United States and obtained the frequencies being used between the ship and an apartment in the Philippines.¹⁴⁷ Philippine officials then taped the coded communications and gave them to the United States to decode, and Philippine officials placed a tap on the phone in the apartment and provided transcripts of the calls to the United States.¹⁴⁸ That led to evidence that the United States used to obtain the permission of the Panamanian government to search the ship on behalf of the Panamanian government for contraband, which was discovered and ultimately led to a prosecution in the United States.¹⁴⁹

Similarly, in *United States v. Emery*,¹⁵⁰ the Ninth Circuit found joint action where a United States officer alerted Mexican officials to a drug transaction in Mexico, participated in the surveillance of the transaction, and gave the signal for the Mexican

143. *Id.* at 221–22. The Court noted that its decision in *Wolf v. Colorado*, 338 U.S. 25 (1949), already had made the Fourth Amendment applicable to the states, such that the state officers’ search was unconstitutional. *Elkins*, 364 U.S. at 213–14. The issue in *Elkins* was whether the fruits of an unlawful state search could be used in proceedings brought by federal officers, even if there was no involvement by federal officers that would trigger the *Byars* rule. *Id.* at 208. The Court invoked its “supervisory power over the administration of criminal justice in the federal courts,” to hold such evidence inadmissible. *Id.* at 216.

144. Even when the conduct of the foreign government does not amount to state action that would trigger the guarantees of the U.S. Constitution, evidence gathered through means that would shock the conscience may result in the exclusion of such evidence. *See, e.g.*, *Bram v. United States*, 168 U.S. 532 (1897) (holding that a confession coerced by Canadian officials should have been excluded); *United States v. Barona*, 56 F.3d 1087, 1091 (9th Cir. 1995); *United States v. Fernandez-Caro*, 677 F. Supp. 893, 895 (S.D. Tex. 1987) (rejecting claims of a U.S.-Mexican joint venture, but excluding a confession obtained through torture by Mexican officials).

145. 812 F.2d 486 (9th Cir. 1987).

146. *Id.* at 490.

147. *Id.* at 488–90.

148. *Id.*

149. *Id.* Based on its finding of state action, the Ninth Circuit engaged in Fourth Amendment analysis but concluded that the Fourth Amendment was not violated because the search was reasonable. *Id.* at 494.

150. 591 F.2d 1266 (9th Cir. 1978).

officials to make the arrest.¹⁵¹ The defendants were then interrogated by Mexican officials in the presence of the United States officer without them being afforded their *Miranda* rights.¹⁵² The court found that there was a “joint venture” that federalized this investigation, which triggered *Miranda*, and reversed the convictions because the confessions made without *Miranda* warnings should have been suppressed.¹⁵³

Although the Supreme Court has not definitively ruled on the applicability of the *Byars* principle in the international cooperation context, it has strongly indicated that it would be applicable. In *United States v. Balsys*,¹⁵⁴ the Supreme Court held that the Fifth Amendment’s Self-Incrimination Clause was not implicated by the fear of a foreign prosecution.¹⁵⁵ But the Court added a caveat: “This is not to say that cooperative conduct between the United States and foreign nations could not develop to a point at which a claim could be made for recognizing fear of foreign prosecution under the Self-Incrimination Clause as traditionally understood.”¹⁵⁶ An “argument could be made” for applicability of the Clause if there were a “division of labor between evidence gatherer and prosecutor that made one nation the agent of the other, rendering fear of foreign prosecution tantamount to fear of a criminal case brought by the Government itself.”¹⁵⁷

The substantive constitutional issues are somewhat unique in the international cooperation context because certain constitutional rights operate differently abroad than they do domestically,¹⁵⁸ but the analysis of whether constitutional rights are implicated through state action by federal-international cooperation is instructive to whether federal cooperation with corporate internal investigations can constitute state action as well. Given the increase in international cooperation of the prosecution of corporate crime, there will even be situations when multiple foreign governments will be jointly exerting pressure on the same corporate internal investigators.¹⁵⁹

3. Government and Third-Party Cooperation. In a variety of other cases, the Supreme Court has found that state action occurs when the government enlists third-parties to collect evidence. In *Massiah v. United States*,¹⁶⁰ for example, the Supreme Court held that a defendant’s Sixth Amendment right to counsel is violated when the government enlists a private person to interrogate the accused outside the presence of counsel, just as it would be if the government were to conduct that

151. *Id.* at 1267.

152. *Id.*

153. *Id.* at 1268. The lower courts are not always consistent in their application of the *Byars* principle in the international context. See Nathan & Man, *supra* note 132, at 832–836.

154. 524 U.S. 666 (1998).

155. *Id.* at 698–99.

156. *Id.*

157. *Id.* In dissent, Justice Breyer noted that “experience suggests” that the potential for such abuse “is not totally speculative.” *Id.* at 716.

158. See Nathan & Man, *supra* note 132, at 836–38. For example, the reasonableness of a search for Fourth Amendment purposes may be broader when conducted abroad. See, e.g., *Peterson*, 812 F.2d at 890; *Barona*, 56 F.3d at 1095 (finding an international joint venture, but concluding that compliance with Danish law satisfied the Fourth Amendment when the search was conducted in Denmark). Similarly, *Miranda* warnings given abroad may require some modification. See, e.g., *United States v. Bin Laden*, 132 F. Supp. 2d 168, 186 (S.D.N.Y. 2001).

159. In a recent investigation of Innospec Limited by the United States and the United Kingdom, the prosecutors in the United Kingdom candidly acknowledged that it had been “simultaneously and jointly” investigating the case with the United States, and they had “divided up” the investigation. *Regina v. Innospec Limited*, No. 20107157, Opening Note at ¶¶ 33–34 (Southwark Crown Court 2010). The United Kingdom prosecutors noted that the company had spent \$32 million on an internal investigation that was of great assistance to both governmental investigations. *Id.* at ¶ 32.

160. 377 U.S. 201 (1964).

interrogation itself.¹⁶¹ The conviction in *Massiah* was reversed because the government had deliberately sent an informant to question the defendant while he was free on bail.¹⁶² In the Court's view, that made the situation worse, not better for the accused, "because he did not even know he was under interrogation by a government agent."¹⁶³

The situation here is comparable to the government's enlistment of corporate internal investigators in its investigation of a company's employees. The issue in many cases will be the same—whether the government had prodded a third-party to collect the evidence.¹⁶⁴ The Supreme Court has explained that the *Massiah* test is not violated if the government, "by luck or happenstance," obtains incriminating statements from the accused after the right to counsel has attached,¹⁶⁵ but is violated where the government seeks to "deliberately elicit" the incriminating statements of the accused.¹⁶⁶ Where government officers have made it clear that they want corporate internal investigators to ask specific questions of individuals and share those answers with them, courts should not hesitate to find that this sort of questioning

161. *Id.* at 206. The Supreme Court subsequently clarified that "the *Massiah* right is a right to be free of uncounseled interrogation, and is infringed at the time of the interrogation." *Kansas v. Ventris*, 129 S. Ct. 1841, 1846 (2009). *See also* *Maine v. Moulton*, 474 U.S. 159, 176 (1985) ("[T]he Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent."). The Sixth Amendment right to counsel addressed in the *Massiah* line of cases is unlikely to arise often in corporate internal investigations because the Sixth Amendment right to counsel is not triggered until formal charges are brought against the individual. *United States v. Gouveia*, 467 U.S. 180, 1888 (1984). In most instances, the questioning of an employee through a corporate internal investigation will occur before the Sixth Amendment right would attach by the government bringing formal charges. Nevertheless, the *Massiah* line of cases is helpful in identifying when private conduct in the gathering of evidence will be regarded as state action.

162. *Massiah*, 377 U.S. at 206. The Court previously had found a similar Sixth Amendment violation where a defendant was in police custody, *Spano v. New York*, 360 U.S. 315 (1959), but *Massiah* made clear that the Sixth Amendment could be violated even where the interrogation was not custodial. *See* *United States v. Henry*, 447 U.S. 264, 273 n. 11 (1980) (noting that there is no custody requirement for a *Massiah* violation, but the existence of custody may weigh in favor of a finding that the government had "deliberately elicited" the statements).

163. *Massiah*, 377 U.S. at 206. In *Spano*, the Court made the same point by quoting the verse: "An open foe may prove a curse, But a pretended friend is worse . . ." 360 U.S. at 323. The Supreme Court has explained that "the primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." *Kuhlman v. Wilson*, 477 U.S. 436, 459 (1986).

164. There should be little doubt that where the government directly asks that a corporation question one of its employees to obtain answers for its benefit, the corporation is acting as the agent for the government. In *United States v. Montayne*, 500 F.2d 411 (2d Cir. 1974), for example, a company that conducted a post-hiring polygraph of an employee obtained statements from the employee that suggested she may have been involved in a murder and the company notified the police. *Id.* at 413. The police asked that the company call her back for a second polygraph so that she could be questioned further on that topic, and her statements could be recorded. The Second Circuit had no difficulty finding that the employer was "acting as an agent for the police," and explained that "[t]he state's involvement is no less real for having been indirect and no less impermissible for having been concealed. The state is prohibited in either event from compelling a statement through economically coercive means, whether they are direct or indirect." *Id.* at 415. The same is true when the government asks a company to conduct a search of an employee's or customer's belongings. *Fries v. Barnes*, 618 F.2d 988, 991 (2d Cir. 1980) ("[W]here federal officials actively participate in a search being conducted by private parties or else stand by watching with approval as the search continues, federal authorities are clearly implicated in the search and it must comport with fourth amendment requirements.") (quoting *United States v. Mekjian*, 505 F.2d 1320, 1327 (5th Cir. 1980)); *United States v. Newton*, 510 F.2d 1149, 1153–54 (7th Cir. 1975) (holding that Fourth Amendment was violated when law enforcement asked airline employees to search a bag that the government lacked probable cause to search); *Corngold v. United States*, 367 F.2d 1, 5 (9th Cir. 1966) (en banc) (same).

165. *Maine v. Moulton*, 474 U.S. 159, 176 (1985). *See* *Kuhlman v. Wilson*, 477 U.S. 436, 459.

166. *See, e.g., Kuhlman*, 477 U.S. at 457.

constitutes the same sort of state action as in *Massiah*.

The *Massiah* line of cases also may indicate that state action may occur in the corporate internal investigation context, even when the government does not directly ask that the investigation proceed in any particular manner or even if the government is unaware of that particular investigation. The government has gotten its point across without having to micro-manage the internal investigation. Companies are well aware of the consequences of indictment and, ever since the *Holder Memorandum*, the government has made clear that the only way to avoid indictment after the relevant conduct has occurred is to cooperate.¹⁶⁷ And companies already know that “cooperation” means conducting an internal investigation, and the questions that must be asked and answered as part of that investigation.¹⁶⁸ The government, in effect, has set the stage for what must follow, even before the corporation realizes it will be cast in the play.

In *Maine v. Moulton*¹⁶⁹ and *United States v. Henry*,¹⁷⁰ the Supreme Court found state action where the government intentionally created an opportunity for a third-party to collect the evidence it sought improperly. In *Henry*, the government retained a jailhouse snitch as a paid informant on a contingency-fee basis.¹⁷¹ The informant actively questioned the defendant seeking to elicit incriminating statements, but the government argued that such conduct should not be attributed to the state because the government had explicitly instructed the informant not to question the defendant.¹⁷² The Supreme Court rejected that argument because, despite the government’s instructions to the informant, the government was well aware of the contingency-fee arrangement and “must have known that such propinquity likely would lead to that result.”¹⁷³

Henry was further extended in *Moulton*. In *Moulton*, one of the defendant’s accomplices had confessed to the government and, unbeknownst to the defendant, agreed to become an informant.¹⁷⁴ Under that agreement, the informant would not face further charges if he confessed and agreed to work as a cooperator.¹⁷⁵ The defendant had asked the informant to meet to discuss the charges pending against them, and the government asked the informant to wear a body wire transmitter, but not to ask any questions of the defendant.¹⁷⁶ Because the government knew the purpose of the meeting was to discuss their defense at trial, the Court found that the government’s instructions that the informant not engage in that conversation were inadequate because such discussion was “inevitable.”¹⁷⁷

The government’s charging guidance and practice has made clear to companies that, as in *Henry*, it is in the companies’ financial interest to gather the evidence it seeks and, as in *Moulton*, may be the only way to avoid facing more serious criminal charges.¹⁷⁸ Those incentives were strong enough to cause the informants in *Henry*

167. See *Holder Memorandum*, *supra* note 22.

168. See *supra* Part I.B.

169. 474 U.S. 159 (1985).

170. 447 U.S. 264 (1980).

171. *Id.* at 270.

172. *Id.* at 271.

173. *Id.*

174. 474 U.S. at 162–64.

175. *Id.* at 163.

176. *Id.* at 164–5.

177. *Id.* at 177 n.14.

178. A company that gathers evidence for the government in the hope of avoiding an indictment may find itself in circumstances similar to the one addressed in *United States v. Stein*, 322 F. Supp. 346 (N.D. Ill. 1971). In *Stein*, the court ordered evidence that had been stolen by a government informant suppressed. *Id.* at 349. Although the government had no knowledge that the informant would steal the

and *Moulton* to gather evidence and their conduct constituted state action, despite explicit government instructions to the contrary. Those same incentives may be even more powerful in the corporate internal investigation context because indictment is the equivalent of a corporate death sentence,¹⁷⁹ and while the government may not offer more specific advice to corporate internal investigators about how it should proceed, it will not ask the investigators to exercise any restraint in collecting evidence as was the case in *Henry* and *Moulton*.¹⁸⁰

III. THE “FEDERALIZATION” OF CORPORATE INTERNAL INVESTIGATIONS THREATENS THE FIFTH AMENDMENT RIGHTS OF EMPLOYEES

In *Garrity v. New Jersey*,¹⁸¹ the Supreme Court held that the government cannot compel its own workers to make self-incriminating statements in the course of an internal investigation by threatening to fire or discipline them if they do not. The defendants in *Garrity* were police officers who came under investigation and were subject to questioning by the state attorney general’s office. They were warned that their statements could be used against them and that they had the right to refuse to answer, but would be fired if they refused to answer.¹⁸² As the Supreme Court explained: “The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent.”¹⁸³ The Supreme Court reversed their convictions because those convictions were based on coerced, self-incriminatory statements.¹⁸⁴

The *Garrity* principle becomes applicable whenever the government seeks to impose penalties whenever a person seeks to exercise their right to remain silent, and is not limited to penalties imposed on government employees. The Supreme Court, for example, has extended *Garrity*, to invalidate statutes that would debar private

materials, the defendant was under tremendous pressure to avoid indictment and the government had exploited that pressure by offering hope that an indictment could be avoided if he offered his “cooperation.” *Id.* at 348. The court found state action because the informant believed he would be rewarded by the government for stealing the materials and that, given the government’s pressure to obtain “cooperation,” the government was not “totally divorced from the situation.” *Id.* See also *Knoll Assoc., Inc. v. FTC*, 397 F.2d 530, 536 (7th Cir. 1968) (now-Justice Stevens was on the panel) (holding that government’s use of documents stolen for its benefit by a third-party violated the Fourth Amendment).

179. See *supra* at Part I.A.

180. The situations in *Henry* and *Moulton* were distinguished in *Kuhlman v. Wilson*, 477 U.S. 436 (1986), where the government’s involvement was entirely passive. In *Kuhlman*, the defendant was placed in a cell with an informant who was told to “keep his ears open” for the names of other’s believed to have participated in the defendant’s crimes, but was instructed not to question the defendant. *Id.* at 439–40. Unlike *Henry* and *Moulton*, the informant did not actually question the defendant and it was far from inevitable that the defendant would volunteer information concerning his crimes, but he did make “spontaneous” and “unsolicited” incriminating remarks that were used against the defendant at trial. It was not sufficient to constitute state action that an informant reported the incriminating statements either voluntarily or by prior arrangement, rather the state must have been shown to take some action “beyond merely listening, that was designed deliberately to elicit incriminating remarks.” *Id.* at 459. In the corporate internal investigation context, a *Kuhlman* type situation may arise if corporate internal investigators ask an employee to be the same kind of casual listener to what other employees are saying. Evidence gathered in corporate criminal investigations, however, is more likely to be gathered through formal interviews, where corporate investigators are actively questioning witnesses and not acting as mere passive listeners, as in *Kuhlman*.

181. 385 U.S. 493 (1967). In *United States v. Henry*, 447 U.S. 264 (1980), the Supreme Court expressly rejected the government’s request to reconsider *Garrity*. *Id.* at 269 n.6.

182. *Id.* at 494.

183. *Id.* at 497.

184. *Id.* at 497–98. The Supreme Court has applied *Garrity* in the government employment occasions on numerous occasions. See, e.g., *Gardner v. Broderick*, 392 U.S. 273 (1968); *Sanitation Men v. Comm’r of Sanitation*, 392 U.S. 280 (1968).

contractors from receiving government contracts and requiring the removal from office of political party officials who invoke their right to remain silent.¹⁸⁵ As the Second Circuit explained, there is “no constitutional significance” whether the coercion is “practiced upon members of the private, as distinguished from, public sector.”¹⁸⁶ The “controlling factor” is whether “the state had involved itself in the use of a substantial economic threat to coerce a person into furnishing an incriminating statement.”¹⁸⁷

In *Stein*, Judge Kaplan applied *Garrity* to statements made by corporate employees to KPMG’s internal investigators. He explained that “an individual claiming that a statement was compelled in violation of the Fifth Amendment must adduce evidence *both* that the individual subjectively believed that he or she had no real choice but to speak *and* that a reasonable person in that position would have felt the same way.”¹⁸⁸ Judge Kaplan held an evidentiary hearing and, after which, held that the statements made by some individuals were coerced and had to be suppressed,¹⁸⁹ while the statements of others were made voluntarily and suppression of those statements would not be warranted.¹⁹⁰

The government appealed Judge Kaplan’s suppression decision, but the Second Circuit held that appeal was moot because it affirmed Judge Kaplan’s more sweeping remedy to the government’s constitutional violations of dismissing the indictment.¹⁹¹ Nevertheless, the fact that the Second Circuit did find that KPMG’s conduct attributable to the government plainly goes a long way in supporting Judge Kaplan’s suppression decision as well.¹⁹²

Unfortunately, the government appears to have limited its reforms to the Thompson Memorandum to the attorneys’ fee issues that led the Second Circuit to affirm the

185. *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977) (political parties); *Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973) (contractors).

186. *United States ex rel. Sanney v. Montanye*, 500 F.2d 411, 415 (1974).

187. *Id.* While the government cannot coerce self-incriminating statements, *see generally* *Miranda v. Arizona*, 384 U.S. 436 (1966), that does not mean that the government (or corporate investigators acting as government agents) must give the so-called *Miranda* warnings in every interview. *Miranda* warnings are required only in custodial interrogations. *See, e.g.*, *Florida v. Powell*, 130 S. Ct 1195 (2010); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). While employees being questioned may feel economic coercion to participate in an interview, it is doubtful that this situation would be regarded as a restriction of liberty tantamount to arrest, which would trigger the need for a *Miranda* warning to be given. *See, e.g.*, *United States v. Muegge*, 225 F.3d 1267, 1270 (11th Cir. 2000) (“[F]or a court to conclude that, under the totality of the circumstances, a reasonable man in the suspect’s position would feel a restraint on his freedom of movement fairly characterized as that ‘degree associated with a formal arrest’ to such extent that he would not feel free to leave.”) (*quoting* *United States v. Phillips*, 812 F.2d 1355, 1360 (11th Cir. 1987)).

188. *United States v. Stein*, 440 F. Supp. 2d 315, 328 (2006).

189. *Id.* at 331. Judge Kaplan added that prospective defendants often have to make “hard choices” and that there often is nothing wrong with that, but those circumstances were distinguished because “the government here coerced KPMG to apply pressure to . . . individual defendants in order to secure waivers of constitutional rights that the government itself could not obtain. That goes beyond the bounds of appropriate government action.” *Id.* at 333.

190. *Id.* at 333. As a point of practice, a witness or her counsel should ask the company prior to the interview whether the witness could face discipline or termination if she invoked her right to remain silent. The Fifth Amendment’s protection against self-incrimination is not self-executing and must be affirmatively asserted, unless it is established that a penalty would be attached to the assertion of that right. *See, e.g.*, *United States v. Vangates*, 287 F.3d 1315, 1320 (11th Cir. 2002).

191. *United States v. Stein*, 541 F.3d 130, 136 n.2 (2008). Without an indictment, there would be no trial and no need for the court to address the admissibility of evidence at trial.

192. The American Bar Association, former Attorney General Meese, and Senator Leahy also have expressed a concern that DOJ’s pressure on companies to fire employees who assert their Fifth Amendment problems triggers a *Garrity* problem. *Thompson Hearing, supra* note 2, at 30. Numerous scholars have raised similar concerns. *See, e.g.*, Duggin, *supra* note 111, at 386; Marks, *supra* note 3, at 1092; Morvillo & Anello, *supra* note 99, at 1.

dismissal of the indictment.¹⁹³ Without reforms that make clear that companies will not be deemed “uncooperative” unless they penalize their employees for exercising their Fifth Amendment rights, the *Garrity* problem Judge Kaplan identified will continue.¹⁹⁴ Indeed, when applied to vulnerable companies, the pressure created by the still-unmodified aspects of the Thompson Memorandum “inevitably sets in motion precisely what occurred here—the exertion of enormous economic power by the employer upon its employees to sacrifice their constitutional rights.”¹⁹⁵

CONCLUSION

Although there may be many advantages for the government enlisting the help of corporations in ferreting out corporate crime, one of those advantages should not be the circumvention of the constitutional rights of employees. The government should not be allowed to violate the constitutional right of its citizens directly or indirectly by enlisting the help of others to violate those rights. Yet courts have concluded that this has happened and it still appears to be occurring in corporate America, as the government pressures corporations to fire their employees who assert their Fifth Amendment rights to gain leverage over the employee that the government knows it could not assert directly. Having fostered a climate where companies have come to understand such conduct is expected if they want the government to deem them a “cooperator,” the government should rectify the problem by making it clearer still that corporations will not be punished for respecting their employees’ constitutional rights and will not be rewarded for violating them. If and when Congress addresses the continuing issue of corporate investigations in this area, the concerns raised by various judges, this article and other commentators should be part of a legislative solution.

193. Following the decision in *Stein*, the government wrote Judge Kaplan and stated that “the prosecutors’ conduct in this case was in accordance with established Department of Justice policy that had never before been addressed by a court.” Letter from Michael J. Garcia, U.S. Attorney, to Hon. Lewis A. Kaplan at 1 (June 30, 2006); *see also* Morvillo & Anello, *supra* note 99, at 1 (noting that DOJ pressure on companies to fire employees who exercise their Fifth Amendment rights is common). The fact that DOJ modified the Thompson Memorandum to address the attorneys’ fee issues that led to the dismissal of the indictment in *Stein*, but has not modified the policy with respect to pressuring companies to terminate employees who exercise their Fifth Amendment rights raises concern that DOJ will continue to exert that pressure.

194. The American Bar Association has urged DOJ to “eliminate these employee-related provisions from the Thompson [M]emorandum” as well. *Thompson Hearing*, *supra* note 2, at 23 (statement of Karen J. Mathis, President of the American Bar Association).

195. *Stein*, 440 F. Supp. 2d at 337. *See also* Thompson Hearings, *supra* note 2, at 23 (explaining the Thompson Memorandum “contains language that violates employees’ legal rights by pressuring their employers to take certain punitive actions against them during investigations,” including “by declining to fire or sanction them for exercising their Fifth Amendment rights”) (statement of Karen J. Mathis, President of the American Bar Association).