

CORPORATE AMERICA FIGHTS BACK: THE BATTLE OVER WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE

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Abstract: This Article addresses a topic that is the subject of an on-going and heated contest between the business lobby and its lawyers, on the one side, and the U.S. Department of Justice on the other. The fight is over federal prosecutors' escalating practice of requesting that corporations accused of criminal wrongdoing waive their attorney-client privilege as part of their cooperation with the government. The Department of Justice views privilege waiver as a legitimate and critical tool in its post-Enron battle against white collar crime. The business lobby views it as encroaching on corporations' fundamental right to protect confidential attorney-client communications. This Article seeks to transcend the feverish rhetoric dominating the debate by undertaking a careful cost-benefit approach to the matter. It concludes that the Department of Justice's recent policy statement on privilege waiver, contained in Deputy Attorney General Paul McNulty's 2006 Memorandum, merits a chance to work—with a number of important caveats that are fleshed out in the text.

INTRODUCTION

In the years leading up to the turn of the twenty-first century, the stock market was riding high.¹ Everyone was making money. Some even theorized that, because of the impact of information technology on the U.S. economy, the market might never decline again.² Pre-

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¹ For example, from 1996 to 2000, the NASDAQ composite index rose from 600 to 5000. See *Stock Market Crash, The Nasdaq Bubble*, <http://www.stock-market-crash.net/nasdaq.htm> (last visited Oct. 8, 2007).

² *Id.* ("Several economists even postulated that we were in a 'New Economy' where inflation was virtually nonexistent and the stock market crashes were obsolete!"); see also Jeff Madrick, *Enron, the Media and the New Economy*, NATION, Apr. 1, 2002, at 17 (commenting on the rhetoric of the "new economy" of the mid-1990s that fueled the inflated speculative value of information technology stocks); Steven Weber, *The End of the Business Cycle*, FOREIGN AFFAIRS, July/Aug. 1997, at 69–70.

dictably, such talk was hogwash. The soaring equity markets were the result of "irrational exuberance,"³ and in 2000, the so-called technology bubble burst.⁴ Although the result was a far cry from the Great Depression of the 1930s, many people lost a great deal of money. Individuals and institutional investors started to look for others to blame. They quickly identified culprits: corporate officers who had used "creative accounting"—that is, fraud—to pump up the value of their companies in the face of declining demand for their products.⁵ Soon, other illegal activity came to light, including the actions of corporate officers and employees who simply gave in to the greed of the times and padded their pockets with unauthorized corporate assets.⁶

The poster child for participation in this illegal activity was, of course, the energy giant Enron. The revelation of widespread fraud at Enron forced the company into bankruptcy and led to the loss of jobs and pensions for thousands of its employees.⁷ Consequently, Congress and the public called for vigorous criminal pursuit, not just of Enron,

³ The term "irrational exuberance" derives from a speech entitled "The Challenge of Central Banking in a Democracy" given by Alan Greenspan, chairman of the Federal Reserve Board, before the American Enterprise Institute at the Washington Hilton Hotel on December 5, 1996. See Robert J. Schiller, Definition of Irrational Exuberance, <http://www.irrationalexuberance.com/definition.htm> (last visited Oct. 8, 2007).

⁴ See Leslie Eaton & Jayson Blair, *Dot-Com Fever Followed by Bout of Dot-Com Chill*, N.Y. TIMES, Oct. 27, 2000, at B1; Richard W. Stevenson, *Economists Make It Official: U.S. Is in Recession*, N.Y. TIMES, Nov. 27, 2001, at C1 (noting that the National Bureau of Economic Research concluded that the U.S. economy entered a recession in March of 2001).

⁵ Some of the more high-profile tech-bubble prosecutions of this type were brought against Kenneth Lay and Jeffrey Skilling in connection with the Enron debacle. See generally ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS (Nancy P. Rapoport & Bala G. Dharan eds., 2004) [hereinafter ENRON]; see also Press Release, Sec. & Exch. Comm'n, SEC Charges Qwest Communications International Inc. with Multi-Faceted Accounting and Financial Reporting Fraud (Oct. 21, 2004), available at <http://www.sec.gov/news/press/2004-148.htm> (announcing charges against Qwest Communications); Press Release, Sec. & Exch. Comm'n, SEC Charges HealthSouth Corp. CEO Richard Scrushy with \$1.4 Billion Accounting Fraud (Mar. 19, 2003), available at <http://www.sec.gov/news/press/2003-34.htm> (announcing the indictment of Richard Scrushy of HealthSouth).

⁶ Prosecutions of this kind targeted individuals such as: Frank Bergonzi, Franklin Brown, and Martin Grass of Rite Aid, see Press Release, Sec. & Exch. Comm'n, SEC Announces Fraud Charges Against Former Rite Aid Senior Management (June 21, 2002), available at <http://www.sec.gov/news/press/2002-92.htm>; James R. Brown, Michael C. Mulcahey, James P. Rigas, John Rigas, Michael J. Rigas, and Timothy J. Rigas of Adelphia, see Press Release, Sec. & Exch. Comm'n, SEC Charges Adelphia and Rigas Family with Massive Financial Fraud (July 24, 2002), available at <http://www.sec.gov/news/press/2002-110.htm>; and Mark A. Belnick, Dennis Kozlowski, and Mark H. Swartz of Tyco, see Press Release, Sec. & Exch. Comm'n, SEC Sues Former Tyco CEO Kozlowski, Two Others for Fraud (Sept. 12, 2002), available at <http://www.sec.gov/news/press/2002-135.htm>.

⁷ See Steven Harmon Wilson, *Malefactors of Great Wealth: A Short History of "Aggressive Accounting,"* in ENRON, *supra* note 5, at 41.

but of all companies that had engaged in similar behavior.⁸ To this end, Congress passed the Sarbanes-Oxley Act in June 2002, tightening up on corporate criminal enforcement.⁹ The U.S. Department of Justice ("DOJ" or the "Department") set up an Enron Task Force to investigate and prosecute that particular case,¹⁰ and President George W. Bush ordered the creation of a Corporate Fraud Task Force to build cases against other potentially criminal corporate executives.¹¹ At the same time, U.S. Attorney's offices around the country stepped up their white collar criminal enforcement.

The federal government's efforts to ferret out and prosecute corporate criminals were remarkably successful. Over the four-year period from 2002 to 2006, federal prosecutors brought charges against more than 200 chief executive officers, company presidents, and chief financial officers, and obtained over 1100 convictions or guilty pleas in white collar cases.¹² These are staggering figures, particularly in light of the tremendous resources traditionally needed to investigate and prosecute complex fraud. DOJ's newfound success in this area, however, was not accidental. Rather, the Department had found a new and extremely powerful investigative tool: convincing corporations to cooperate by turning against their (often former) officers and employees.¹³

Prior to 1998, DOJ had no set policy regarding the prosecution of corporations, and many prosecutors did not see the point of charging an entity that, as a mere legal fiction, could not be put in jail.¹⁴ A

⁸ See Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 878 ("[T]he current enforcement climate: legislators, law enforcement authorities, and the public are united in demanding greater corporate accountability . . .").

⁹ Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C. (2000 & Supp. III 2003)).

¹⁰ See Carrie Johnson, *Task Force Found Way to Top of Enron*, WASH. POST, July 10, 2004, at E1 (discussing creation of the Enron Task Force in 2001).

¹¹ See *United States v. Stein*, 435 F. Supp. 2d 330, 337 (S.D.N.Y. 2006) ("[O]n July 9, 2002, the President issued Executive Order 13271, which established a Corporate Fraud Task Force . . .").

¹² Paul Davies & Kara Scannell, *Guilty Verdicts Provide "Red Meat" to Prosecutors Chasing Companies*, WALL ST. J., May 26, 2006, at A1; Jason McLure, *Specter Bill Seeks to Alter DOJ Corporate Fraud Investigations*, LEGAL TIMES, Dec. 8, 2006, available at <http://www.law.com/jsp/article.jsp?id=1165501515476>.

¹³ See Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and "Good Corporate Citizenship"*, 76 ST. JOHN'S L. REV. 979, 996-97 (2007) (describing how prosecutors now take an aggressive approach toward corporate cooperation).

¹⁴ See Duggin, *supra* note 8, at 868-70 (stating that, prior to the 1960s, criminal prosecution of corporations and other entities was very unusual); Simons, *supra* note 13, at 992 (noting that DOJ's 1980 Principles of Federal Prosecution said nothing about the charging of corporations, a void that was not filled until 1999).

memorandum written by then-Deputy Attorney General Eric Holder in 1998, however, changed all this.¹⁵ For the first time in its history, the Department set out a list of criteria to guide prosecutors faced with deciding whether to indict a corporate (or other collective) entity.¹⁶ Among other factors, the memorandum mentioned the importance of a corporation's cooperation with the investigation.¹⁷ It further noted that such cooperation might require the corporation to waive its attorney-client privilege and work-product protection.¹⁸ The guidelines set forth in the Holder Memorandum were later reinforced in a memorandum written by Holder's successor, then-Deputy Attorney General Larry Thompson, in 2003.¹⁹ It did not take long before companies threatened with prosecution understood that the only realistic way of avoiding indictment was to cooperate fully.

It was the increase in cooperation by corporations faced with the danger of being indicted that enabled DOJ lawyers to wrap up so many cases in record time.²⁰ Typically, upon learning that criminal behavior might be taking place in its midst, a corporation conducts an internal investigation so that it can take appropriate action.²¹ Usually conducted by counsel, either outside or in-house, the investigation leads to a report supported by witness statements, internal documents, and other evidentiary material.²² Later, upon deciding to cooperate, the corporation turns this material over to government investigators, enabling them to uncover the facts of the case far more quickly than they would using traditional methods of investigation.²³ As a result, prosecutors are able to bring prompt charges against those criminally responsible and then move on to the next case.²⁴

¹⁵ Memorandum from Eric Holder, Jr., Deputy Attorney Gen., to All Component Heads and United States Attorneys (June 16, 1999) [hereinafter Holder Memorandum], available at <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html> (including attachment entitled "Federal Prosecution of Corporations").

¹⁶ See generally Jason McClure, *Unlikely Alliance*, 53 MIAMI DAILY BUS. REV. (Dec. 20, 2006) (on file with author).

¹⁷ Holder Memorandum, *supra* note 15.

¹⁸ *Id.*

¹⁹ Memorandum from Larry D. Thompson, Deputy Attorney Gen., to Heads of Department Components and U.S. Attorneys (Jan. 20, 2003) [hereinafter Thompson Memorandum], available at http://www.usdoj.gov/dag/cfif/corporate_guidelines.htm.

²⁰ See Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1170-71 (2006); McClure, *supra* note 16.

²¹ See Duggin, *supra* note 8, at 863-64.

²² See *infra* notes 104-109 and accompanying text.

²³ See *infra* notes 104-109 and accompanying text.

²⁴ McClure, *supra* note 16.

Not surprisingly, DOJ's enhanced success was not well received within the corporate world. As high-profile corporate executives fell in domino-like fashion, corporations themselves bristled under the pressure to cooperate or face indictment. Soon, a backlash against white collar prosecutions began to take shape. The imperative to maintain a positive public image meant that Corporate America could not directly complain about governmental success in flushing out white collar criminality. So, instead, corporations took aim at the government's tactics. In particular, the business lobby, represented by the U.S. Chamber of Commerce and other groups, initiated a public campaign against DOJ's increasing insistence on the waiver of attorney-client privilege²⁵ and work-product protection²⁶ as part of an entity's cooperation.²⁷ Joining forces with its attorneys, represented by the American Bar Association (the "ABA"),²⁸ the Association of Corporate Counsel,²⁹ and the National Association of Criminal Defense Attorneys, the business lobby complained that DOJ had created a "culture of waiver"³⁰ that threat-

²⁵ The attorney-client privilege protects against disclosure of communications between an attorney and a client who is seeking or receiving legal advice. See *United States v. U.S. Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950); see also John F.X. Peloso & Jeffrey D. Brooks, *The Thompson Memorandum vs. the Attorney-Client Privilege: Where Things Stand*, 1 White Collar Crime Rep. (BNA) No. 19, at 623 (Oct. 13, 2006) (describing contours of privilege).

²⁶ The work-product doctrine protects an attorney's work product—thoughts, mental impressions, and strategies—against disclosure in a litigious setting unless the opposing party can show an extraordinary need. See *Hickman v. Taylor*, 329 U.S. 495, 508-09 (1947); see also Peloso & Brooks, *supra* note 25, at 624. From this point forward, this Article will employ the term "attorney-client privilege" to include that privilege as well as work-product protection because, for the issues raised herein, there is no need to distinguish between the two.

²⁷ See McClure, *supra* note 16.

²⁸ The ABA set up a Task Force on the Attorney-Client Privilege in October 2004. Although the mission of the Task Force was ostensibly to examine the balance between the privilege and competing interests, the position it would take was undoubtedly a *fait accompli*: the press release announcing the creation of the Task Force was titled "ABA President Robert Grey Creates Task Force to Advocate for Attorney Client Privilege." See Peloso & Brooks, *supra* note 25, at 625 (emphasis added). In August 2005, the ABA House of Delegates unanimously adopted a resolution opposed to the practice of privilege waiver. *Id.* at 626. See generally *American Bar Association Task Force on Attorney-Client Privilege Report to House of Delegates*, in 38TH ANNUAL INSTITUTE ON SECURITIES REGULATION (PLI Corp. Law and Practice Course Handbook Series No. 9151, 2006), WL 1571 PLI/Corp 723.

²⁹ See Peloso & Brooks, *supra* note 25, at 626 (describing the actions taken by the Association of Corporate Counsel in opposition to privilege waiver).

³⁰ See Leonard Orland, *The McNulty Memorandum: Not a Real Remedy*, NAT'L L.J., Jan. 1, 2007, at 27 (discussing the Senate Judiciary Committee hearings in September 2006, during which "a broad coalition of business and legal organizations argued that the Thompson memo created a 'culture of waiver'"); Edward Iwata, *Justice Toughens Rules on Corporate Probes*, USA TODAY, Dec. 13, 2006, at 1B (quoting Frederick J. Krebs, President of the Association of Corporate Counsel, as claiming that the McNulty Memorandum "will not put an

ened the very existence of the time-honored attorney-client privilege.³¹ By framing the issue as one of the government intruding on fundamental rights, the business lobby was able to attract liberal groups such as the American Civil Liberties Union into its coalition, unimaginatively named the Coalition to Preserve the Attorney-Client Privilege (the "Coalition").³² The battle over attorney-client privilege waiver was thus underway.

At first, the Department stood its ground. But the combination of business, lawyers, and civil rights groups proved too strong a force to resist. The Coalition took its case to Congress, prompting hearings at which the new Deputy Attorney General, Paul McNulty, found himself under sustained attack.³³ Soon thereafter, Senator Arlen Specter introduced a bill that would prohibit government attorneys from asking a corporation to waive its attorney-client privilege or using its failure to waive as a factor in deciding whether to bring charges or determine its degree of cooperation.³⁴ Reading the handwriting on the wall,³⁵ on December 12, 2006, McNulty issued a revised memorandum on the sub-

end to the 'culture of waiver' that exists within the DOJ"). Waiver critics support their "culture of waiver" characterization by pointing to a March 2006 study by the Association of Corporate Counsel and the National Association of Criminal Defense Lawyers, which revealed that seventy-five percent of corporate counsel believed that prosecutors routinely demanded waiver of privilege as evidence that a company was cooperating. See McClure, *supra* note 16. In light of the obvious bias of the surveyors and the population surveyed, this statistic is meaningless. Moreover, the survey was conducted prior to the McNulty Memorandum's adjustments to prior policy.

³¹ See McClure, *supra* note 16 (stating that the "Coalition to Preserve the Attorney-Client Privilege . . . could easily be cast as an alliance of big business and defense lawyers merely pushing back at an aggressive government crackdown on fraud").

³² *Id.* The Coalition was also able to garner the support of ten former senior DOJ officials, including a number of former U.S. Attorneys General. See *Former Federal Prosecutors Want Changes in DOJ Client Privilege Policy*, 75 U.S. L. Wk. (BNA) 2131, 2131-32 (Sept. 12, 2006). This was a public relations coup. No one pointed out, however, that many of the former DOJ officials were now working in the private sector representing big business; one suspects, but cannot prove, that others signed on to the cause based upon the vast array of groups and individuals who were already on board, without giving the issue a great deal of critical thought.

³³ See *The Thompson Memorandum's Effect on the Right to Counsel Corporate Investigations: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 835 (2006); McClure, *supra* note 16, at *3-4; see also Peloso & Brooks, *supra* note 25, at 627-28 (describing House Judiciary subcommittee hearings held on March 7, 2006, and Senate Judiciary Committee hearings held on September 12, 2006).

³⁴ Technically, the bill was not formally introduced; instead, Senator Specter brought it to the Senate floor and placed it in the Congressional Record. 152 CONG. REC. S11438-39 (daily ed. Dec. 7, 2006) (statement of Sen. Specter).

³⁵ See *Attorney-Client Privilege: Revised DOJ Policy Limits Consideration of Privilege Waivers in Criminal Matters*, 1 White Collar Crime Rep. (BNA) No. 24, at 763 (Dec. 22, 2006) (noting that the new policy was in response to widespread and mounting criticism).

ject to all DOJ attorneys.³⁶ The McNulty Memorandum makes clear that (1) a corporation can cooperate without waiving its privilege if it can provide the necessary information through other means; (2) waiver requests should be made only if there is a "legitimate need"; and (3) waiver requests require high-level supervisory approval, which varies depending upon the sensitivity of the information sought.³⁷

The McNulty Memorandum failed in its bid to satisfy Coalition members. They stated that it did not go far enough and claimed that the proper resolution of the issue was a total ban on waiver requests, as provided in the Specter bill.³⁸ As a result, Specter reintroduced his proposed legislation at the opening of the next Congress.³⁹ The battle over attorney-client privilege waiver rages on.

This Article joins the fray. As the Introduction suggests, this Article is skeptical toward the motives of those who seek to remove the powerful weapon of waiver requests from the prosecution's arsenal. At the same time, it recognizes that the attorney-client privilege is central to the American system of justice because of the critical functions it serves. Certain prosecutorial tactics during the Thompson Memorandum era did go too far in upsetting the balance between governmental power and individual rights. The goal of this Article is to go beyond the rhetoric resorted to by individuals on both sides of the debate and examine, fairly and in detail, the ramifications of privilege waiver.⁴⁰ The point of reference is the public's best interest, meaning

³⁶ See generally Memorandum from Paul J. McNulty, Deputy Attorney Gen., to Heads of Department Components and U.S. Attorneys (Dec. 12, 2006) [hereinafter McNulty Memorandum], available at http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

³⁷ *Id.* at 8–10.

³⁸ See Marcia Coyle, *The "McNulty Memo": Real Change or Retreat?*, NAT'L L.J., Dec. 18–20, 2006, at 25 (discussing reactions to the McNulty Memorandum); Andrew Weissmann & Ana R. Bugan, *The McNulty Memorandum*, NAT'L L.J., Feb. 5, 2007, at 12 (arguing that the McNulty Memorandum does not go far enough); Press Release, Am. Bar Ass'n, Statement by ABA President Karen J. Mathis Regarding Revisions to the Justice Department's Thompson Memorandum (Dec. 12, 2006), <http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=59> (stating that the McNulty Memorandum is "but a modest improvement" that "falls far short" of what is needed to prevent further erosion of the attorney-client privilege).

³⁹ Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007). When reintroducing the legislation, Senator Specter stated that "[t]here is no need to wait and see how the McNulty memorandum will operate in practice. The flaws in that memorandum are already apparent." *Sen. Specter Continues Efforts to Force DOJ to Stop Seeking Corporate Waiver of Privilege*, 1 White Collar Crime Rep. (BNA) No. 26, at 827 (Jan. 19, 2007) [hereinafter *Sen. Specter Continues Efforts*].

⁴⁰ This Article will refer to the process through which federal prosecutors ask for or demand that a corporation waive its attorney-client privilege to get the full benefit of cooperation simply as "privilege waiver." In so doing, it declines to adopt the more biased

the interest of taxpayers and shareholders, not the narrow interest of corporations, corporate or defense counsel, or federal prosecutors. The conclusion is that the new position staked out by the Department in the McNulty Memorandum, with some important caveats, deserves a chance to work.⁴¹

Part I of this Article sets out and defends the fundamental proposition that, given the right set of circumstances, the power to prosecute a corporate entity and the corporation's resultant cooperation are public goods.⁴² Part II examines in detail how full cooperation by a corporation often requires it to waive its attorney-client privilege.⁴³ In Part III, the Article addresses the arguments typically raised against privilege waivers, including: (1) they will result in fewer internal corporate investigations; (2) they will decrease the effectiveness of internal investigations because corporate employees will not speak with counsel; (3) as a result of factors (1) and (2), they will actually increase overall corporate criminality; and (4) they will erode corporate employees' rights under the Fifth and Sixth Amendments to the U.S. Constitution.⁴⁴ This Part will demonstrate that, although there is some legitimate basis for concern, these arguments do not compel a blanket prohibition against waiver requests.⁴⁵ Rather, they indicate that certain good practices by corporate counsel, extending beyond the present ethical requirements, are necessary to protect the rights of employees caught in the midst of an internal investigation. In addition, these arguments highlight the necessity of tempering prosecutorial zeal in this arena by making waiver requests a last resort rather than a precondition to cooperation. More-

terminology of "coerced privilege waiver" employed by other commentators. See, e.g., Robert J. Jossen & Phillip M. Meyer, *Recent Developments in Securities Cases and Investigations*, in SECURITIES LITIGATION & ENFORCEMENT INSTITUTE 2006, at 953 (PLI Corp. Law and Practice Course Handbook Series No. 8805, 2006), WL 1557 PLI/Corp 933.

⁴¹ *The McNulty Memorandum's Effect on The Right to Counsel in Corporate Investigations: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Security of the Comm. on the Judiciary*, 17-23 (2007) (statement of Barry M. Sabin, Deputy Assistant Att'y Gen., Criminal Div., Dep't of Justice) [hereinafter Statement of Barry M. Sabin]. Although this Article focuses on the DOJ's position regarding privilege waiver and its effect on criminal prosecutions, it is noted that other government agencies, such as the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Environmental Protection Agency, the Department of Defense, and the Department of Health and Human Services, have adopted similar policies on privilege waiver in connection with their civil enforcement authority. See Liesa L. Richter, *Corporate Salvation or Damnation? Proposed New Federal Legislation on Selective Waiver*, 76 FORDHAM L. REV. 129, 141-42 (2007).

⁴² See *infra* notes 48-120 and accompanying text.

⁴³ See *infra* notes 121-146 and accompanying text.

⁴⁴ See *infra* notes 147-232 and accompanying text.

⁴⁵ See *infra* notes 147-232 and accompanying text.

over, these arguments point the way to an area of real concern: where prosecutors and a cooperating corporation team up in real time to pressure employees to waive their constitutional protections, thus exercising a force that neither player could muster without the other. This practice, which so exorcised Judge Lewis Kaplan in the 2006 case of *United States v. Stein*,⁴⁶ should, indeed, be proscribed. It is the subject of Part IV.⁴⁷

I. CORPORATE PROSECUTIONS

A. *Constitutional Authority, Doctrinal Requirements, and Discretionary Factors*

The U.S. Supreme Court upheld the constitutionality of corporate criminal prosecution in the 1909 case of *New York Central & Hudson River Railroad v. United States*.⁴⁸ According to subsequent case law, a corporation is liable for the criminal acts of any of its agents or employees if the agent committed the crime within the scope of employment and acted, at least in part, for the benefit of the corporation.⁴⁹ The breadth of this definition provides prosecutors with vast discretion to determine whether, and under what circumstances, to charge a corporation for criminality in its midst. No one would seriously argue, for example, that Best Buy should face indictment if one of its sales assistants, angling for a promotion, were discovered lying to customers about the quality of a given product to increase revenues in the employee's department. On the other hand, it would be hard to argue against the indictment of a corporation whose officers and directors were personally engaged in wholesale fraud against the consuming or investing public. Determining the exact point at which a company should be charged for the acts of its employees, however, is a very difficult undertaking.

⁴⁶ 435 F. Supp. 2d at 344–45.

⁴⁷ See *infra* notes 233–269 and accompanying text.

⁴⁸ 212 U.S. 481, 481–82 (1909). One of the arguments before the Court in this case was that, as fictitious entities, corporations could not, by definition, form criminal intent. *Id.* at 492–93. The Court, of course, rejected this contention. *Id.* at 494–95. For a fascinating discussion of how corporations are more than simply the sum of the individuals who make their parts, and thus how they can “do” things (including have intentions and break the law), see John Braithwaite & Brent Fisse, *On the Plausibility of Corporate Crime Control*, in *WHITE COLLAR CRIME: CLASSIC AND CONTEMPORARY VIEWS* 432–49 (Gilbert Geis et al. eds., 3d ed. 1995).

⁴⁹ See *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 970–71 (D.C. Cir. 1998), *aff'd on other grounds*, 526 U.S. 398 (1999); *United States v. Am. Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204–05 (3d Cir. 1970).

Until the very end of the twentieth century, DOJ provided federal prosecutors with little guidance for determining how to exercise their discretion in this critical arena. This changed in 1999, when then-Deputy Attorney General Eric Holder issued a memorandum to Department attorneys on the subject.⁵⁰ In 2003, then-Deputy Attorney General Larry Thompson issued a memorandum of his own that affirmed and refined the principles of the Holder version.⁵¹ The Thompson Memorandum laid out nine factors that a prosecutor should weigh when deciding whether to indict a corporation: (1) the nature and seriousness of the offense, including the risk of harm to the public; (2) the extent to which the wrongdoing was pervasive in the company, and whether high level management was complicit in it; (3) whether the corporation was a recidivist; (4) whether the corporation had taken steps voluntarily to disclose the wrongdoing, and the extent of its willingness to cooperate in the investigation of individuals, including the extent to which it was willing to waive attorney-client privilege and work-product protection, if necessary; (5) whether the corporation had a tough compliance program in place; (6) the extent to which the corporation took remedial action once the criminality was discovered; (7) the extent to which innocent people, such as employees and shareholders, would suffer disproportionate harm from criminal enforcement; (8) whether the prosecution of individuals responsible for the malfeasance would be adequate; and (9) whether civil remedies existed and would suffice.⁵²

B. *Public Benefits of Corporate Criminal Liability*

Setting aside for a moment the factors bearing on cooperation, if the other factors line up the right way, prosecution (or at least the threat of prosecution) of the corporate entity is in the public's interest. Specifically, if (1) the criminality was serious, pervasive, and high-reaching, (2) criminal prosecution would not unduly harm investors and consumers, and (3) other remedies are either unavailable or insufficient, then corporate criminal liability furthers a number of critical social goods.⁵³

As an initial matter, corporate culpability achieves significant additional deterrence, specific and general, beyond that achieved solely by

⁵⁰ See generally Holder Memorandum, *supra* note 15.

⁵¹ See generally Thompson Memorandum, *supra* note 19.

⁵² *Id.* at 2-3.

⁵³ See *infra* notes 54-59 and accompanying text.

the prosecution of individuals. Specifically, corporate liability deters corporate officers from creating an atmosphere in which mid- and lower-level employees know that criminal conduct is either tolerated or encouraged, but which shields the officers themselves from liability.⁵⁴ High-level management can generate this situation in a number of ways; one method is to set sales or other targets so high that they cannot be met through legal means and then fire or demote employees who fail to meet these unrealistic targets.⁵⁵ Employees quickly understand what they need to do to keep their jobs and get promoted, while management hides behind a veil of plausible deniability. Later, if criminal proceedings are initiated and lower-level employees get caught, management can point to the fact that it never sanctioned criminal activity and was not aware of its existence. It can go even further and throw a couple of minor employees to the prosecution wolves, claiming that they were rogues and that their termination (and prosecution) has cured the problem. Meanwhile, the managers—the true rogues—continue their way up the sleazy corporate ladder.

Entity prosecution helps to reverse this equation. If managers obliquely encourage widespread criminality and the entity gets caught, prosecution of the corporation means that the entity will pay a price. It will suffer a loss of reputation and perhaps even lost revenues, monetary penalties, and debarment. Harm to the corporation means harm to the officers. They may lose their jobs or at least suffer monetary losses such as a reduction in the value of their stock portfolios and perhaps the loss of future salary increases or bonuses. Certainly, their professional reputations will be forever tainted. Given these prospects, preventing—as opposed to encouraging—criminality within the corporation looks to the officers like the better path to choose.

Of course, nothing deters a white collar criminal more than the prospect of serving time in prison. Thus, for deterrence purposes, prosecutors place an emphasis on having both tools at their disposal:

⁵⁴ See FRANCIS T. CULLEN ET AL., *CORPORATE CRIME UNDER ATTACK* 352 (1987) ("The existence of corporate criminal liability also provides an incentive for top officers to supervise middle- and lower-level management more closely.").

⁵⁵ See *United States v. C.R. Bard, Inc.*, 848 F. Supp. 287, 291 (D. Mass. 1994) ("This is a case in which a pervasive and powerful corporate culture exalted the value of profit above the value of human life."); see also John Greenwald, *Rank and Fire*, *TIME*, June 18, 2001, at 38 (noting that Enron had the policy of annually firing the bottom fifteen percent of its workforce regardless of their performance).

individual liability, when it can be proved, and corporate liability as a vital complement to it.⁵⁶

Corporate liability also plays an important role in the area of victim restitution. Often, white collar prosecutions involve millions—even hundreds of millions or billions—of dollars of fraud.⁵⁷ Convicted individuals rarely have at their disposal anything near the amount of money necessary to pay restitution to the victims of the crime. The corporate entity, however, is a potential deep pocket. Given that the risk of corporate criminality is priced into the market, it is not unfair to make the entity (and thus its shareholders) responsible for repaying the victims, if possible.⁵⁸

In addition, the threat of criminal liability gives corporations an incentive to set up compliance programs with real teeth in them. Absent criminal liability, the decision whether to comply with the law is simply a matter of dollars and cents: is compliance more or less costly than the cost of fines and penalties (multiplied by the risk of getting caught)? Criminal liability, with its negative stigma, raises the stakes to a higher level, and one much more difficult to measure. It is hard to estimate in advance the degree to which a criminal conviction will harm a corporation's bottom line; indeed, in the very rare case, criminal conviction can effectively be a "death penalty."⁵⁹ The resultant uncertainty undoubtedly makes corporate officers much more risk adverse, increas-

⁵⁶ See *C.R. Bard*, 848 F. Supp. at 290 ("It is . . . essential in a case like this [where corporate fraud caused great risk to the public] . . . that individuals, as well as corporations be the target of criminal prosecution.").

⁵⁷ For example, some have estimated the Enron fraud to be in the neighborhood of \$20 billion. See William Lerach & Al Meyerhoff, *Why Insiders Get Rich, and the Little Guy Loses* (Jan. 20, 2002), <http://www.enronfraud.com/insidervslittle.html>. WorldCom paid a fine of \$750 million based upon its estimated \$11 billion fraud, and Qwest Communications paid a \$250 million fine based upon its fraudulent accounting amounting to \$3.8 billion. See *Settlement News: Qwest Engaged in Fraud, SEC Says—Regulators Claim Misdeeds Were Led by Top Officials; Firm to Pay \$250 Million Fine*, WALL ST. J., Oct. 22, 2004, at A3. Fraud of this magnitude is not confined to securities cases: Columbia/HCA settled its healthcare fraud case with the government in 2000 for \$745 million. See *Columbia/HCA Settles Fraud Charge*, CBS NEWS, May 18, 2000, <http://www.cbsnews.com/stories/2000/05/18/national/main197023.shtml>.

⁵⁸ Although not classically considered a goal of the criminal justice system, restitution has become an increasingly important function in recent years. See *Criminal Restitution Improvement Act of 2006: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Committee on the Judiciary*, 109th Cong. 1 (2006) (statement of Rep. Howard Coble) (claiming that restitution "plays a critical role in the deterrence and rehabilitation of offenders").

⁵⁹ Though this does not happen nearly as often as those opposing attorney-client privilege waiver like to claim. See *infra* notes 86–98 and accompanying text (discussing Arthur Andersen case).

ing the attractiveness of implementing procedures and hiring experts to assure legal and regulatory compliance.

Finally, the threat of entity liability provides prosecutors with leverage to encourage the corporation to cooperate with the investigation. Because this issue bears directly on the heart of the matter—attorney-client privilege waivers—it is taken up separately in the next Section.⁶⁰

C. Public Benefits of Corporate Cooperation

1. Costs of Prosecuting White Collar Crime

The prosecution of white collar crime can be slow, resource-intensive work. There are numerous reasons for this. First, the crime itself is often very complex.⁶¹ Indeed, sophisticated white collar criminals frequently do all they can to add to the complexity of their crime by disguising what they did beneath layers of accounting tricks, false or fraudulent transactions, deleted records, and second sets of books.⁶² In a case of any significance, investigators might face hundreds of thousands—if not millions—of pages of documents, increasingly in electronic form, that they must sort through to unravel the criminal behavior.⁶³ This work might take a team of investigative agents, at least some of whom are trained accountants, and one or more prosecutors years to carry out.⁶⁴

⁶⁰ See *infra* notes 61–101 and accompanying text.

⁶¹ See Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. Rev. 311, 340 (2007) (noting complexity of corporate fraud).

⁶² See Jim McGee, *War on Crime Expands U.S. Prosecutors' Powers: Aggressive Tactics Put Fairness at Issue*, WASH. POST, Jan. 10, 1993, at A1 (quoting former Attorney General Richard Thornburgh as stating, "You're trying to get every edge you can on those people who are devising increasingly more intricate schemes to rip off the public . . .").

⁶³ See, e.g., *United States v. Stein*, 435 F. Supp. 2d 330, 362 (S.D.N.Y. 2006) (describing how discovery in this tax fraud case amounted to 5 to 6 million pages of documents plus transcripts of 335 depositions and 195 income tax returns); James Bandler & Kara Scannell, *In Options Probes, Private Law Firms Play Crucial Role: As More Than 130 Companies Come Under Scrutiny, Government Relies on Help*, WALL. ST. J., Oct. 28, 2006, at A1 (noting that, during the internal investigation into allegations of options back-dating by UnitedHealth Group, counsel examined almost 4 million documents and conducted roughly 80 interviews); Statement of Stephen S. Trott, Assistant Attorney Gen., Criminal Div., Before the Subcomm. on Crime of the H. Comm. on the Judiciary, Concerning E.F. Hutton Case, Dec. 6 & 11, 1985, reprinted in KATHLEEN F. BRICKEY, *CORPORATE AND WHITE COLLAR CRIME, CASES AND MATERIALS* 734, 734 (4th ed. 2007) ("The investigation covered 3 years and ultimately involved the analysis of 7,000,000 documents.").

⁶⁴ See *Stein*, 435 F. Supp. 2d at 371 ("The government has spent years investigating the case, presumably reviewing millions of pages of documents and interviewing scores of witnesses if not more.").

Second, white collar cases are often not open and shut. Many times, the key question will be whether the individual defendants, and thus the corporation, harbored the requisite criminal intent.⁶⁵ The typical defendant will plead good faith or advice of counsel.⁶⁶ Specifically, the defendant might claim that the action in question was a close accounting call, but that he was comfortable it fell on the right side of the law. Alternatively, the defendant will contend that he approved the transaction, or the manner in which it was recorded on the company's books and records, only after carefully consulting with the corporation's accountants and legal counsel. In cases in which the prosecution alleges that the defendant stole from the company, the defendant is very likely to claim that the compensation at issue was approved by the board of directors, or that some other corporate employee was the true culprit.⁶⁷

These kinds of defenses are unique to white collar crimes; a bank robber, for instance, cannot plead ignorance of the law⁶⁸ or claim that the bank approved of his (illicit) withdrawal.⁶⁹ Moreover, these defenses are difficult to overcome. At minimum, they require extensive interviews with the accountants, lawyers, and directors involved. If these individuals are not inclined to be cooperative, they must be subpoenaed to the grand jury and perhaps even granted immunity. This process can

⁶⁵ See Gilber Geis et al., *Medicaid Fraud*, in *WHITE COLLAR CRIME: CLASSIC AND CONTEMPORARY VIEWS*, *supra* note 48, at 250 (quoting a Medicaid fraud investigator claiming that intent is the most difficult thing to prove in such cases). See generally Michael L. Seigel, *Bringing Coherence to Mens Rea Analysis for Securities-Related Offenses*, 2006 Wis. L. Rev. 1563 (discussing the criminal intent necessary to prove several securities-related criminal offenses).

⁶⁶ See Seigel, *supra* note 65, at 1609–10 (discussing good faith and advice of counsel defenses).

⁶⁷ For example, Dennis Kozlowski employed the former defense in the Tyco case. See Dan Ackerman, *Tyco Trial II: Verdict First, Law Second*, FORBES.COM, June 17, 2005, http://www.forbes.com/business/2005/06/17/kozlowski-tyco-verdict-cx_da_0617tycoverdict.html (discussing the jury's rejection of Kozlowski's defense that what he took from the company was authorized).

⁶⁸ In general, ignorance or mistake of the criminal law is not a defense. See *People v. Marrero*, 507 N.E.2d 1068, 1070 (N.Y. 1987); MODEL PENAL CODE § 2.02(9) (1962). In certain types of white collar cases, including securities fraud tax fraud, it is. See *Cheek v. United States*, 498 U.S. 192, 198 (1991) (holding that prosecution must prove that defendant knew he was violating tax code for criminal conviction); Seigel, *supra* note 65, at 1579–80 (analyzing statutes and cases and concluding that for securities crimes the term "willfully" imports a "weak" mistake of law defense).

⁶⁹ See Ackerman, *supra* note 67 (discussing the *Tyco II* trial, in which "board members testified that they had no intention of paying certain bonuses or permitting the company to buy Kozlowski multimillion-dollar homes, as it did. The jury apparently believed the board members and disbelieved Swartz and Kozlowski . . .").

take months and even years.⁷⁰ In addition, overcoming typical white collar defenses requires prosecutors to seek the advice of experts in the field and prepare the experts for possible testimony at trial.⁷¹

Third, white collar defendants, especially major corporations and the individuals associated with them, usually have the resources to hire excellent attorneys who specialize in white collar criminal defense.⁷² These attorneys have the ability to slow down an investigation to a considerable extent if they so choose. They can object to subpoenas *duces tecum* on a whole host of grounds, forcing repeated hearings relating to subpoena enforcement.⁷³ They can claim attorney-client privilege and work-product protection of the documents subject to a subpoena, requiring the establishment of a system to filter out challenged documents to obtain a ruling from the court before government agents may see them.⁷⁴ Defense counsel can advise their clients not to give voluntary statements to government investigators and to exercise their Fifth Amendment right not to testify before the grand jury absent immunity.⁷⁵ If they are coordinating their efforts through a joint defense agreement, counsel can ensure that this lack of cooperation is widespread, if not universal, forcing prosecutors to decide which potential witnesses to immunize in a situation of substantial uncertainty—something they are hesitant to do.⁷⁶ Unless it is fueled by a whistleblower or other inside information, these tactics can slow an investigation to a snail's pace, and perhaps even cause it to stall altogether.

⁷⁰ See, e.g., Bandler & Scannell, *supra* note 63.

⁷¹ See P.J. Meidl, *Who's the Boss? Prosecutorial Involvement in Corporate America*, 34 N. KY. L. REV. 1, 25 (2007).

⁷² The corporation will, of course, be able to tap into its revenues to pay its attorneys; in addition, employees and agents of the corporation may be entitled to indemnification of attorneys' fees, meaning that they can get far more expensive representation than they might personally be able to afford. See Stein, 435 F. Supp. 2d at 340.

⁷³ See JEROLD H. ISRAEL ET AL., WHITE COLLAR CRIME: LAW AND PRACTICE 347-73, 648-93 (2d ed. 2003) (describing various objections to grand jury subpoenas).

⁷⁴ See *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 117-18 (2006) (statement of Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice) [hereinafter Statement of Paul J. McNulty] (discussing how corporate counsel can use privilege as a sword if they so choose).

⁷⁵ See *Counselman v. Hitchcock*, 142 U.S. 547, 559 (1892) (holding that the Fifth Amendment applies to grand jury proceedings); see also ISRAEL ET AL., *supra* note 73, at 600-47 (discussing testimonial act of production privilege).

⁷⁶ See Richard M. Cooper, *A Closer Look at the ABA's Opposition to the Thompson Memo*, BUS. CRIMES BULLETIN, Nov. 17, 2006, <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1163671527732> (discussing joint defense agreements).

One observer calls this the "delaying game"⁷⁷ and describes it in part as follows:

A corporation will often refuse to voluntarily turn over data and documents requested by government regulatory agencies, thus forcing a time-consuming legal battle to obtain the information. If a court orders that the information actually be divulged, the alternative tactic of "overcompliance" is commonly used Our review of the antitrust actions against the petroleum industry showed how that industry used an almost endless chain of legal appeals and maneuvers to bog down understaffed government agencies. The effectiveness of this tactic can be seen in the FTC's capitulation in the Exxon case, when the government openly admitted that it gave up because the case would take too long to pursue.⁷⁸

Fourth, the difficult nature of white collar investigation means that it often must be prosecuted bit by bit, as prosecutors unravel the wrongdoing and work their way up the corporate ladder.⁷⁹ Charges are first brought against the lower-level employees, who are much more likely to have been caught red-handed, with the hope that their indictment or conviction will lead to cooperation against mid-level management. If this succeeds, the mid-level managers are prosecuted with the hope that they will implicate responsible corporate officers at the highest level. If so, prosecutors can finally bring these individuals to justice. The whole process can take many years;⁸⁰ even then, pleading ignorance or good faith, the highest level managers undoubtedly have the best chance of either escaping conviction⁸¹ or having their conviction overturned on appeal.⁸²

⁷⁷ JAMES WILLIAM COLEMAN, *THE CRIMINAL ELITE: UNDERSTANDING WHITE COLLAR CRIME* 172 (5th ed. 2002).

⁷⁸ *Id.* at 172-73.

⁷⁹ An example of this process at work is the Enron investigation. Prosecutors made cases against lower level employees until they were finally in a position to indict (and convict) Jeffrey Skilling, the CFO, and Kenneth Lay, the CEO. See Johnson, *supra* note 10 (describing how the Enron Task Force worked its way up Enron's chain of command).

⁸⁰ The process took two and half years in the Enron case. See *id.*

⁸¹ For example, in a result that shocked many, HealthSouth founder and CEO Richard M. Scrushy was acquitted of all charges using this defense. See Carrie Johnson, *Jury Acquits HealthSouth Founder of All Charges*, WASH. POST, June 29, 2005, at A1 (reporting on acquittal and reactions to it).

⁸² See, e.g., *United States v. Whiteside*, 285 F.3d 1345, 1346 (11th Cir. 2002) (reversing Medicare fraud convictions of high level corporate defendants on grounds that the regula-

If the cases are not settled through guilty pleas, each jury trial in a white collar case is likely to be time-consuming and expensive. Prosecutors almost inevitably must introduce a massive amount of documentary evidence, along with the testimony of dozens of witnesses, often including forensic accounting and other experts. Highly paid defense counsel will conduct extensive and often effective cross-examinations of the government's witnesses. After the government rests, the defense is very likely to put on a case of its own. In light of the fact that the defendant probably has no prior criminal record and may even be an upstanding citizen of the community (apart from the criminal conduct alleged in the case), she is free to take the witness stand to proffer her ignorance or good faith defense. Defense experts may be called to rebut the opinions of the prosecution experts. Sometimes, defense counsel will line up a parade of good character witnesses to testify to the defendant's honest, law-abiding nature.⁸³

Critics of privilege waiver frequently refer to the power of the federal government and the vast tools at its disposal to crush corporate criminal defendants who fail to cooperate.⁸⁴ They contend that the mere indictment of a company can easily be a death sentence, giving prosecutors far too much leverage to coerce corporations into pre-indictment cooperation and waiver.⁸⁵ Often they bolster this argument by reference to the prosecution of the accounting firm Arthur Andersen in connection with its role in the Enron affair.⁸⁶ After refusing to cooperate, Andersen was indicted for obstructing justice by destroying an untold number of documents when it learned that the Securities and Exchange Commission (the "SEC") was contemplating an investigation of Enron's accounting practices.⁸⁷ Immedi-

tions were too vague to support mens rea of knowingly and willfully submitting false documents).

⁸³ See FED. R. EVID. 404(a) (permitting criminal defendants to put on evidence of their good character).

⁸⁴ See Richter, *supra* note 41, at 13 ("Several groups suggest that corporate clients are unable to resist the pressure for waivers from the behemoth power that is the Department of Justice, making waivers by cooperating companies coerced and involuntary.").

⁸⁵ See Orland, *supra* note 30, at 27 (noting that "faced with the stark reality that corporate indictment could mean corporate death, corporations now routinely capitulate"); Wray & Hur, *supra* note 20, at 1097 ("Because indictment often amounts to a virtual death sentence for business entities . . .").

⁸⁶ See Orland, *supra* note 30, at 27; Wray & Hur, *supra* note 20, at 1097.

⁸⁷ See *Arthur Andersen, LLP v. United States*, 544 U.S. 696, 698-702 (2005) (setting forth the facts of at issue); see also *Arthur Andersen Indicted in Enron Probe*, NEWSMAX.COM WIRES, Mar. 15, 2002, <http://www.newsmax.com/archives/articles/2002/3/14/170156.shtml> (discussing *Arthur Andersen* allegations in indictment).

ately upon indictment, Andersen's clients abandoned ship and, not long after, the firm collapsed.⁸⁸ Waiver critics often note that Andersen's conviction was overturned by the Supreme Court,⁸⁹ implying that the entire prosecution was ill-founded and that Andersen was thus "hanged" without cause.⁹⁰

Despite the claims of critics, the Andersen case provides little support for their position. The collapse of the firm as a result of being indicted was the exception, not the rule. The best evidence of this is the huge number of corporations that have been charged (or have settled charges) over the years that have lived on to produce their widgets for another day.⁹¹ Andersen's situation was unique because, as a firm specializing in public accounting, it was subject to the loss of its ability to conduct public audits upon conviction.⁹² The value of an audit to a publicly traded company rests on the reputation of the firm certifying it. Once Andersen was indicted, its clients no longer believed it had the credibility necessary to do its job—even if it were eventually exonerated.⁹³ These factors are simply not present in the run-of-the-mill corporate case.

In addition, Andersen suffered because it was a multiple recidivist: it had recently settled with the government in connection with numer-

⁸⁸ See Stephen Taub, *Abandon Ship? More Companies Bail on Andersen*, CFO.COM, Feb. 13, 2002, <http://www.cfo.com/article.cfm/3003418?f=search>.

⁸⁹ *Arthur Andersen*, 544 U.S. at 707–08 (reversing conviction and remanding case).

⁹⁰ See Griffin, *supra* note 61, at 327, 340–42, (referring to *Arthur Andersen* in arguing that companies have no bargaining power against the government; claiming that the Supreme Court's opinion contained a subtext that "not quite all is fair in the war on corporate crime").

⁹¹ See, e.g., Russell Mokhiber, *Top 100 Corporate Criminals of the Decade*, CORP. CRIME REP., <http://www.corporatecrimereporter.com/top100.html> (last visited Oct. 12, 2007) (listing top 100 corporate criminals of the 1990s, with many on the list—including Exxon; Archers Daniel Midland; Pfizer, Inc.; Rockwell International Corporation; Royal Caribbean Cruise Lines; Teledyne Industries, Inc.; Northrop; Warner-Lambert Company; General Electric; Chevron; Tyson Foods, Inc.; ALCOA; United States Sugar Corporation; Bristol-Myers Squibb; Consolidated Edison Company; Hyundai Motor Company; and Samsung America, Inc.—still very much in existence today); Penelope Patsuris, *The Corporate Scandal Sheet*, FORBES.COM, Aug. 26, 2002, <http://www.forbes.com/home/2002/07/25/accountingtracker.html> (listing twenty-two corporate frauds, most involving claims against the corporate entity, that came to light between June 2000 and April 2002; many of the companies on the list—including AOL Time Warner, Halliburton, and Merck—are still in operation).

⁹² See Penelope Patsuris, *Andersen Clients Evacuate Post-Verdict*, FORBES.COM, Aug. 14, 2002, <http://www.forbes.com/2002/03/13/0313andersen.html> (reporting that the firm was required to stop auditing clients as of August 31, 2002).

⁹³ See ICAFI Ctr. for Mgmt. Research, *Fall of Arthur Andersen* (2002), <http://www.icmr.icfai.org/casestudies/catalogue/Business%20Ethics/BE027.htm> (discussing how Andersen's clients and some employees abandoned it after its indictment) [hereinafter ICAFI Ctr.].

ous other claims of wrongdoing.⁹⁴ The Enron debacle was the final straw.⁹⁵ Finally, the contention that the firm was exonerated on appeal is incorrect. The Supreme Court held that the trial judge's jury instructions on the criminal intent required for conviction were erroneous, and it remanded the case for a new trial.⁹⁶ The Court did not enter a judgment of acquittal.⁹⁷ Presumably, prosecutors did not retry the case because by the time it came back on remand the firm was more or less defunct.⁹⁸

Nevertheless, there can be no doubt that federal prosecutors are powerful and that corporate defendants are fearful of indictment, especially when conviction may lead to serious collateral consequences.⁹⁹ This characterization of the situation, however, must be tempered by a realistic look at the resources of the opposing parties. Although on paper one side is the "United States of America," the resources devoted by the federal government to any given case is necessarily constrained. The prosecution team likely consists of one or two prosecutors and

⁹⁴ See *Arthur Andersen*, 544 U.S. at 699 n.2 (describing Andersen's June 2001 settlement with the SEC and the fact that one of its partners had been named in an SEC complaint filed in yet another case in July 2001); see also ICFAI Ctr., *supra* note 93 (describing Andersen's role in "various instances of business fraud by its clients, namely, Sunbeam, Waste Management Inc., Qwest Communications, Global Crossing, and Baptist Foundation of Arizona").

⁹⁵ See *Arthur Andersen*, 544 U.S. at 699 n.2.

⁹⁶ See *id.* at 707-08.

⁹⁷ See *id.*

⁹⁸ See Terry Frieden, *Arthur Andersen Avoids Criminal Rap*, CNNMONEY.COM, Nov. 23, 2005, http://money.cnn.com/2005/11/23/news/midcaps/arthur_andersen/index.htm (reporting that prosecutors had filed papers announcing their decision not to re-prosecute). The Andersen prosecution was difficult in part because no existing obstruction of justice statute clearly covered the behavior in that case—destroying audit records in anticipation of a criminal investigation. For example, the omnibus obstruction provision, 18 U.S.C. § 1503, applies only after a proceeding is already underway. See 18 U.S.C. § 1503 (2000); *United States v. Simmons*, 591 F.2d 206, 210 (3d Cir. 1979). Thus, prosecutors had to stretch and charge the company under 18 U.S.C. § 1512(b) for "corruptly persuad[ing] another person" to destroy documents. See 18 U.S.C. § 1512(b) (2000) (amended 2002). In the Sarbanes-Oxley Act, Congress made clear its view of Andersen's behavior by passing three additional obstruction statutes directly aimed at making it clearly illegal in the future. 18 U.S.C. § 1512(b) (2000 & Supp. IV 2004); see *id.* § 1512(c) (corruptly destroying documents with the intent to impair its integrity or availability for use in official proceedings); *id.* § 1519 (destruction of documents with the intent to impede a federal investigation or any matter within the jurisdiction of any department or agency of the United States); *id.* § 1520 (destruction of corporate audit records).

⁹⁹ Interestingly, constant repetition about the Andersen legacy appears to have caused irrational fear among corporate executives and unwarranted bravado among prosecutors. See Daniel Fisher & Peter Lattman, *Rattled Out: That Reassuring Corporate Attorney Who Asked You a Few Questions May Turn Out to Be the Long Arm of the Law*, FORBES, July 4, 2005, at 49 (indicating that fear from the Andersen case lives on).

three or four primary investigative agents, many of whom have other investigations and cases to attend to in addition to the one at issue.¹⁰⁰ On the other side, representing the corporation and its employees are numerous very experienced defense attorneys, along with paralegals, investigators, and other assistants, collectively being paid a great sum of money to thwart the government's investigation. All told, it is a relatively fair fight.¹⁰¹

Finally, there are opportunity costs. Whenever DOJ is entangled in an all-out brawl with an alleged corporate felon, the resources the Department is expending on that particular case are resources that it could be expending elsewhere, if the first company chose to settle. This last point is developed at some length in the next Section.¹⁰²

2. Benefits of Cooperation

a. *Efficiency*

In light of the difficulties of waging war against uncooperative corporate targets, it should not be surprising that in recent years prosecutors have become increasingly aggressive in seeking out their coopera-

¹⁰⁰ I hearken back to the days when I was prosecuting a huge Sicilian Mafia heroin importation and distribution case. See generally *United States v. Gambino*, 728 F. Supp. 1150 (E.D. Pa. 1989), *aff'd*, 926 F.2d 1355 (3d Cir. 1991). During a multi-year investigation, we had recorded thousands of hours of wiretaps, during which the defendants spoke to each other in Sicilian. At one point, the court, aggravated by how slow it was taking the prosecution to turn over transcripts of key conversations to the defense, threatened that the entire prosecution team would be held in contempt unless the transcriptions were completed by a certain date. When I protested that, with our lone Sicilian translator, the deadline would be impossible to meet, the court responded, "Oh, come on Mr. Seigel. You are the United States of America. You have unlimited resources at your disposal. You can do anything you want." In fact, for purposes of this case, we had one interpreter, period. Luckily, he was an extremely conscientious sole who worked round-the-clock for several days to get the task done.

¹⁰¹ Indeed, some argue that, if any party is at a disadvantage in white collar investigations and prosecutions, it is the government. See COLEMAN, *supra* note 77, at 169 (discussing the paucity of federal resources, especially at times when a large scandal engulfs the system); Mokhiber, *supra* note 91 (discussing the criminal prosecution of Royal Caribbean Cruise Lines for illegal dumping during which two federal prosecutors faced a range of opposing counsel and hired experts including Judson Starr and Jerry Block, both former heads of DOJ's Environmental Crimes Section, former Attorneys General Benjamin Civiletti and Eliot Richardson, former State Department Officials Terry Leitzell and Bernard Oxman, University of Virginia Professor of Law John Norton Moore, former federal prosecutors Kenneth C. Bass III and Norman Moscovitz, and Donald Carr of Winthrop & Stimson).

¹⁰² See *infra* notes 104-120 and accompanying text.

tion.¹⁰³ When a collective entity decides to be cooperative, the balance of power shifts dramatically. No longer foes, the corporation and the government can team up to unmask the individuals who were at the center of the criminal activity, thereby getting to the heart of the matter quickly and efficiently.

In the majority of cases, upon learning of possible criminal behavior in its midst, a corporation conducts an internal investigation to determine what happened and what to do about it.¹⁰⁴ Upon reaching a conclusion, the investigators make a report—either orally or in writing—to the corporation's officers or board of directors or both. Those in charge then decide what remedial action, if any, to take.

In many cases, the internal investigation is substantially completed by the time government agents come knocking at the corporation's door. If so, the corporation is in an obvious position to be of significant help to prosecutors if it chooses to cooperate with them. The corporation has already isolated the critical documents and witnesses, compiled witness statements, and identified the likely culprits. If it willingly turns this information over to the government, a great deal of time can be shaved from the investigative phase of the criminal case.¹⁰⁵ The corporation can do other things to help as well, such as provide background about the corporation, including its organizational structure and in-house policies.¹⁰⁶

With company cooperation, the successful completion of a complex white collar prosecution, including resolution of corporate as well as all individual charges, could very well be reduced from a matter of years to a matter of months. This huge efficiency gain represents a sig-

¹⁰³ See Robert Creamer, *Criminal Law Concerns for Civil Lawyers*, FED. LAW., May 2005, 34, 35 (2005).

¹⁰⁴ See Duggin, *supra* note 8, at 884–87 (stating that conducting an internal investigation has become the standard of care whenever credible allegations of misconduct arise in the corporate setting); 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, 152 (2000) ("Upon learning of some potential criminal activity within its ranks, a corporation typically retains counsel to gather the facts, assesses [sic] those facts in light of the relevant law, and furnishes [sic] advice about how to proceed from both legal and tactical perspectives."); see also *infra* notes 175–212 and accompanying text (discussing internal investigations in more detail).

¹⁰⁵ See *infra* notes 175–212 and accompanying text.

¹⁰⁶ See *infra* notes 175–212 and accompanying text.

nificant public good.¹⁰⁷ Far more white collar criminal behavior can be attacked with the same amount of resources devoted to the effort.¹⁰⁸

The efficiency argument is equally strong even when prosecutors erroneously target an innocent company. The fastest way a company can convince government agents of its innocence is to share all pertinent information with them so that they can draw this conclusion themselves.¹⁰⁹

b. *Remorse and Renunciation of Criminal Activity*

There is more to be gained from cooperation, however, than mere efficiency. In the noncorporate setting, an individual's cooperation is seen as a sign that the defendant is willing to make a clean break with the past through acceptance of responsibility and renunciation of prior criminal behavior.¹¹⁰ Such public acts of remorse no doubt serve two distinct goals. First, if there is any hope that the defendant will give up his criminal ways, recognizing in public that what he did was wrong and apologizing for it are a necessary psychological start.¹¹¹ Second, other criminals are much less likely to associate with

¹⁰⁷ Oddly enough, even this seemingly uncontroversial claim has dissenters. Specifically, one group of commentators stands the past to put limits on governmental power and forced the government

to make triage decisions in order to best allocate its resources for a particular investigation The efficiency argument on its head, claiming that the lack of government resources served in costliness of investigations, combined with real budgetary limits, operated as a natural check on prosecutorial inquiries that could otherwise have no bounds.

William R. McLucas et al., *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. CRIM. L. & CRIMINOLOGY 621, 639 (2006). They claim that the ability of the government to leverage its resources through corporate cooperation takes away these "historical checks and balances." *Id.* This position makes sense, however, only if one believes that, prior to the Holder Memorandum, the government was prosecuting an optimal amount of white collar crime, which seems to be a belief that only big firm corporate lawyers (such as these authors) would hold.

¹⁰⁸ See Richter, *supra* note 41, at 27-28 (discussing the successful results of corporate cooperation in criminal cases in recent years).

¹⁰⁹ See Statement of Paul J. McNulty, *supra* note 74, at 115 (arguing that it is good practice for all concerned for a company claiming innocence to share the results of its internal investigation with prosecutors to satisfy them of this fact).

¹¹⁰ See Stephen J. Morse, *Reasons, Results and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 392-93.

¹¹¹ Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 104 (2004) ("Remorse and apology are not simply tools for diagnosing the appropriate punishments for individual defendants. They can heal . . .").

an individual who has pleaded guilty and cooperated with the authorities in the past.¹¹²

These rationales must be tailored a bit to fit the corporate setting. By cooperating, those in charge of the company signal to the company's workforce in no uncertain terms that illegal behavior is not acceptable. Cooperation lets the criminals in the organization know that, although the company may have tolerated their unscrupulous activities in the past, it will not be hospitable to such activities in the future. The company's collaboration with law enforcement makes a statement to the outside world as well, effectively declaring that, when wrongdoing is found in its midst, the company will do the right thing by ousting those responsible and seeing to it that they are brought to justice.¹¹³ Certainly, a business environment in which companies consistently make clear that criminal behavior is unacceptable is in the public's best interest.

c. Emphasis on Cooperation Is Not an Anomaly Found Within White Collar or Corporate Prosecution

Some of the complaints about the Department's emphasis on corporate cooperation make it sound like the technique of "squeezing" or "coercing" cooperation from a putative defendant is unique to the white collar setting.¹¹⁴ This cannot be farther from the truth: "Judicial leniency for cooperators traces its roots back hundreds of years to the common law practice of approvement, and American prosecutors have been striking deals with cooperators at least since the nineteenth century."¹¹⁵ In more recent times, the U.S. Sentencing Guidelines have made defendants' cooperation and declarations of remorse centerpieces of the federal sentencing regime. A defendant can earn a reduction in base offense level points for accepting responsibility for her criminal conduct,¹¹⁶ and she can obtain a downward departure from a guideline sentence if the government files a motion stating that she provided "substantial assistance in the investigation or prose-

¹¹² See Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 29 (2003) ("The common contempt for rats carries significant practical consequences for the cooperator. Most obviously, the cooperator is ostracized from his criminal cohorts.").

¹¹³ Cf. Simons, *supra* note 13, at 994-95 ("From the prosecutor's perspective, a corporation's cooperation (or lack of cooperation) becomes a proxy for the corporation's character—a window, if you will, into the corporation's soul.").

¹¹⁴ Davies & Scannell, *supra* note 12 ("Prosecutors continue to use the threat of indictment to force companies to cooperate with investigators . . .").

¹¹⁵ Simons, *supra* note 13, at 979.

¹¹⁶ U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2003).

cution of another person."¹¹⁷ Congress specifically blessed downward departures for cooperation in 18 U.S.C. § 3553(e), whereby it authorized courts to impose a sentence below a statutory minimum upon government motion and a judicial finding of substantial assistance.¹¹⁸

Is the process of convincing a putative defendant to cooperate against others coercive? Of course it is. To facilitate cooperation, an individual defendant must waive his Fifth Amendment right against self-incrimination, along with his Seventh Amendment right to trial by jury, in addition to his right to appeal a guilty verdict.¹¹⁹ Also, going through the ordeal of admitting guilt, being debriefed, and possibly testifying against confederates in court is extremely unpleasant. Yet, many putative defendants choose to cooperate despite the cost because they judge that the benefit—a reduction in sentence—is worth the price. Their Hobson's choice is not caused by an unfair or overbearing government. Rather, it is the direct result of their prior criminal conduct.¹²⁰ The same is true for a company faced with having to choose between cooperating to minimize the damage done by corporate wrongdoing on the one hand, and fighting the charges on the other.

II. IMPLICATING THE ATTORNEY-CLIENT PRIVILEGE

A. *Protected Corporate Matters*

When an individual person decides to cooperate with prosecutors, his decision usually has no bearing on the attorney-client privilege. To effectuate his cooperation, the individual must tell all he knows about the criminal activity in question, and although this will involve repeating to the prosecutor the facts he shared earlier with his attorney, the facts themselves are not protected by the attorney-client

¹¹⁷ *Id.* § 5K1.1.

¹¹⁸ 18 U.S.C.A. § 3553(e) (West 2003).

¹¹⁹ See Richter, *supra* note 41, at 30 ("[F]ederal and state prosecutors routinely insist that individual defendants waive important rights such as the Fifth Amendment right against self-incrimination, the Seventh Amendment right to a trial by jury, and the right to appeal a conviction and sentence in exchange for favorable treatment.").

¹²⁰ See *id.* at 28 ("Targets are often asked to come clean and reveal the details of their [sic] crime in exchange for more lenient treatment. No one would argue that it is inappropriate to ask an individual to waive his Fifth Amendment right against self-incrimination and share all pertinent information about a crime in order to obtain a reduced charge or lighter sentence.").

privilege.¹²¹ In other words, the defendant does not say to prosecutors, "I told my attorney I did X, and my attorney responded Y." Instead, he simply relates to the prosecutors, "I did X," which happens to correspond with what he told counsel when seeking legal advice. The facts are not privileged.¹²² Likewise, documents created outside of the attorney-client relationship, which are later shown to the attorney to facilitate the giving and receiving of legal advice, are not attorney-client protected.¹²³ It is easy to see why the latter is so. If documents presented to an attorney became privileged, every putative defendant would gather up all relevant documents at his disposal and dump them on the nearest attorney's desk. When an individual shares documents with the government after deciding to cooperate therefore, the privilege is simply not implicated.

The same could be true for corporations. As noted above, upon learning about potential criminal conduct by corporate employees, corporations typically launch an internal investigation.¹²⁴ This is the only way the corporation can figure out "what happened." The corporation needs to know this for a variety of reasons: to avoid or reduce liability to the victims of the alleged illegality (be they creditors, consumers, or shareholders); to avoid or reduce liability in the administrative context (such as during an enforcement proceeding by the SEC); to avoid or reduce corporate criminal liability; and, hopefully, to do the right thing by halting any criminal activity.¹²⁵ If the corporate officer

¹²¹ See *id.* at 29 ("It is true that *privilege waivers* as a component of cooperation are unique to corporate defendants Rarely, if ever, would an individual target need to refer to any privileged information in order to come clean").

¹²² See *id.*

¹²³ *Fisher v. United States*, 425 U.S. 391, 392 (1976).

¹²⁴ See *supra* notes 104–106 and accompanying text.

¹²⁵ See Duggin, *supra* note 8, at 884. As Sarah Helene Duggin explains:

The rapid rise in the incidence of criminal prosecution of major corporations, the implementation of the USSC's *Organizational Sentencing Guidelines*, the expanding bases of corporate civil liability, and the current national focus on curbing "corporate greed" have created compelling incentives for organizations to act promptly to discover and correct acts and omissions that pose significant liability risks. The internal investigation is the tool that permits them to do so. The circumstances that prompt internal investigations are myriad: evidence of irregular stock trades, allegations of illegal employment discrimination, the results of an internal audit, an anonymous tip about billing irregularities, a civil suit, the sudden departure of a key employee, an inquiry or site inspection by regulatory agency personnel, a customer complaint, a civil investigative demand, a grand jury subpoena, or any of a vast assortment of other reasons.

initiating the investigation were exclusively to use nonlawyers, such as forensic accountants, as investigators, the results of the investigation—witness statements, notes of the investigators, the final report—would not be attorney-client protected. Nor would they be protected by any other privilege.¹²⁶ If the government later undertook an investigation, these materials would have to be turned over pursuant to subpoena or other appropriate process.

Of course, corporations typically choose to employ counsel, either in-house, outside, or both, to conduct their internal investigations.¹²⁷ This practice is eminently rational. As experts in the legal and regulatory landscape, lawyers are in the best position to advise the corporation on whether a crime has been committed and, if so, what course of action it should take. Moreover, when lawyers conduct an investigation, the resultant materials gain protection under the attorney-client privilege. This gives the corporation the ability to control whether it will reveal such materials to outsiders at a later time through privilege waiver.¹²⁸

Corporations generate other attorney-client protected material as well. This occurs when ideas or proposals are “run by” counsel to determine whether (or how) they can be done legally.¹²⁹ It also occurs when counsel functions in a general compliance capacity, either through structured compliance programs or on a more informal, ad hoc basis.¹³⁰ The privilege does not apply, however, when counsel renders business, as opposed to legal, advice.¹³¹

¹²⁶ The Supreme Court has held that there is no such thing as accountant-client privilege under federal common law. *Couch v. United States*, 409 U.S. 322, 335 (1973).

¹²⁷ See Alec Joch, Note, *Internal Corporate Investigations: The Waiver of Attorney-Client Privilege and Work-Product Protection Through Voluntary Disclosures to the Government*, 34 AM. CRIM. L. REV. 347, 348–49 (1997) (describing how corporate self-investigation by outside or in-house counsel is the norm).

¹²⁸ Duggin, *supra* note 8, at 889 (discussing why corporations usually have counsel conduct internal investigations).

¹²⁹ See Zornow & Krakaur, *supra* note 104, at 150 (“The attorney-client privilege . . . facilitate[s] the participation of attorneys in our legal system in the role of confidential legal advisors Specifically, clients may obtain guidance about the legality of past and prospective behavior”) (emphasis added).

¹³⁰ See *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981) (privilege enables attorneys to “ensure their client’s compliance with the law”).

¹³¹ See Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 909 (2006).

B. Privilege Waiver

Most corporate misconduct initially comes to the attention of the administrative agency that has jurisdiction over relevant matters.¹³² The information may come from the corporation's own self-reporting, from a whistleblower, or as a result of the agency's routine compliance mechanisms.¹³³ Depending upon the nature and seriousness of the allegations, the agency may decide to handle the matter purely administratively or to make a referral to DOJ or the appropriate law enforcement agency for criminal investigation.¹³⁴ Due to the nature of white collar investigations, the corporation is likely to learn of a criminal investigation long before any charges are brought. Most often, this is because the corporation is served with grand jury subpoenas or informal requests for documents and information during the investigatory phase of the case.¹³⁵

For all of the reasons set out above, a rational prosecutor will seek the corporation's cooperation in the investigation at the earliest possible stage.¹³⁶ Cooperation will enable the prosecutor to shortcut what would otherwise be a long and difficult process of information gathering—figuring out who is who, who did what, and what evidence there is to prove it. A prosecutor who ignores this reality would be derelict in duty.

If the corporation chooses to cooperate, much of the assistance it can offer will have no bearing on its attorney-client privilege. For example, the corporation can provide access to nonprivileged computer files and documents; including organizational charts, books and ledgers; policy manuals; and internal (nonlegal) memoranda.¹³⁷ It can also make available for interviews and testimony officers and employees who are willing to speak.¹³⁸ Corporate officers or counsel can explain to prosecutors how pieces of the puzzle fit together to form a coherent picture of the activity in question.¹³⁹

¹³² See Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN. ST. L. REV. 1107, 1109 (2005) ("Most of the time, white-collar investigations are initiated, not by members of the Department of Justice, but by employees of regulatory agencies such as the SEC, IRS, or EPA.").

¹³³ See *id.*

¹³⁴ *Id.* at 1109–10.

¹³⁵ See ISRAEL ET AL., *supra* note 73, at 330–34 (describing investigative use of grand jury).

¹³⁶ See *infra* notes 104–109 and accompanying text.

¹³⁷ See Duggin, *supra* note 8, at 896–97.

¹³⁸ See *id.* at 907–09.

¹³⁹ See *id.* at 864.

Sometimes, this degree of cooperation will be sufficient for prosecutors to decide either that no crimes took place or that certain of the corporation's employees merit indictment.¹⁴⁰ It will also be a factor in determining whether, if criminality existed, the corporation should be charged separately as a legal entity. If cooperation short of waiver is sufficient, the case can be concluded without any impact on the corporation's attorney-client privilege. As the McNulty Memorandum indicates, this manner of resolution should be the prosecution's goal.¹⁴¹

On other occasions, however, this level of corporate cooperation will be of more limited use. For example, the relevant corporate documents may have been devised at the request of in-house counsel acting as legal compliance officer. Such documents would thus be privileged and could not be shared with prosecutors absent privilege waiver. Alternatively, the corporation might have severed its relationship with the main culprits of the criminal activity, meaning that it would have no leverage to encourage them to provide statements or testimony. At the same time, however, the corporation may have in its possession the results of the internal investigation, conducted by counsel, which led it to fire the culprits and take other remedial action. As noted above, such materials would be protected by the privilege.¹⁴²

Even in cases of this latter kind, it is still possible that the corporation could provide substantial assistance to prosecutors without privilege waiver. If the case is small and the criminality focused, the corporation's sharing of nonprivileged information, combined with the federal government's ability to probe through its use of the grand jury and other investigatory techniques, may enable prosecutors to track down the responsible individuals in a fast and efficient manner. By requiring prosecutors to justify to their superiors why privilege waiver in any given situation is necessary, presumably the McNulty Memorandum protects the privilege in cases of this small, focused variety as well.¹⁴³

Some white collar investigations, however, will involve criminality that spans years, implicates multiple individuals, and bleeds across a seemingly infinite array of documents.¹⁴⁴ Worse yet for prosecutors,

¹⁴⁰ See Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 604 (2004) (noting that often cooperation short of waiver can be sufficient).

¹⁴¹ McNulty Memorandum, *supra* note 36, at 8-9. The memorandum could be clearer, however, in stating that privilege waiver should be sought only as a last resort.

¹⁴² See *supra* notes 127-128 and accompanying text.

¹⁴³ See McNulty Memorandum, *supra* note 36, at 8-9.

¹⁴⁴ See *supra* notes 61-67 and accompanying text.

cases of this magnitude often involve extremely sophisticated schemes that are difficult for an outsider to understand, let alone unravel. In such cases, a corporation might point prosecutors in the right direction without waiving privilege, but this would be of only limited assistance. The investigation would still take years to run its course as prosecutors struggled to subpoena and interpret the right documents, immunize and debrief the correct witnesses, figure out whether a crime had been committed, and, if so, whether there was sufficient proof to bring charges. Only if the corporation short-circuited these extensive prosecutorial efforts by waiving privilege and sharing internal reports, documents, and witness statements that laid out the crime and the conduct of those responsible could it fairly claim to have rendered substantial assistance to the prosecution.¹⁴⁵

Having set forth the benefit of privilege waiver in the right context, this Article turns to an examination of the many arguments proffered against it.¹⁴⁶

III. ARGUMENTS AGAINST PRIVILEGE WAIVER

A. *The Attorney-Client Privilege Is Sacrosanct*

Oft repeated in the debate over privilege waiver are statements hailing the attorney-client privilege as a time-honored and fundamental feature of any fair system of justice.¹⁴⁷ The implication flowing from this claim is that *any* intrusion on the privilege, such as permitting the government to "coerce" corporations into waiving it, is inherently a bad thing.

Although many who wax poetic about the foundational nature of the attorney-client privilege would be surprised to learn about its rela-

¹⁴⁵ See Buchanan, *supra* note 140, at 604–05 (stating that privilege waiver enables a corporation to assist the government in cases where the corporation has a complicated organizational structure, sophisticated document management and computer systems, idiosyncratic policies and procedures, and diffused knowledge of the pertinent events).

¹⁴⁶ See *infra* notes 147–232 and accompanying text.

¹⁴⁷ See, e.g., Am. Coll. of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work-Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307, 319, 350 (2003); Brown *supra* note 131, at 912, 917–18 (noting the "sacrosanct aura" of the privilege and the "air of sacredness that . . . envelops it"); Richter, *supra* note 41, at 13 ("[C]ritics . . . argue that government requests for waiver . . . represent an inappropriate intrusion into the sanctity of the time-honored lawyer-client relationship that is inherently unfair."); Robert A. Del Giorgio, *Corporate Counsel as Government's Agent: The Holder Memorandum and Sarbanes-Oxley Section 307*, CHAMPION, Aug. 2003, at 22; cf. Buchanan, *supra* note 140, at 595 (noting that critics frequently raise the argument that "the government's evaluation of cooperation violates the sanctity of the attorney-client privilege").

tively humble beginnings,¹⁴⁸ there can be little doubt that, today, it is a centerpiece of our legal system.¹⁴⁹ This, however, is not because of a deontological notion that the privilege is fundamentally right, fair, or good, a conclusion that would inevitably lead to the position that it should remain inviolate regardless of consequences. Rather, the attorney-client privilege is defensible only on utilitarian grounds, that is, because it results in more good for society than bad.¹⁵⁰ Because the justification for the privilege is utilitarian, reciting homilies in support of it cannot assist in determining whether it should be enforced in any particular setting; rather, a cost-benefit analysis must be employed. Only if the benefits of protecting attorney-client confidences outweigh the costs should the privilege be protected.

There is nothing earth-shattering about this revelation. The cost of enforcing the attorney-client privilege has long been recognized: in any given matter, the privilege interferes with ascertainment of the truth. Not surprisingly, then, black letter law surrounding the privilege makes clear that enforcement is the exception, not the rule:

"For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule."¹⁵¹

¹⁴⁸ See Brown, *supra* note 131, at 912-18 (recounting that the privilege began in England as a "by-product of British etiquette": lawyers were "reluctant to breach the code of a gentleman by being compelled to reveal in court what they had been told by their clients").

¹⁴⁹ Not everyone believes that the attorney-client privilege, at least in the corporate context, serves any useful purpose at all. Professor Elizabeth Thornburg has advocated its wholesale abrogation. See generally Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157 (1993). This Article does not adhere to this extreme position.

¹⁵⁰ For a brief discussion of the utilitarian arguments in favor of attorney-client privilege, see Lawton P. Cummings, *The Ethical Minefield: Corporate Internal Investigations and Individual Assertions of the Attorney-Client Privilege*, 109 W. VA. L. REV. 669, 672-73 (2007).

¹⁵¹ *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting 8 J. WIGMORE, EVIDENCE § 2192 (3d ed. 1940)); see *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 915 (8th Cir. 1997) (holding that government official is not entitled to attorney-client privilege when consulting with government counsel).

The cost associated with the privilege is present in the corporate arena: an assertion of corporate privilege deprives prosecutors, and thus the public, of the true facts surrounding alleged corporate criminality. Thus, those arguing that DOJ should not be able to request privilege waivers, or give cooperation credit to companies that waive privilege, have the burden of explaining why such an extraordinary position is necessary to further an even greater public good.

Consistent with this understanding of the privilege, it is useful to note that the ABA's own Model Rules of Professional Conduct recognize that client confidentiality, and consequently the attorney-client privilege, must sometimes yield to other more important considerations.¹⁵² The most widely cited of these exceptions allows an attorney to reveal a confidence to prevent future death or serious bodily harm.¹⁵³ A relatively new exception permits disclosure "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services."¹⁵⁴ One other long-standing exception is especially interesting. It permits an attorney to breach confidence if necessary:

to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.¹⁵⁵

In other words, this exception allows an attorney to breach a client's confidence whenever it is in the attorney's best interest to do so—even when the attack on the attorney comes from a source other than the client personally.¹⁵⁶ Looking at this last exception, the ABA's outrage at the practice of privilege waiver seems precariously close to hypocritical.¹⁵⁷

¹⁵² See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2003).

¹⁵³ *Id.* R. 1.6(b)(1).

¹⁵⁴ *Id.* R. 1.6(b)(2).

¹⁵⁵ *Id.* R. 1.6(b)(5).

¹⁵⁶ See *id.*

¹⁵⁷ See Michael Seigel, *Use of Privileged Information for Attorney Self-Interest: A Moral Dilemma*, 3 BUS. & PROF. ETHICS J. 1, 1 (1983) (arguing that exceptions to attorney-client privilege for attorneys themselves and not for others similarly situated violate Kant's categorical imperative).

B. Privilege Waiver Does More Harm Than Good

Critics of privilege waiver do not stop at deontological argument. They proceed to make the utilitarian case that widespread privilege waiver (1) deters corporate insiders from running ideas by corporate counsel;¹⁵⁸ (2) deters corporations from instituting serious compliance programs;¹⁵⁹ (3) deters corporations from conducting internal investigations;¹⁶⁰ and (4) deters corporate employees from being forthcoming with counsel during the course of internal investigations.¹⁶¹ As a result, they say, privilege waiver impedes the ability of corporations to police themselves and, therefore, will result in more criminality, not less.¹⁶² For the most part, these are very serious contentions that require careful analysis.¹⁶³

¹⁵⁸ See George Ellard, *Making the Silent Speak and the Informed Wary*, 42 AM. CRIM. L. REV. 985, 992-93 (2005) ("[T]he attorney-client privilege is often justified as a means to encourage employees to be forthcoming with counsel so that legal advice can be based on all relevant knowledge . . . the Thompson Memorandum gives company personnel an incentive not to speak to internal counsel."); Susan Hackett, *Wither Attorney Client Privilege?* 8 ACC DOCKET 132, 139 (2005) ("Without privilege, employees may decide it is better to keep their worries to themselves, rather than provide potentially damaging information to lawyers which could come back to haunt them."); Peloso & Brooks, *supra* note 25, at 630 ("[W]ithout these protections, corporate officers and directors will be less likely to seek legal advice from corporate counsel."); *infra* notes 164-166 and accompanying text.

¹⁵⁹ See *infra* notes 167-174 and accompanying text.

¹⁶⁰ See *infra* notes 175-192 and accompanying text.

¹⁶¹ See *infra* notes 193-212 and accompanying text.

¹⁶² See Ellard, *supra* note 158, at 992-93; Hackett, *supra* note 158, at 139.

¹⁶³ Some instrumental arguments against waiver do not merit a serious response. For example, Professor Lisa Griffin contends that deputizing corporate insiders may cause officers and board members to "engage in additional wrongdoing to avoid detection and exposure to liability They may respond to the pressures of investigations with still more creative accounting." Griffin, *supra* note 61, at 334. Professor Griffin does not explain why the reaction of corporate officers would be any different if government officials were doing the investigating instead of corporate insiders. Yet, she can not possibly be suggesting that society would be better off if criminal activity went uninvestigated on the theory that this would *prevent* crime.

The arguments made by Professor John S. Baker are even more outlandish. He claims that "using criminal law to bring about moral reform or rehabilitation among individuals has been a failure" and argues that there is "absolutely no basis at all for attempting to achieve moral reform or rehabilitation of a corporation" because it has "no soul to damn." John S. Baker, *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 322 (2004). In fact, because corporations have the ability to divest themselves of wrongdoers, it is *more* likely that criminal prosecution will lead to their reformation than in the case of individuals, not less. Professor Baker also contends that the federal government's use of the criminal law to encourage good corporate citizenship is an infringement of state's rights, *id.* at 311-12, an unjustified intrusion into the private sector, *id.* at 313-15, a potentially unconstitutional practice, *id.* at 323, and just bad policy, *id.* at 337-53. His final proscription—that the Justice Department should leave corporations

1. Waiver Discourages Insiders from Conducting Routine Consultations with Corporate Counsel

The first argument, that waiver causes company officials to forgo routine interactions with in-house counsel,¹⁶⁴ is not terribly credible. Corporate officers run ideas by counsel *before* they have been converted into policies or plans and put into place. In seeking out legal advice at this stage, the corporate officer has nothing to hide because nothing has been done yet. It is in the officer's interests to disclose all aspects of the plan to counsel and to receive help in discerning how it can be implemented in a legal manner. Because the communication between management and counsel does not implicate criminality of any kind, it will take place regardless of its status under the attorney-client privilege. Of course, the officer might lie to counsel because she is planning to commit a crime, or she might not follow counsel's advice and decide to engage in criminal activity after the fact. In the former instance, the conversation would not be privileged because it would fall under the crime-fraud exception.¹⁶⁵ In the latter case, protecting the conversation against disclosure (should the corporation choose to waive) seems contrary to the goal of the privilege, which is to encourage individuals to seek legal advice in order to *follow it*.¹⁶⁶

2. Waiver Discourages Compliance Programs

The second rationale against privilege waiver—that it will discourage compliance programs¹⁶⁷—is only slightly more serious. For most corporations, not having a strong compliance department is simply not an option. Compliance programs are essential for coping

alone and begin policing itself, *see id.* at 353–55—is evidence of his extreme ideological bias: even assuming that government reform is needed, what does that have to do with the pros and cons of prosecuting white collar crime? These additional contentions merit no response.

¹⁶⁴ *See* Griffin, *supra* note 61, at 348 (arguing that with waiver looming in the background, corporations cannot seek advice “that suggests even a hypothetical consideration of fraudulent conduct”).

¹⁶⁵ *See In re Impounded Case (Law Firm)*, 879 F.2d 1211, 1213 (3d Cir. 1989).

¹⁶⁶ *See* H. Lowell Brown, *The Crime-Fraud Exception to the Attorney-Client Privilege in the Context of Corporate Counseling*, 87 Ky. L.J. 1191, 1218 (1999) (“Indeed, it is to prevent abuse of the secrecy accorded bona fide attorney-client communications that the modern crime-fraud exception has been fashioned.”).

¹⁶⁷ *See* Griffin, *supra* note 61, at 335 (“[D]eputizing corporate insiders to perform prosecutorial functions makes it difficult for employees to consult in good faith with counsel about compliance”); Hackett, *supra* note 158, at 141 (arguing that incursions into the attorney-client privilege are undermining future compliance efforts).

with the vast regulatory landscape found in today's world. For example, a healthcare provider must ensure that it is complying with the horrifically complicated Medicare, Medicaid, and other health insurance rules.¹⁶⁸ Likewise, cruise ship¹⁶⁹ and waste disposal companies¹⁷⁰ need to be extremely sensitive to regulations issued by the Environmental Protection Agency. All companies, especially publicly traded ones, must be on a consistent vigil to ensure observance of all SEC rules and regulations.¹⁷¹ Failure to be in regulatory compliance can subject a company to a wide variety of administrative penalties, including debarment from participation in government programs—which can be the death knell of a company that depends on government contracts or reimbursement for the majority of its income.¹⁷² Disobedience can also lead to expensive shareholder derivative suits and lawsuits from third parties claiming harm.¹⁷³ Finally, shutting down compliance programs to avoid generating materials that might later be used against the company or its officials in a criminal case is extremely short-sighted: under the McNulty Memorandum, one of the factors a prosecutor must take into account when deciding whether to indict a corporation is the strength of these very same programs.¹⁷⁴

3. Waiver Discourages Internal Investigations

The third argument against privilege waiver is that it will discourage companies suspecting internal criminality from conducting an investigation because the materials generated by the investigation may be used against the company and its employees in a future criminal

¹⁶⁸ See U.S. Dep't of Health and Human Servs., Regulations and Guidance, <http://www.cms.hhs.gov/home/regsguidance.asp> (last visited Oct. 12, 2007).

¹⁶⁹ See Press Release, Dep't of Justice, Royal Caribbean to Pay Record \$18 Million Criminal Fine for Dumping Oil and Hazardous Chemicals, Making False Statements (July 21, 1999), <http://www.usdoj.gov/opa/pr/1999/July/316enr.htm>.

¹⁷⁰ See *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 61 (1st Cir. 1991) (upholding defendants' convictions for improperly disposing of hazardous waste).

¹⁷¹ See generally Seigel, *supra* note 65 (explaining SEC's administrative enforcement of securities laws and regulations).

¹⁷² See Carole Basri, *Why Implement an Effective Corporate Compliance Program?*, in *CORPORATE COMPLIANCE INSTITUTE 2006*, at 809 (PLI Corp. Law and Practice Course Handbook Series No. 8917, 2006), WL 1536 PLI/Corp 805 (listing nine companies forced to make "large settlements with the government" of over a million dollars each because they lacked an "effective compliance program"); U.S. Envtl. Prot. Agency, Suspension and Debarment Program, <http://epa.gov/ogd/sdd/debarment.htm> (last visited Oct. 5, 2007).

¹⁷³ Steven M. Kowell, 53 *FOOD & DRUG L.J.* 517, 522 (1998) ("Perhaps most importantly, a compliance program may be necessary to comply with a director's duty of care and to avoid director liability in shareholder derivative suits.").

¹⁷⁴ McNulty Memorandum, *supra* note 36, at 4.

case.¹⁷⁵ The proponents of this argument contend that, as a result, illegal conduct will be ignored or undiscovered for long periods of time, causing more harm to society than if corporate privilege were treated as sacrosanct.¹⁷⁶ Though not completely without merit, this contention cannot survive careful scrutiny.

As an initial matter, all of the reasons why corporations will continue to have strong compliance programs in place despite privilege waiver apply here as well. A corporation that suspects criminality in its midst simply cannot afford to ignore it: the risks of regulatory and third-party liability are too high.¹⁷⁷ There is, however, an even stronger reason for high-level corporate officials to investigate allegations of criminal activity amongst their subordinates: if they don't, and the government initiates a criminal investigation at a later date, the acquiescence of the officials in the criminal activity could subject them to personal criminal liability.¹⁷⁸ One would think that the consequence of facing time in prison provides a strong incentive to act.

Proponents of the argument that waiver discourages internal investigations provide no empirical evidence to support it.¹⁷⁹ The available evidence, moreover, tends to refute it.¹⁸⁰ This evidence is the very increase in deferred prosecutions based upon corporate cooperation and waiver of privilege that has taken place—and so outraged opponents of it—in recent years.¹⁸¹ If corporations were not continuing to conduct internal investigations, one would expect to see a decrease in the number of privilege waivers, as fewer corporations would have anything useful to turn over to prosecutors through this technique. This does not appear to be the case.¹⁸²

This is not to say that the possibility that their company may waive privilege in the future has no impact on the manner in which counsel

¹⁷⁵ See Wray & Hur, *supra* note 20, at 1174 (stating that critics contend that “companies may balk at conducting otherwise warranted internal investigations for fear of the implications of waiver”); see also Brown, *supra* note 131, at 901 (same).

¹⁷⁶ See Brown, *supra* note 131, at 901–05 (discussing alleged consequences from companies’ decision to forgo internal investigations).

¹⁷⁷ See *supra* notes 167–174 and accompanying text.

¹⁷⁸ See, e.g., *United States v. Brown*, 925 F.2d 1182, 1191 (9th Cir. 1998) (upholding conviction of superior for knowing about and consenting to criminal activity of subordinates); *United States v. Mistle Bus & Equip. Co.*, 967 F.2d 1227, 1232 (8th Cir. 1992) (upholding defendant’s conspiracy conviction based on his being aware of the existence of the conspiracy and failing to stop it).

¹⁷⁹ See Wray & Hur, *supra* note 20, at 1176.

¹⁸⁰ Griffin, *supra* note 61, at 345–47.

¹⁸¹ See *id.*

¹⁸² See *id.*

conduct internal investigations. Anecdotal evidence suggests that attorneys take steps to minimize the written record connected to an internal investigation so as to limit the materials subject to disclosure to government investigators at a later date.¹⁸³ These steps include not finalizing witness statements and reporting orally to senior management in lieu of writing a final investigative report.¹⁸⁴

There is undoubtedly a cost associated with these practices, namely, less efficient and exacting internal investigations. By not pinning witnesses down, forgoing the process of having them review and sign written statements, and not giving management the opportunity to study a final written report before determining what action to take, the probability that the corporation will be able to uncover the full scope of the criminal activity and hold all culpable individuals accountable is slightly diminished.¹⁸⁵ This cost, however, is probably small; a firm's management and its attorneys are likely to be quite deft at handling most internal situations. Further, these practices do little to impede the effectiveness of corporate cooperation with the government later on. If a corporation decides to waive, attorneys' notes (especially notes of interviews) can be provided to prosecutors, along with an explanation of the significance of the corporation's actions. This is nearly as good as a more complete written record.

In any event, this barn door was opened a long time ago, and closing it now by restricting privilege waiver would serve no purpose. In the 1981 case of *Upjohn Co. v. United States*,¹⁸⁶ the U.S. Supreme Court held that corporate communications are protected by the attorney-client privilege regardless of the level or title of the employee

¹⁸³ See, e.g., Richard Ben-Veniste & Lee H. Rubin, *DOJ Reaffirms and Expands Aggressive Corporate Cooperation Guidelines*, LEGAL BACKGROUNDER, Apr. 4, 2003, at 1, 2, available at <http://www.mayerbrown.com/news/article.asp?id=702&nid=5> ("[T]he prospects of a company waiver may . . . creat[e] disincentives to formalize thoughts or convey impressions in writing . . ."); Peloso & Brooks, *supra* note 25, at 630 ("[A]ttorneys conducting internal investigations may become less effective because they may be reluctant to document their work-product for fear that any documentation will have to be produced to the government.").

¹⁸⁴ See, e.g., Ben-Veniste & Rubin, *supra* note 183, at 2; Peloso & Brooks, *supra* note 25, at 630.

¹⁸⁵ Professor Brown argues that "a lawyer's ethical duty of competency combined with a fear of malpractice liability or the possibility that some other civil or criminal action will be instituted against him or her seem to provide ample motivation for careful documentation and record-keeping." Brown, *supra* note 131, at 942. This view might be overly optimistic, however, because an attorney is likely to be able to argue successfully in these venues that balancing the goals of investigating thoroughly against minimizing a harmful record met the standard of practice in the field.

¹⁸⁶ 449 U.S. 383 (1981).

who consulted with corporate counsel, so long as certain conditions are met.¹⁸⁷ The Court made clear, however, that the privilege belongs to the corporation as an entity, not to any of its agents.¹⁸⁸ Thus, when officers and employees reveal confidences to corporate counsel for the purpose of facilitating counsel's provision of legal advice to the corporation, these confidences are protected only as long as, and to the extent that, the corporation wishes to invoke the privilege.¹⁸⁹ If corporate agents with the appropriate authority choose to waive the privilege at a later date, there is nothing that the confidence-revealing agents or employees can do to prevent disclosure.¹⁹⁰ Control of the privilege rests with the corporation.¹⁹¹

When corporate counsel minimize the records generated by an internal investigation, they are not really reacting to DOJ's increasing reliance in recent years on privilege waivers; rather, their actions are consistent with the legal landscape created by *Upjohn* in 1981.¹⁹² Lawyers are trained to consider and prepare for the worst-case scenario; they must therefore assume that the government (or some private party) will come knocking at the door at a later date seeking disclosure of protected materials. Whether or not this actually happens is effectively beside the point. If DOJ announced tomorrow that it would never seek privilege waiver again, or if legislation were passed forcing it to adopt this position, the risk that the corporation might *voluntarily* waive privilege in any number of future circumstances would continue, as long as *Upjohn* remained good law. Thus, lawyers would persist in taking steps to minimize the creation of materials subject to later disclosure. Critics of DOJ's increasing reliance on privilege waivers have missed this fundamental point.

4. Waiver Discourages Employee Cooperation with Internal Investigations

The most troubling arguments against privilege waiver stem from the impact it is said to have on the behavior of corporate employees who face questioning during an internal investigation into criminal activity, and the lack of fairness that the prospect of waiver creates with

¹⁸⁷ See *id.* at 395-97.

¹⁸⁸ See *id.* at 389-92.

¹⁸⁹ See *id.*

¹⁹⁰ See *id.*

¹⁹¹ See *Upjohn*, 449 U.S. at 389-92.

¹⁹² See Brown, *supra* note 131, at 903-04 (questioning how forthcoming corporate employees are with counsel in light of *Upjohn*).

respect to these individuals.¹⁹³ These arguments merit careful consideration.

An internal investigation often begins with a freeze on access to computer and paper files so that the relevant evidence is not subject to tampering. Once this is accomplished, counsel examines the records at issue.¹⁹⁴ The next logical step—and probably the most important—is the interviewing of prospective witnesses.¹⁹⁵ Most of these witnesses will be employees of the organization. Typically, cooperation with such investigations will be an implicit or explicit requirement of the employee's job. Nothing in the law stops a company from taking action against a recalcitrant employee. Refusal to cooperate with the investigation, therefore, could result in sanctioning by the corporation, up to and including termination.¹⁹⁶

The main reason that an employee would refuse to cooperate under threat of sanction is fear of self-incrimination. The employee might be worried about the prospect of suffering even worse employer sanctions upon discovery of the underlying conduct, or she might be fearful that her words will be used against her in a later criminal proceeding, or both. A potentially guilty employee thus faces a dismal set of options: (1) silence, and likely termination; (2) cooperation, and likely sanctions; and (3) lying, perhaps avoiding liability in the short term, but running the risk of worse consequences in the future.

Caught in this trilemma, the employee needs legal advice. If she is a high-level officer, she is probably aware of the implications of *Upjohn* and will seek advice from a private attorney. If she is relatively unsophisticated, however, she might believe that, in speaking to corporate counsel, her confidences will be kept and her personal situation addressed.¹⁹⁷ This, of course, is not the case, and if the employee is not made aware of this fact, she has not been treated fairly by the corporation and its attorney. Once again, the situation the employee finds herself in is not dictated by the possibility that DOJ might make a future request for privilege waiver. Rather, it rests on the mere abil-

¹⁹³ See *id.* at 937–41 (discussing problem of lack of candor); Griffin, *supra* note 61, at 335–36.

¹⁹⁴ See Duggin, *supra* note 8, at 888–91 ("Most commentators agree that it is usually best to begin with obtaining and reviewing relevant documents. It is clear that immediate steps should be taken to prevent the destruction of any possibly relevant documents, as well as email messages, video and audio recordings, or any of a host of other potentially related materials.")

¹⁹⁵ See *id.* at 891–92.

¹⁹⁶ See *id.* at 907.

¹⁹⁷ See *id.* at 910 (noting that the employee might not realize his vulnerable situation).

ity of the corporation, post-*Upjohn*, to waive privilege voluntarily in any situation it sees fit. *Upjohn* puts the employee at risk.¹⁹⁸

Moreover, the employee's dilemma is of her own making; that is, it is a result of her apparent participation in criminal activity. If she suffers consequences as a result of this behavior—be it termination from employment or a criminal conviction—she is not a candidate for a whole lot of sympathy.¹⁹⁹ Nevertheless, the employee should have the opportunity to consult with counsel, in an absolutely privileged context, prior to making any decisions about her reaction to the corporation's internal investigation. It might turn out, for example, that—despite her own fears and beliefs—she is not criminally liable, which counsel can tell her and which would change the range of her options dramatically. Alternatively, if her role is minimal and she can help point the finger at others, it may be that her best option is complete cooperation with the investigation. She might even benefit from being the first one to knock on the prosecutor's door. Yet another strategy would be for her to remain silent, face the consequences for failing to cooperate, and take her chances vis-à-vis a future criminal prosecution.

To the extent that the law and legal practice is lacking here, the culprit is not DOJ waiver policy. Instead, it is with the rules regarding when and how corporate counsel must advise an employee that counsel does not represent her. ABA Model Rule of Professional Conduct 1.13(f) states:

In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.²⁰⁰

¹⁹⁸ See Brown, *supra* note 131, at 937–38 (“Ironically, the most significant of these perceived side effects—reduced candor between counsel and corporate employees—already exists under the current formulation of the federal privilege, even absent the specter of government-coerced waiver.”); Richter, *supra* note 41, at 32 (noting that concerns over the willingness of corporate employees to cooperate with internal investigations can be traced to *Upjohn*, not privilege waiver).

¹⁹⁹ Of course, not everyone agrees with this statement. See Duggin, *supra* note 8, at 914 (“While few would suggest that protection of ‘culpable’ employees is appropriate, punishment or termination of an employee simply because a third party—whether a co-worker, prosecutor or agency—views that person as ‘culpable’ is difficult to square with basic notions of fairness”).

²⁰⁰ MODEL RULES OF PROF'L CONDUCT R. 1.13 (2003).

For two distinct reasons, this rule is very weak. First, it is triggered only when a lawyer has reason to believe that the interests of the "constituent[]," in this case, the employee, are adverse to those of the organization.²⁰¹ This is likely true any time the employee has personal liability for criminal conduct. However, the attorney may not have reason to know about the employee's criminal liability until she has made a disclosure—which is too late for her, because the disclosure is not protected. Second, the lawyer's responsibility is simply to "explain the identity of the client," which is unnecessarily vague.²⁰² If the attorney tells the employee that he represents the corporation, she may think he is stating the obvious and may have no idea the consequences this has for the status of her confidences.²⁰³

One other rule is on point. ABA Model Rule 4.3 deals with situations when an attorney interacts with an unrepresented person.²⁰⁴ The rule states that, when an attorney "knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."²⁰⁵ Further, the rule cautions that the attorney should provide no legal advice to the unrepresented individual except advice to obtain counsel.²⁰⁶ Once again, this rule is of questionable help to a corporate employee facing interrogation. Given that she is being questioned by an attorney who is or who represents a superior, she may never express a misunderstanding of his role. On the contrary, she may believe that she fully understands his role: to get to the heart of the matter.²⁰⁷

Critics of privilege waiver claim that corporate officers and employees who provide statements during internal investigations, only to see these statements used against them in a later criminal investigation, are being deprived of their Fifth Amendment privilege against self-incrimination.²⁰⁸ At best, there is a sliver of truth to this proposition. As a strict legal matter, it is incorrect because the Fifth Amendment pro-

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ See Duggin, *supra* note 8, at 938–39 (discussing inadequacy of Model Rule 1.13 in employee interview setting).

²⁰⁴ MODEL RULES OF PROF'L CONDUCT R. 4.3.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ See Duggin, *supra* note 8, at 939–40 (discussing inadequacies of Model Rule 4.3 in the context of employee interviews).

²⁰⁸ See Colin Marks, *Corporate Investigations, Attorney-Client Privilege, and Selective Waiver: Is a Half-Privilege Worth Having at All?* 30 SEATTLE U. L. REV. 155, 180–82 (2006).

fects against governmental—not corporate—compulsion.²⁰⁹ Nevertheless, one might have some sympathy for an employee who provides an incriminating statement to corporate superiors ignorant of the consequences and possible alternative courses of action. The remedy for this problem, however, is not altering the power of DOJ to request privilege waivers should a criminal investigation commence far in the future. Rather, it is ensuring that the employee gets appropriate legal counseling from the outset.

This goal can best be accomplished by placing additional requirements on corporate counsel when they interface with employees. Instead of the weak and conditional warnings suggested by *Upjohn* and the ABA Model Rules, counsel should be required to provide employees with an affirmative pre-interview warning that counsel does not represent the employee, with the specific caution that anything the employee says could be used against her in a later criminal prosecution if the corporation should choose to cooperate and waive its privilege. Counsel should further inform the employee that, if she has any questions regarding her own involvement in criminal activity, she would be well-advised to contact a lawyer prior to answering any questions. Finally, counsel should provide the employee with the company's policy regarding the possible consequences for failing to cooperate with an internal investigation, so that she understands the full context of her predicament. Ideally, the ethical rule should require this *Miranda*-type cautioning to be in writing and the signature of the employee to acknowledge receipt.²¹⁰ If the employee expressed a desire to consult with counsel prior to cooperating, her wishes would necessarily be accommodated.²¹¹

Some might argue that these suggestions would have a chilling effect on internal investigations, thereby decreasing their utility and ultimately causing more corporate fraud rather than less. This is not the case, however. Undoubtedly, some employees would exercise their option to consult with counsel, which could slow down the pace of an internal investigation. But corporations would still possess considerable leverage to convince employees to be as cooperative as possible. The bulk of that leverage, of course, would come from the threat of

²⁰⁹ Griffin, *supra* note 61, at 356–57 (listing cases).

²¹⁰ See *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966) (summarizing the warnings that law enforcement must give to suspects in custody).

²¹¹ Cf. Duggin, *supra* note 8, at 941–46; 958–62 (discussing various reformers proposals to strengthen pre-interview warnings in the corporate employee setting; setting forth her own proposals to amend the rules).

the ultimate sanction: termination. Only an employee truly mired in criminality would suffer this consequence rather than cooperate. Thus, in most instances, the corporation should be able to discern the extent of the criminal activity from innocent employees and those whose conduct played only a minor role in it; the corporation can then take any action the situation warrants.²¹²

Furthermore, from the corporation's and society's perspective, termination of rogue employees who refuse to cooperate is a net good. It is a step toward the corporation purging itself of bad actors, it marks the employee as a person of interest in any future criminal investigation, and it is a form of punishment for the rogue individual's actions. As long as the employee made the decision to suffer these consequences after exploration of all possible options with private counsel, it is hard to see how this is a bad outcome.

C. Waiver Exposes the Corporation to Vulnerability in Other Litigation

Courts are divided on the issue of whether waiver of the attorney-client privilege for one purpose constitutes waiver in all other circumstances.²¹³ This means that, if a corporation waives in the context of a criminal investigation, it risks having a court determine later that it has waived for purposes of unrelated litigation, such as shareholder derivative suits and lawsuits by third parties claiming harm from the corporation's misconduct. Critics of waiver point to this result as yet another reason why it should be prohibited.²¹⁴

Views on whether waiver in a criminal case should automatically result in waiver in other contexts vary depending on who is considering the question. Corporations, of course, want to minimize the damages they must pay out as a result of internal illegality, and having to reveal privileged information to an opponent certainly does not further this

²¹² See Richter, *supra* note 41, at 33–34 (arguing that, even with warnings, internal investigations are likely to be successful).

²¹³ See *id.* at 16 (observing that courts have almost unanimously rejected selective waiver); see also Nolan Mitchell, Note, *Preserving the Privilege: Codification of Selective Waiver and the Limits of Federal Power over State Courts*, 86 B.U. L. REV. 691, 692–93 (2006); Ashok M. Pinto, Note, *Cooperation and Self-Interest Are Strange Bedfellows: Limited Waiver of the Attorney-Client Privilege Through Production of Privileged Documents in a Government Investigation*, 106 W. VA. L. REV. 359, 368–82 (2004) (setting out the views of the various federal courts of appeals on the issue of selective waiver). See generally Katherine M. Weiss, Note, *Upjohn Co. v United States as Support for Selective Waiver of the Attorney-Client Privilege in Corporate Criminal Investigations*, 48 B.C. L. REV. 501 (2007).

²¹⁴ See, e.g., Carmen Couden, *The Thompson Memorandum: A Revised Solution or Just a Problem?* 30 J. CORP. L. 405, 418–19 (2007) (waiver might incite civil lawsuits).

aim. On the other hand, the attorney-client privilege shields the truth from the light of day; one could argue that, just as in the criminal arena, privilege waiver leads to better, more efficient outcomes in collateral private litigation as well.

In any event, weighing the pros and cons of extending waiver to the civil context is beyond the scope of this Article. It is noted that prosecutors are specifically counseled in the McNulty Memorandum to consider whether waiver will result in collateral harm that outweighs its benefits; accordingly, a corporation has the opportunity to convince prosecutors that, in the specific circumstances it faces, waiver would be harmful overall.²¹⁵ Further, the corporation can decide not to waive if it believes that the potential collateral harm outweighs its benefits. Finally, proposals have been put on the table to amend attorney-client privilege doctrine to permit selective waiver—that is, to allow corporations to waive privilege to assist in criminal cases without having to disclose the documents in any other context.²¹⁶ This may very well strike the correct balance between competing goals.²¹⁷

D. Corporate Counsel Should Not Be Gatekeepers

A number of commentators have pointed out that the net result of corporate cooperation and privilege waiver is the “deputation” of corporate counsel in the fight against white collar crime.²¹⁸ They contend that this trend, also reflected in Sarbanes-Oxley’s requirement that corporate counsel report criminal activity up the corporate chain

²¹⁵ McNulty Memorandum, *supra* note 36, at 9.

²¹⁶ The Supreme Court’s Advisory Committee on the Federal Rules of Evidence has proposed a new Rule 502 that would foster selective waiver in the federal courts. See Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for a Federal Rule of Evidence 502*, 58 S.C. L. Rev. 211, 238–40 (2006). Interestingly, the ABA and affiliated groups at first strongly supported this provision, but apparently now that they think they can successfully win their campaign to prohibit waiver altogether, they have reversed their position, making enactment of the new rule unlikely. See Richter, *supra* note 41, at 26.

²¹⁷ See Richter, *supra* note 41, at 41–59 (discussing the contours of an appropriate selective waiver provision); Pinto, *supra* note 213, at 382–88 (arguing for the legislative or judicial creation of a selective waiver provision). But see Marks, *supra* note 208, at 190–94 (arguing that selective waiver is an insufficient protection of the privilege).

²¹⁸ See, e.g., Ellard, *supra* note 158, at 988 (“Today companies are under pressure to waive that privilege, thereby, in effect, deputizing their counsel as federal agents”); Marks, *supra* note 208, at 180 (discussing the deputation of corporate counsel); Zornow & Krakaur, *supra* note 104, at 156–57 (“In all situations where the company decides to waive privilege to please the prosecutor, the role of criminal counsel is repositioned from that of the client’s confidential legal advisor and the government’s adversary into a conduit of information between the client and the government.”).

of command and perhaps even to outsiders,²¹⁹ is bad for the nation's commerce and the legal profession. These arguments are important, and they merit examination.

There is no doubt that the net result of Sarbanes-Oxley, corporate cooperation, and attorney-client privilege waiver has been an increasing level of enlistment of members of corporations' in-house counsel departments and their outside law firms as soldiers in the battle against white collar crime.²²⁰ It is exactly this additional manpower, by insiders who hold sway over potential wrongdoers, that has enhanced the prosecution of white collar cases in recent years. The question is whether this development is good or bad.

The fundamental argument against this trend is that it has morphed the role of the corporate lawyer from trusted advisor to potential government informant.²²¹ Counsel will no longer be invited to strategy sessions; her opinion will not be sought unless absolutely necessary; her loyalty will constantly be questioned.²²² An adversarial relationship between management and in-house counsel will erode corporate compliance, resulting in more criminal behavior.²²³

Much of the response to this argument lies in the earlier discussion of why corporate agents will seek legal advice despite lacking iron-tight guarantees of confidentiality.²²⁴ But the argument points out a more human dimension to the problem. In effect, the prospects of corporate cooperation and privilege waiver potentially pit employee against employee in the organization. It is likely to make fellow employees more distrustful of each other, of management, and of corporate counsel. The workplace will become a less pleasant environment in which to function.²²⁵

²¹⁹ Sarbanes-Oxley Act § 307, 15 U.S.C.A. § 7245 (2002). For a discussion of this provision, see Thomas G. Bost, *Corporate Lawyers After the Big Quake: The Conceptual Fault Line in the Professional Duty of Confidentiality*, 19 GEO. J. LEGAL ETHICS 1089, 1102-10 (2006).

²²⁰ Griffin, *supra* note 61, at 335-36.

²²¹ See Zornow & Krakaur, *supra* note 104, at 157 ("The situation sometimes comes close to converting corporate counsel into a government agent.").

²²² See Griffin, *supra* note 61, at 335-36 ("Over time, corporations will respond by excluding lawyers from the very situations in which competent legal advice might best be able to ensure compliance with the law.").

²²³ See Zornow & Krakaur, *supra* note 104, at 156-57 (arguing that waiver creates chilling effect during internal investigations).

²²⁴ See *supra* notes 164-166 and accompanying text.

²²⁵ See Duggin, *supra* note 8, at 913-14 (arguing that privilege waiver creates atmosphere of disloyalty); Griffin, *supra* note 61, at 336 (noting that "corporate cooperation . . . may cause disloyalty within the corporation" by creating conflict between individuals and management).

This is probably true, but it is not necessarily a bad thing. By many accounts, the present corporate environment is one in which fraudulent practices and other criminal activities abound.²²⁶ When an individual is caught committing a crime red-handed, his response often is that "everyone else was doing it, too." A strong argument can be made that, despite the personal hardships involved, shaking up the complacency of the corporate environment is in the public's best interest.²²⁷

No players in the corporate game have resisted change more vigorously than members of the bar.²²⁸ This is not surprising given their position and responsibilities. Lawyers are at the very heart of the corporation's compliance programs and investigative efforts.²²⁹ Already they must worry that they do not add anything of tangible value to the enterprise; instead, they present obstacles that must be overcome any time the company wants to innovate.²³⁰ At least their traditional role as corporate litigators provides them with the opportunity to be white knights: to protect and defend the corporation against harm from outsiders. With this in mind, one can understand how awful those lawyers must feel when, confronted with a government investigation, the product of their own work is used as a primary weapon against the organization and its employees if waiver is chosen.

In effect, lawyers do not want to be cast in the role of the conscience of the enterprise. And for good reason: no one likes being a killjoy.²³¹ History demonstrates, however, that corporations are in des-

²²⁶ See COLEMAN, *supra* note 77, at 8–10.

²²⁷ As U.S. Attorney Mary Beth Buchanan writes:

Employees should not have false expectations concerning the confidentiality of their communications with corporate counsel in an organization that has implemented a compliance program that requires its employees to promptly provide complete information about wrongdoing. An effective program would also require the organization to provide such information about criminal conduct to the appropriate authorities and regulators. Such a zero tolerance approach to employee crime is integral to the organizational culture of a good corporate citizen and can be based on rewards as well as punitive action.

Buchanan, *supra* note 140, at 599.

²²⁸ See McClure, *supra* note 16.

²²⁹ See Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 *FORDHAM L. REV.* 983, 997 (2005) ("[I]nside counsel is the single most important lawyer in a securities fraud committed by a public company and . . . the logical lawyer candidate for the gatekeeping function.").

²³⁰ See *id.* at 1016–17 (discussing how in-house counsel are concerned about adding value to their company).

²³¹ Actually, the problem is probably worse than stated. A number of factors combine to cause the atmosphere in many corporations to be one of indifference to legal compliance. These factors include the personality of those who enter the business world and the

perate need of consciences, and who better to serve in this capacity than counsel? For one thing, counsel understands the legal landscape and is in the best position to keep a corporation from straying from the straight and narrow. In addition, attorneys are uniquely trained to serve two masters at the same time: litigators, for example, are simultaneously charged with representing their client zealously and serving as an officer of the court. Wearing dual hats is not easy, but it can be done.²³²

The bottom line is this: in the pre-waiver world, corporations had a horrific track record of obeying the law. It is time for a new approach. Expecting corporate counsel to be more aggressive in policing the activities of the enterprise and using the results of counsel's efforts in criminal (as well as civil enforcement) proceedings is well worth a try.

IV. PROTECTING AGAINST PROSECUTORIAL EXCESS

None of the foregoing should be taken to suggest that federal prosecutors are immune from abusing their authority. Protections should be in place to minimize the likelihood of such occurrences.

A. *Ensuring That Waiver Is a Last Resort*

Attorney-client privilege waiver should be a last resort, not a prerequisite to a corporation's cooperation. Because of the important goals served by the privilege, a corporation should be permitted to invoke it if at all possible. Thus, if other means of assisting prosecutors are available to enable them to uncover the core criminality in a reasonable amount of time, such assistance should warrant full credit.

culture of competition that they find when they get there. See COLEMAN, *supra* note 77, at 183-93. Legal counsel might initially approach the workplace with a more rule-abiding orientation, but the forces of organizational conformity soon cause them to become "amoral functionaries" just like those around them. See *id.* at 199-204.

²³² Professor Kim argues that the banality of fraud in the corporate setting makes it difficult for in house counsel to play the role of gate keeper because of the pressures resulting from (1) being a "mere employee"; (2) wanting to be a "faithful agent"; and (3) wanting to be a team player. See Kim, *supra* note 229, at 1001-26. She argues that, as a result, counsel develop a self-serving bias and motivated reasoning. See *id.* at 1027-29. To assist counsel in playing the role of gatekeeper, she suggests three reforms: (1) public companies should transfer the oversight of their corporate legal departments from the company's officers to a committee of independent board members; (2) the law should strengthen whistleblower protection to attorneys under the Sarbanes-Oxley Act; and (3) public companies should limit the amount of equity investments counsel can accept as compensation to minimize conflicts of interest. See *id.* at 1053-74. These suggestions are worthy of careful examination, which is left for another day.

Only if all else has failed or is likely to fail should the subject of waiver be broached.²³³

The McNulty Memorandum comes close to stating that waiver is to be treated as a last resort. It provides:

Waiver of attorney-client and work-product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation. . . .

Prosecutors may only request waiver . . . when there is a legitimate need for the privileged information to fulfill their law enforcement obligations. A legitimate need for the information is not established by concluding it is merely desirable or convenient to obtain privileged information.²³⁴

Further, the memo provides four criteria by which a prosecutor should measure need: (1) the likelihood and degree to which the information will be helpful, (2) whether there are alternative means for obtaining the information, (3) the completeness of voluntary disclosure already provided, and (4) collateral consequences of waiver.²³⁵

The McNulty Memorandum could be improved by incorporating an explicit statement that waiver should not be requested unless and until all other means of obtaining the necessary information through corporate cooperation have been pursued to no avail, or when it becomes clear that such means will not be sufficient to uncover the full extent of complex criminality in a reasonable amount of time. This would put more teeth in the Department's position that waiver will be requested only in rare instances and might have the effect of calming some critics.²³⁶

If a prosecutor concludes that a waiver request is appropriate, the request should be as minimally intrusive as possible. To this end, the McNulty Memorandum divides protected material into two categories.²³⁷ The first ("Category I") contains purely factual information, such as witness statements and underlying documents.²³⁸ The second

²³³ See Duggin, *supra* note 8, at 962-63 (arguing that waiver requests should be made only if there is "no other way to serve the interests of justice").

²³⁴ McNulty Memorandum, *supra* note 36, at 8-9.

²³⁵ *Id.* at 9.

²³⁶ For example, Senator Specter reacted to the "legitimate need" language of the McNulty Memorandum by stating that such a standard "should guide the most basic of prosecutorial requests, not sensitive requests for privileged information." *Sen. Specter Continues Efforts*, *supra* note 39, at 828.

²³⁷ McNulty Memorandum, *supra* note 36, at 9-10.

²³⁸ *Id.* at 9.

category ("Category II") consists of attorney-client communications or nonfactual attorney work-product, which might include attorney notes, memoranda, and reports containing counsel's legal impressions and advice.²³⁹ Category I information can be obtained only after approval of the U.S. Attorney, who must consult with the Assistant Attorney General for the Criminal Division prior to giving approval.²⁴⁰ Prosecutors are cautioned that Category II information should be sought only in rare instances and only after obtaining approval from the Deputy Attorney General.²⁴¹ A corporation's determination not to provide Category I information may be factored into the charging decision, but the same judgment regarding Category II information may not.²⁴²

Although this regime has not satisfied critics of privilege waiver,²⁴³ it provides a genuine check on prosecutorial overreaching. No longer can individual "line" prosecutors act as "cowboys" by demanding waiver at the outset of an investigation. Personal approval by the U.S. Attorney or the Deputy Attorney General is required in every case. This also means that a corporation that believes it has been treated unfairly with respect to attorney-client privilege issues can appeal any disputed decisions up the chain of command. Because they are removed from the front lines, supervisory Assistant U.S. Attorneys and U.S. Attorneys themselves are more likely to give a fair hearing to corporate counsel than their subordinates.

The McNulty Memorandum did not come into existence until December 2006.²⁴⁴ Time will tell if its provisions are sufficiently strenuous to strike the right balance between adequate protection of attorney-client confidences and successful prosecution of white collar crime. DOJ has asked that the McNulty Memorandum be given a chance.²⁴⁵ If provided the opportunity, it appears that the McNulty Memorandum may, with some caveats, provide a workable solution to the problem.

²³⁹ *Id.* at 10.

²⁴⁰ *Id.* at 9.

²⁴¹ *Id.* at 10.

²⁴² McNulty Memorandum, *supra* note 36, at 9–10.

²⁴³ See Wray & Hur, *supra* note 20, at 1179 (arguing that the prior approval provisions of the McNulty Memorandum are too cumbersome and are not likely to be efficacious).

²⁴⁴ Weissman & Bugar, *supra* note 38, at 12.

²⁴⁵ See DOJ Official, *Defense Attorneys Square Off over McNulty Memorandum Waiver Issue*, 2 White Collar Crime Rep. (BNA) No. 1, at 25–26 (Feb. 2, 2007) (reporting on Assistant Attorney General Alice S. Fisher's defense of the McNulty Memorandum during a panel discussion with defense attorneys).

B. Prohibiting Contemporaneous Teaming Up

Exhibit A for those making the case that DOJ has abused its authority in recent years is its conduct in the on-going KPMG litigation.²⁴⁶ In that case, prosecutors pressured the accounting firm KPMG to cooperate early²⁴⁷ in its investigation into illegal tax shelters, which ultimately led the firm to pay a \$456 million fine.²⁴⁸ As it is a major accounting firm engaged in public audits, KPMG's rush to cooperate aggressively was highly rational; unlike most corporate defendants, KPMG actually would have faced the same fate as Arthur Andersen had it been indicted. As part of its cooperation, KPMG agreed not only to make its employees available to prosecutors for questioning, but also to sanction those employees who failed to cooperate with the government.²⁴⁹ An employee's invocation of the Fifth Amendment privilege against self-incrimination was considered lack of cooperation.²⁵⁰ Sanctions included the denial of previously promised attorneys' fees and termination of employment.²⁵¹ Eventually, some of these employees were indicted.²⁵²

In 2006, in *United States v. Stein*, the U.S. District Court for the Southern District of New York held, inter alia, that this arrangement (and the Thompson Memorandum itself) violated the defendants' Fifth Amendment right to due process and their Sixth Amendment right to counsel of choice.²⁵³ Although the court focused on the attorneys' fees issue, it likely would have come to a similar conclusion had it turned its attention to the admissibility of the statements that several of the employees made after being threatened with dismissal. At the time these statements were made, prosecutors and KPMG's counsel had teamed up against the individual employees.²⁵⁴ Under the 1967 U.S. Supreme Court case *Garrity v. New Jersey*, there is no question that the government could not have directly used threats of employment termination to force KPMG employees to incriminate

²⁴⁶ See generally *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

²⁴⁷ See *id.* at 339–43 (describing early discussions between KPMG and U.S. Attorney's Office).

²⁴⁸ *Id.* at 349.

²⁴⁹ See *id.* at 347–50.

²⁵⁰ See *id.*

²⁵¹ *Stein*, 435 F. Supp. 2d at 345–47.

²⁵² *Id.* at 336, 350.

²⁵³ *Id.* at 362–73.

²⁵⁴ See *id.* at 363.

themselves.²⁵⁵ Though it is unclear under existing case law whether the entanglement of the government and KPMG elevated the latter's conduct to the level of state action, strong arguments can be made to this effect.²⁵⁶ Regardless of legal doctrine, it seems clear as a normative matter that the government should not be able to enlist the aid of an agent to do its bidding in this regard. Thus, convincing KPMG management to sanction employees who invoked their Fifth Amendment right amounted to prosecutorial overreaching.

Written after Judge Lewis Kaplan's decision in *Stein*, the McNulty Memorandum specifically states that prosecutors "generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment" when evaluating the corporation's cooperation.²⁵⁷ The only exception to this is when the totality of circumstances indicates that the corporation's advancement of fees is part of an overall scheme to impede a criminal investigation.²⁵⁸ Once again, however, the Memorandum requires approval by the Deputy Attorney General before a prosecutor may consider this factor as part of the charging decision.²⁵⁹ As a result, the attorneys' fees issue appears to be off the table.

The McNulty Memorandum does not, however, explicitly address the more general *Garrity* problem, a troubling oversight given that the state of the law is unclear.²⁶⁰ Therefore, DOJ should issue an addendum to the McNulty Memorandum providing explicit guidance ensuring that the spirit of *Garrity* is enforced.²⁶¹

²⁵⁵ See 385 U.S. 493, 496-98 (1967) (holding that evidence received from police officers who were compelled in an administrative inquiry either to answer questions or risk losing their jobs violated their Fifth Amendment privilege).

²⁵⁶ Professor Griffin has done an excellent job of making this case. See Griffin, *supra* note 61, at 365-71.

²⁵⁷ McNulty Memorandum, *supra* note 36, at 11.

²⁵⁸ *Id.* at 11 n.3.

²⁵⁹ *Id.*

²⁶⁰ See 385 U.S. at 496-98; see also Griffin, *supra* note 61, at 365-71.

²⁶¹ This is not to say that government and corporate officials should not work together contemporaneously to investigate and punish corporate crime if the allegations come to light prior to the completion of an internal investigation. Indeed, a joint effort of this nature appears to be functioning successfully in uncovering the latest corporate scourge, the backdating of stock options. See Richter, *supra* note 41, at 39. It simply means that, when the investigations are contemporaneous, special care must be taken to honor the rights and privileges of corporate employees—even if this means that the investigation will take more time.

C. Prosecuting Corporate Agents and Employees for Lies Made to Superiors

The federal false statements statute, 18 U.S.C. § 1001, provides, in part:

whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statements or representations . . . shall be fined under this title, imprisoned not more than 5 years . . . or both.²⁶²

In the 1984 case of *United States v. Yermian*, the U.S. Supreme Court held that the government need not prove that the defendant knew he was lying to the federal government in order to obtain a false statements conviction.²⁶³ Later courts have gone even further, holding that defendants are strictly liable on this element because it is jurisdictional only.²⁶⁴

In a similar vein, one of the new Sarbanes-Oxley obstruction-of-justice provisions states, in part, that “[w]hoever corruptly . . . obstructs . . . or impedes . . . the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States” is guilty of a felony.²⁶⁵ This statute does not require the obstruction to be direct, so long as the intended impact is on the federal proceeding.²⁶⁶

The interpretation of these statutes has led to the prosecution of some corporate employees for lying to in-house and outside counsel during an internal investigation if a criminal investigation is also underway.²⁶⁷ If the prosecution is for false statements, *Yermian* dictates that the employee does not even need to be aware of the federal investigation.²⁶⁸ Although they have not gained much attention from critics of privilege waiver, these prosecutions are very troubling.²⁶⁹ For the balance of power between the government, the corporation, and individ-

²⁶² 18 U.S.C.A. § 1001 (2006).

²⁶³ 468 U.S. 63, 68–75 (1984).

²⁶⁴ See, e.g., *United States v. Green*, 745 F.2d 1205, 1210 (9th Cir. 1984); see also MODEL PENAL CODE § 1.13(10)1 (Proposed Official Draft 1962) (defining jurisdictional elements as nonmaterial, meaning that the defendant need not have mens rea regarding them).

²⁶⁵ 18 U.S.C.A. § 1505 (2004).

²⁶⁶ See *id.*

²⁶⁷ See Griffin, *supra* note 61, at 371–73.

²⁶⁸ See 468 U.S. at 68–75.

²⁶⁹ It has gained the attention of Professor Griffin, who agrees that it should be stopped. See Griffin, *supra* note 61, at 373–74.

ual employees to remain intact, the corporation's internal investigation and the government's external one must remain independent of each other. Otherwise, the two entities are in a position to "gang up" on the employee, using tactics to compel cooperation that neither one could use individually. A corporation has the power to fire an employee who lies during its investigation; it should not also be able to make the threat that any lies will subject the employee to criminal prosecution by the government. The Department should renounce its intention to prosecute such cases, seek legislation to reverse the *Yermian*, decision and limit the scope of the obstruction statute.

CONCLUSION

Some might argue that the present debate over privilege waiver is much ado about nothing. They might suggest that prohibiting DOJ lawyers from requesting waiver and from using it to evaluate a corporation's cooperation would not fundamentally alter the status quo as long as corporations retained the ability to waive voluntarily. The only thing that would change is which party would initiate waiver discussions.

Such a contention, however, would be a misunderstanding of reality. If a prohibition against asking for or using waiver were written into law, the balance of power between prosecutors and corporations would undergo a fundamental shift. Far more corporations would choose to exercise their privilege even if it meant that they could provide only minimal assistance to a criminal investigation as a result. If a prosecutor decided to bring charges against a corporation under such circumstances, the corporation could move for dismissal of the indictment based upon the statute, claiming that it was being penalized for failing to waive privilege. This would be a powerful argument.²⁷⁰ If the court refused to dismiss the charges, the same issue would arise at sentencing. The corporation would want (and presumably would be entitled to receive) the full benefit of cooperation, even if that cooperation were of little use.

Thus, it is not surprising that the issue of privilege waiver has been so hotly debated. Indeed, it has induced near-hysteria in some circles.²⁷¹ Cries that government practices have resulted in a "culture

²⁷⁰ See Statement of Barry M. Sabin, *supra* note 41.

²⁷¹ For example, Susan Hackett begins her article with an outlandish hypothetical that she claims is now quite possible in light of privilege waiver. See Hackett, *supra* note 158, at 132-34. Another example is the hyperbolic opening quote by N. Richard Janis in the Christopher Wray and Robert Hur's article:

of waiver" abound.²⁷² The ABA set up a task force that quickly condemned the practice of privilege waiver and started a very calculated lobbying campaign to see it stopped.²⁷³ Circling the wagons with other lobbying groups, the bar association successfully pressed its case before the U.S. Sentencing Commission²⁷⁴ and achieved partial success at DOJ.²⁷⁵ It continues to write letters to any government agency that requests privilege waivers demanding that this practice be eliminated. It is working behind the scenes to obtain passage of legislation that would outlaw requests for waiver.²⁷⁶ The New York State Bar Association has followed suit,²⁷⁷ and other state bars are not far behind.²⁷⁸

"[P]rosecutors have exploited their virtually unchecked power to extract and coerce ever greater concessions, jeopardizing the very nature of our adversary system. It is destruction by accretion—a staged but seemingly inexorable concentration of power that has skewed the system. The net result has been the emasculation of the defense bar and the enforcement of the criminal law in a way that is often wildly out of proportion to the perceived wrongdoing. It . . . often is . . . a state-sponsored shakedown scheme in which corporations are extorted to pay penalties grossly out of proportion to any actual misconduct. Criminal sanctions . . . make the payment of tribute to the federal government essentially a cost of doing business."

Wray & Hur, *supra* note 20, at 1095 (quoting 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, available at http://www.dcbbar.org/for_lawyers/resources/publications/washington_lawyer/march_2005/stand.cfm).

Yet a third example comes from Colin Marks's article. See Marks, *supra* note 208, at 155. It begins by posing a hypothetical based upon the government asking an individual—the reader—to waive privilege to obtain credit for cooperating. *Id.* He notes that the reader would "likely be outraged" by this practice. See *id.* His hypothetical, however, is what is truly outrageous; no one has ever suggested that privilege waiver has the slightest application in the noncorporate setting.

²⁷² See *supra* notes 28–31 and accompanying text.

²⁷³ See *supra* note 28.

²⁷⁴ On April 5, 2006, the U.S. Sentencing Commission recommended the deletion of commentary in the Sentencing Guidelines suggesting that privilege waiver is a required component of cooperation with the government in certain circumstances. The commentary had been added in 2004. The deletion became effective on November 1, 2006, when the time for congressional disapproval passed with no legislative action. See *U.S. Sentencing Commission Removes Guidelines' Reference to Waiver of Attorney-Client Privilege and Work-product Protections*, LITIG. ALERT (Bingham McCutchen, Boston, Mass.), Mar. 2006, at 1–4, <http://www.bingham.com/Media.aspx?MediaID=2716>.

²⁷⁵ That success is found in the changes made by the McNulty Memorandum over prior DOJ guidelines. Compare McNulty Memorandum, *supra* note 36, with Holder Memorandum, *supra* note 15, and Thompson Memorandum, *supra* note 19.

²⁷⁶ See *supra* note 34 and accompanying text (referencing the Specter Bill).

²⁷⁷ Sheri Qualters, *State Bars Push Back on Privilege Waivers*, NAT'L L.J., Nov. 13, 2006, at 9.

²⁷⁸ For example, the author is a member of the Florida Bar's Attorney-Client Task Force created by the President of the Florida Bar in early 2007.

Hysteria is probably an understandable reaction upon observing, indeed, experiencing, a significant shift in the balance of power between the government and its people, even if those "people" are legal fictions created to further economic progress. Nevertheless, it is not a warranted reaction to the matter at hand.²⁷⁹ This Article has taken a reasoned approach to addressing the question whether corporate privilege waiver is a net good for society; it has engaged in a careful cost-benefit analysis. Its conclusion is that retaining the ability of federal prosecutors to ask a corporation to waive its attorney-client privilege, and to weigh the corporation's response when evaluating the level of its cooperation, is in the public's best interest when waiver is necessary to conduct a complex criminal investigation efficiently. A few corrective brush strokes, however, are necessary to paint a perfect picture. First, corporate employees should be protected during internal corporate investigations by written warnings that include specific references to the problem of self-incrimination and the right to separate counsel. Second, the protections of the recently created McNulty Memorandum should be strengthened by making it clear that waiver requests are a last resort and by adding specific guidelines for situations where threats of termination force employees to incriminate themselves. Third, the doctrine set out by the U.S. Supreme Court in 1984, in *United States v. Yermian*, allowing for strict liability in federal prosecutions of employees for false statements made to counsel during concurrent internal and criminal investigations, should be renounced and reversed. With these adjustments in place, DOJ should be left alone to continue its job of tracking down and aggressively prosecuting white collar crime.

²⁷⁹ Professor Brown points out that the practicing bar had an equally hysterical reaction to the proposed voluntary disclosure requirements under the Federal Rules of Civil Procedure enacted in 1993, which turned out to be unwarranted. See Brown, *supra* note 131, at 943-44.