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From the Legal Literature

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Constitutional Problems with Discretionary Decisions Regarding Federal Corporate Prosecutions

Quantifying the amount of harm caused by corporate criminal conduct is a difficult if not impossible task. Part of the difficulty stems from the lack of available data. Another difficulty is that corporate crimes often cause more than just financial harm. Quantifying damage to the environment or the loss of investor-market trust that may follow a highly publicized corporate criminal prosecution is inexact, to say the least. Nonetheless, there is little doubt that "U.S. citizens and businesses lose billions of dollars each year to criminals engaged in non-violent fraudulent enterprises." [FN1]

The U.S. Sentencing Commission tracks the number of organizational sentences on a yearly basis for offenses in which "pecuniary loss or harm can be more readily quantified, such as fraud, theft, and tax offenses." [FN2] The Commission reported that in 2006 there were a total of 217 sentences handed down for such offenses. [FN3] This number represented a 16% increase from 2005, and a 67% increase from 2004. [FN4] As was the case in 2005, the most common offense for federally sentenced organizations was fraud. [FN5]

Because corporations obviously cannot be imprisoned, sanctions for criminal conduct often include substantial fines and/or restitution. In 2006, fines were imposed upon 74.7% of the sentenced organizations tracked by the Commission. And restitution was ordered in 28.1% of the sentenced cases. The mean fine was $5,890,259, and the mean restitution order was $1,976,593. The highest fine in 2006 was $300 million, while the highest restitution order was for $39.8 million. In addition to monetary sanctions, 74.7% of the sentenced organizations were put on probation and 19.8% were compelled to make ethics-related or compliance improvements. [FN6]

In a series of memoranda issued to the heads of the U.S. Attorney offices across the country, the U.S. Department of Justice through the Deputy Attorney General has provided guidance on the propriety of charging corporations and the various factors that should be taken into account. These memoranda have fueled many controversies that have spilled over into the judicial arena. Judges have been forced to analyze the policies contained in the memoranda. [FN7] Ultimately, the memoranda have been revised and replaced due to various controversies that they sparked. The most recent memorandum, the McNulty Memorandum, was issued on December 12, 2006. [FN8] It superseded and replaced the previous Thompson and McCallum memoranda. [FN9]

The McNulty Memo begins by explaining the general goals of the Department of Justice as they relate to the prosecution of corporate crime. It explains that "protecting investors and ensuring public confidence in business entities and in the investment markets in which those entities participate" are the primary goals. [FN10] The memo then delves into a discussion of how corporations are "legal persons" under the law, and how they "should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment." [FN11] The memo goes on to explain the concept of *respondeat superior* and the varying circumstances in which employee misconduct may be attributed to the corporation for purposes of criminal liability. [FN12]

The remainder, and indeed bulk, of the McNulty Memo is dedicated to exploring the factors that should be taken into consideration when prosecutors are contemplating a corporate prosecution. For starters, because corporations are "legal persons" under the law, prosecutors should "apply the same factors in determining whether to charge a corporation as they do with respect to individuals." [FN13] These factors include "the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of non-criminal approaches." [FN14] In addition to these factors, a slew of additional factors unique to the "corporate 'person"' should be considered by prosecutors in "conducting an investigation, determining whether to bring charges, and negotiating plea agreements" with corporations. [FN15] Those factors include, but are not limited to, the following:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;

2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management;

3. the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;

4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;

5. the existence and adequacy of the corporation's pre-existing compliance program;

6. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;

7. collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution;

8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and

9. the adequacy of remedies such as civil or regulatory enforcement actions. [FN16]

The fourth of the factors enumerated above has been the most hotly debated. Prior versions of factor four in previous memoranda were viewed as attacks on the sacrosanct principles underlying the attorney-client privilege, and to a lesser extent the work-product doctrine. [FN17] In the Thompson Memo, in force before the McNulty Memo, a corporation's refusal to waive the attorney-client privilege could be taken into account in deciding whether or not to charge the corporation. [FN18] Specifically, the Thompson Memo explained that in "gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to ... waive attorney-client and work product protection." [FN19]

There was a strong backlash to this consideration being included in the mix of factors weighing for and against criminal corporate prosecutions. [FN20] To counter the backlash, the McNulty Memo attempted to scale back the consideration of this factor. Most importantly, it sets forth a uniform method that all federal prosecutors must follow if they seek to have a corporation waive the attorney-client or work-product privileges, including seeking authorization "from the United States Attorney who must provide a copy of the request to, and consult with, the Assistant Attorney General for the Criminal Division before granting or denying the request." [FN21]

The memo also differentiates between two types of privileged information. The first type is described as "purely factual information" such as "copies of key documents, witness statements, or purely factual interview memoranda regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel." [FN22] As to this first category of information, a "corporation's response to the government's request for waiver ... may be considered in determining whether a corporation has cooperated in the government's investigation" and thus may weigh for or against prosecution. [FN23]

The second type of privileged information is everything else that does not fall within category one. "This information includes legal advice given to the corporation before, during, and after the underlying misconduct occurred." [FN24] As to this type of privileged information, "[i]f a corporation declines to provide a waiver ... after a written request from the United States Attorney, prosecutors *must not* consider this declination against the corporation in making a charging decision." [FN25] But, in arguably contradictory fashion, the memo goes on to explain that "[p]rosecutors may always favorably consider a corporation's acquiescence to the government's waiver request in determining whether a corporation has cooperated in the government's investigation" and thus whether or not the corporation should be charged. [FN26] In this sense, the absence of a positive is surely equivalent to a negative for corporations.

It is clear that the Department of Justice was back-peddling on the issue of waiver requests when it issued the McNulty Memo. In the short introduction to the body of the McNulty Memo, Deputy Attorney General McNulty explained the following:

> Many of those associated with the corporate legal community have expressed concern that our practices may be discouraging full and candid communications between corporate employees and legal counsel. To the extent this is happening, it was never the intention of the Department for our corporate charging principles to cause such a result.

Therefore, I have decided to adjust certain aspects of our policy in ways that will further promote public confidence in the Department .... The new language expands upon the Department's long-standing policies concerning how we evaluate the authenticity of a corporation's cooperation with a government investigation. [FN27]

It remains to be seen whether the McNulty Memo's attempt to scale-back governmental pressure to waive the attorney-client privilege is effective. It should be noted, though, that even this softened version of "factor four" continues to be criticized by both scholars and practitioners. [FN28]

Many critics have analyzed the Department of Justice's stated policies related to the charging and prosecution of corporations. Two recent contributions to the legal literature greatly enhance the discourse on these somewhat controversial policies.

Compelled Cooperation and the New Corporate Criminal Procedure
Lisa Kern Griffin, 82 N.Y.U. L. Rev. 311 (2007).

In this article, Lisa Kern Griffin, a Lecturer in Law at the University of California, Los Angeles, School of Law, thoughtfully and carefully explained how the federal government's approach to prosecuting corporate crime has begun to threaten individual liberties. [FN29] She focused her analyses on how corporations are increasingly being forced to work closely with federal prosecutors, resulting in a trend that appears to center blame on individual employees, rather than on the corporate entity itself. [FN30]

Griffin's article begins by exploring the historical backdrop that led to the federal government's current cor-

porate-prosecution policies. The impetus for increased attention shifting to corporate crime was, in large part, a consequence of high-profile corporate scandals such as those related to Enron and WorldCom. [FN31] The effect these high-profile cases had on investor confidence "in a market already stressed by the events of September 11, 2001," prompted the creation of the federal government's Corporate Fraud Task Force in 2002 - an entity charged with leading federal government efforts to combat corporate wrongdoing. [FN32] The government declared "war" on corporate crime with the creation of this Task Force. [FN33] According to Griffin, when "[f]aced both with the evaporation of billions (and perhaps trillions) of dollars in capital value in a few short years and the spectacle of hundreds of public companies restating earnings, the government's aggressive approach is understandable." [FN34]

Griffin then dissects the current policies that guide federal prosecutors when dealing with corporate crime. She explains that the Thompson Memo and the recent McNulty Memo are the "fullest expression" of "the new corporate criminal procedure." [FN35] Griffin explains these policies in an easily digestible manner, using the metaphors of "carrots and sticks." [FN36] The "carrots"-the rewards corporations receive for good behavior-are exemplified by the U.S. Federal Sentencing Guidelines providing for deductions in culpability scores "that translate into reduced fines, if [corporations] maintain 'effective compliance and ethics programs.' prevent and detect violations of law, cooperate fully in ongoing investigations, self-report, and accept responsibility." [FN37] In contrast, "sticks" are the punishments corporations receive for bad behavior, such as increased punishments for a corporation's obstruction of a federal investigation or prosecution. [FN38]

Griffin recognizes and thoughtfully explains an important shift in federal policy with regard to corporate crime. Prior to the Thompson Memo, the U.S. Sentencing Guidelines provided the primary framework for the federal prosecution of criminal conduct by corporations. More recently, though, the Thompson and McNulty Memoranda refocus the remedying of corporate wrongdoing "upstream from the sentencing phase of the adjudicative process to the pre-indictment stage of the investigation." [FN39] As a result, much more attention is now placed on a corporation's willingness to cooperate in an investigation. [FN40] In fact, cooperation plays a large role in determining whether the corporation will even be indicted. [FN41] In other words, "good conduct" after the discovery of corporate wrongdoing good can diminish a corporation's chances of being prosecuted. The ultimate decision whether to prosecute can depend on whether such "good conduct" is maintained throughout the pendency of a negotiated deferred prosecution agreement ("DPA").

Griffin explains that DPAs are

> a form of probation, or "pretrial diversion," according to which the government agrees to suspend charges against a company so long as the company fulfills every obligation set forth in a detailed "contract." These agreements are a compromise intended to split the difference between declination of prosecution and a guilty plea. [FN42]

Under the terms of most DPAs, corporate prosecution is suspended so long as the corporate-defendant agrees to undertake corrective actions to remedy and eliminate future corporate wrongdoing. While the terms of these contracts are negotiated to a certain extent, the bulk of the provisions of a DPA prescribed by the government so that it can exercise a certain "measure of control over personnel and business decisions." [FN43] Griffin is largely critical of DPAs. She argues that they "involve prosecutors in 'corporate-wide behavior modification,' prescribing what is good corporate governance rather than just prohibiting wrongful conduct. The agreements have grown increasingly ad hoc, and their provisions often 'flunk the most elementary standards of business rationality."' [FN44] Moreover, Griffin rightfully expresses concern that DPAs tend to "focus on cooperation for its own sake-in the sense of obedience to the demands of regulators-rather than on the development and enforcement of constructive norms of corporate conduct." [FN45] As a result, corporations "hold only the low cards in

DPA negotiations, and individual employees are not even dealt in." [FN46]

Griffin then makes a compelling argument that DPAs allow corporations to increasingly avoid prosecution or even indictment, while simultaneously shifting federal criminal power to the "retail prosecution of individuals." [FN47] Griffin explores several reasons for this shift. First, some high-profile cases, such as *Arthur Andersen LLP v. United States*, [FN48] seemingly teach that charging a corporation can lead to its destruction-regardless of the ultimate outcome of the case. [FN49] The concomitant shareholder losses flowing from simply charging a corporation can be devastating. According to Griffin, cases like *Arthur Andersen* have a "running *in terrorem* effect that shifts the focus of both prosecutors and corporations to individual employee defendants." [FN50] Griffin also cites the passage of the Sarbanes-Oxley Act [FN51] as a factor that has forced the government's spotlight to focus on individual employees because it expanded "the definition of obstruction" and enhanced "potential penalties for individual criminal misconduct." [FN52] Griffin also cites the Thompson and McNulty Memoranda as additional catalysts that have turned attention towards individual liability. [FN53] These Memoranda invert the doctrine of *respondeat superior*, by encouraging "prosecutors to look unfavorably on 'attempts to shield corporate officers and employees from liability by a willingness of the corporation to plead guilty.'" [FN54]

Griffin argues that policy shift towards a focus on individual liability has had a number of unintended consequences. For example, a corporation's waiver of the attorney-client privilege can pit corporate employees against each other. This is so because corporate counsel essentially becomes an arm of the federal government through their investigatory functions when they disclose the results of their in-house investigations to prosecutors. This has the unintended consequence of corporate decisions to exclude "lawyers from the very situations in which competent legal advice might best be able to ensure compliance with the law." [FN55] Moreover, especially from the perspective of individual corporate employees, when employees answer questions posed by company counsel, they may be "effectively building-up evidence for unpredictable future criminal cases; waivers are so broad that it is as though employees are 'speaking to prosecutors' every time the seek advice." [FN56]

Another way in which employees are pitted against each other is when the corporation helps to identify individual employees for criminal prosecution. Griffin argues that this compelled cooperation, along with the expectation that corporations refuse to provide financial support to employee targets, creates a conflict between the corporation's interests and the individuals responsible for running the corporation. She concludes that this "decline in the traditional loyalty relationships among employees, and between the corporation and its employees, is hardly an optimal condition for compliance or economic success." [FN57]

Griffin laments that prosecutorial supervision of corporate affairs has created a regulatory-based corporate world. This state of affairs is problematic because prosecutors "do not have the administrative expertise to pursue regulatory goals or fashion settlements that enable economic growth while meeting [adversarial] goals." [FN58] Griffin spends several pages of her article decrying the impropriety of coerced waivers of the corporate attorney-client privilege and work product doctrine. [FN59]

But the crux of Griffin's article concerns her theory that when corporations are strong-armed into conducting investigations at the behest of federal prosecutors, certain corporate agents essentially become state actors, thereby giving rise to Fifth Amendment self-incrimination concerns. [FN60] Griffin thoughtfully analyzes this constitutional argument in two phases. She starts by explaining first how the Self-Incrimination Clause is violated because the usual maintenance of "self-protective silence without sanction" is effectively erased under the polices established in the Thompson and McNulty Memoranda. [FN61] Specifically, governmentally-sanctioned conditional threats basically take the following form:

> "If you do not waive Fifth Amendment protections, then you will be fired." Corporations receive negative assessments of their own cooperation if they fail to terminate employees who invoke constitutional protections, and the threat of job loss is thus routine and real. With every statement in an internal investigation of potential significance, exposed employees ... are confronted with a version of the "cruel trilemma" of self-incrimination, perjury, or contempt: They can admit wrongdoing and incriminate themselves (or others), falsely deny and in doing so commit a crime, or refuse to answer and face summary dismissal from their jobs. An employee who confesses under such circumstances does so while between a "rock" and a "whirlpool." [FN62]

To combat these problems, Griffin proposes that a type of use-immunity be employed that would "prevent employee statements compelled by an existing DPA" and their fruits from being used in subsequent individual prosecutions. [FN63] Not only would such an approach avoid running afoul the Fifth Amendment, but also, it could "have the positive practical impact of expediting investigations and increasing compliance by reducing the cost to employees of providing truthful information." [FN64]

Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants Preet Bharara, 44 Am. Crim. L. Rev. 53 (2007).

Bharara's article presents a detailed history of the policies set forth in the Thompson and McNulty Memoranda, paying particular attention to how the factors discussed in those Memoranda grew from over a century of case law on corporate criminality. [FN65] Bharara cites several specific instances within the Memoranda in which broad interpretations of the law by the courts are used to support specific corporate-charging factors. With the state of decisional law as it currently stands, Bharara contends that "whether or not the government has the facts on its side, it always has the law on its side." [FN66]

Bharara also notes that the Memoranda troublingly fail to focus on "the blameworthiness of the conduct of the corporation" and/or "the retributive worth of organizational prosecution." [FN67] Rather, as discussed earlier, the bulk of the factors listed in the Thompson and McNulty Memoranda focus on corporate cooperation with the government. Bharara, like Griffin did, then explores the coercive nature of governmental tactics that are employed in light of the McNulty Memo. He highlights several of the issues commonly raised by critics of the charging memoranda; namely, corporate attorney-client-privilege waivers, "prosecutorial pressure on the corporation to terminate attorney's fees for potentially 'culpable' employees," and prosecutorial pressure to "terminate employees themselves if they refuse to cooperate with the government." [FN68]

Bharara, unlike Griffin, is much more forgiving of the Department of Justice's forced-cooperation policies because, he contends, that a corporate criminal defendant is much different from an individual defendant due, in large part, to the Collective-Entity Doctrine. This doctrine basically prevents corporate employees from resisting subpoenas that seek information from the corporation on the ground that the employees themselves might be personally incriminated. [FN69] Because of this doctrine, business entities "do not even enjoy the privilege against self-incrimination." [FN70] Moreover, Bharara argues that the various psychological pressures that may be attendant to coerced confessions in an individual setting [FN71] are, practically speaking, absent in the corporate-cooperation context. [FN72]

As a result of his views that "corporations are different" with respect to constitutional right, it comes as no surprise that Bharara takes issue with the *Stein* decisions stemming from the federal government's prosecution of KPMG, an international accounting firm, in connection with its development and marketing of certain tax shelters. [FN73] The *Stein* decisions criticized the factors set forth in the Thompson Memo and the tactics used pursuant to it, holding that the government had trampled upon the Fifth and Sixth Amendment rights of corporate employees. The *Stein* decisions received much praise from the business community and undoubtedly influenced

the Department of Justice's decision to issue the revised McNulty Memo. [FN74] But Bharara argues that the rationale underlying *Stein* may not withstand further scrutiny because the case law relied upon in the *Stein* decisions was not derived from corporate-crime cases, but rather from typical criminal ones in which self-incrimination concerns are, according to Bharara, qualitatively different. [FN75] Moreover, Bharara contends that the *Stein* decisions depart from a jurisprudential history that has, to date, unfailingly widened the breadth of corporate-criminal liability: "Among other things, *Stein* is in spirit at odds with a century of utilitarian Supreme Court decisions mostly deferential to law enforcement." [FN76]

In the final section of Bharara's article, he discusses some of his "preliminary thoughts" on "reforming the law of corporate criminal liability." [FN77] Unlike Griffin, whose primary point of contention is the policies outlined in the Thompson and McNulty Memoranda, Bharara faults the substance of the underlying criminal law, stating: "ultimately, the underlying criminal liability rules are the most appropriate target of reform." [FN78] At the outset, he dismisses the possibility of eliminating criminal-corporate liability since there is "overwhelming public, Congressional, and judicial support for the idea of corporate criminal liability ...." [FN79] He does, however, offer three suggestions for changing the law regarding criminal liability for corporations. Notably, however, Bharara acknowledges that there are many shortcomings and limitations with each of the three suggestions.

First, Bharara endorses the suggestions first made by Pamela Bucy that would tighten the rules of corporate criminal liability by requiring:

> proof that the entity-as distinct from any particular agent of the entity-had the requisite *mens rea* to be criminally culpable. Bucy overcomes the difficulties of attributing *mens rea* and assigning blame to a soulless, artificial entity by developing a corporate "ethos" theory, in which the "ethos" of the firm serves as a reasonable substitute for mental state, and by which prosecutors, juries, judges, and the public can identify the blameworthiness of the corporation. [FN80]

Bharara concedes that the "inherent amorphousness of 'corporate ethos' renders a clear liability standard unattainable." [FN81]

Second, Bharara recommends the adoption of the approach taken by the American Law Institute in its Model Penal Code, which would "limit the breadth of the vicarious liability rule largely by calling for criminal liability only where felony crimes requiring intent were 'authorized, requested, commanded, [or] performed ... by a high managerial agent acting on behalf of the corporation within the scope of his office or employment."' [FN82] Not only would this require an act of Congress, but also Bharara acknowledges that this approach would have the "undesirable effect of affording organizations protection from criminal liability for acts of deliberate indifference by high managerial agents." [FN83]

Finally, Bharara suggests a corporate-compliance approach, under which the existence of a corporate-compliance program could be taken into account during the corporation's criminal trial. [FN84] On the extreme end the existence of a compliance program could result in a corporation's entitlement to an acquittal at trial. But generally speaking the existence of such a program would merely become a factor weighing for or against a corporation's ultimate liability. Bharara contends that, "[s]uch consideration is, in most circumstances, unavailable under current law and often identified as one of the most egregious excesses of the current liability standard." [FN85] As with his previous two suggestions, Bharara notes that this approach is no stranger of criticism. But he argues that it might hold the most promise of success because it is more capable of "articulation with clarity" than the other approaches and thus can "meaningfully guide corporate behavior." [FN86] Also, the corporate-compliance approach "may transfer some of the power from 'unaccountable' prosecutors to a judge and jury to determine questions relating to the relevance, aggressiveness, and efficacy of a corporate compliance program."

[FN87]

Viewed as a whole, Bharara's article attacks the pretextual reasoning that he contends taints the arguments concerning prosecutors wielding too much discretion in deciding when to prosecute corporations. He argues that a century's worth of jurisprudence is really at the core of the problem. And while Bharara clearly makes some strong points in support of this argument, he does not offer a sound remedy to the problem. Rather, Bharara suggests several approaches that he considers to be worth exploring, yet, at the same time, he concedes that each approach is flawed.

In comparison, Griffin's arguments and analyses are compelling. Few protections are afforded individuals under current federal corporation prosecution polices when their employers are forced to either partner with prosecutors or, alternatively, accept a heightened threat of criminal prosecution. Through DPAs, private actors become *de facto* government agents. And prosecutors start taking on the role of regulators when they begin mandating that corporations endeavor on a particular course of action. Most troubling is the fact that there is little judicial oversight in upstream prosecutorial investigatory process because, by their nature, DPAs are designed to avoid corporate criminal prosecutions. Yet, along the way toward that end, corporate employee's constitutional rights may be trampled upon. [FN88] Griffin's proposal for allowing use and derivative use immunity addresses these concerns. Moreover, her proposal may also have several positive side-effects.

> With respect to individual employees, it may mitigate unfairness by making it more difficult to convict for marginal misconduct, which could also support underlying law enforcement norms. Immunity may also privilege good-faith employees by making truth cheaper than the fabrication alternative, and it could improve the sorting of innocent and guilty defendants by protecting employees who are blameless at the outset of the investigation but then become ensnared by ambiguous circumstances. This retail approach to the Fifth Amendment issue also has the potential to recalibrate the distinction between public and private enforcement and thereby address the wholesale problem of the unintended consequences and unproductive policy impact of DPAs. Although extending immunity may produce some modest reduction in individual prosecutions, it also may increase the quality of information and its flow to internal compliance mechanisms. [FN89]

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[FN1]. *See* U.S. Department of Justice, FY 2006 Performance and Accountability Report II 16 (2006) (“The loss incurred as a result of these crimes is not merely monetary. These crimes also contribute to a loss of confidence and trust in financial institutions, public institutions, and industry.”); Mark A. Cohen, *Measuring the Costs and Benefits of Crime and Justice*, *in* 4 Criminal Justice 2000: Measurement and Analysis of Crime and Justice 263, 283 & 294-96 (Nat'l Inst. of Justice 2000) (citing the harm caused by white-collar and economic crimes as being in the billions and explaining that “[e]conomic/white-collar crimes such as fraud, theft or services, and antitrust violations, are notoriously difficult to quantify because victims often to not know they have been subject to a criminal offense. Even for those crimes in which victims are aware of their loses, there is no central government survey or reporting mechanism to tally these crimes or their cost.”).

[FN2]. U.S. Sentencing Commission, 2006 Annual Report 40 (2006) [hereinafter “USSC”].

[FN3]. USSC, *supra* note 2, at 40.

[FN4]. USSC, *supra* note 2, at 40.

[FN5]. USSC, *supra* note 2, at 41.

[FN6]. USSC, *supra* note 2, at 42.

[FN7]. *See, e.g.*, Stein v. KPMG, LLP, 486 F.3d 753 (2d Cir. 2007) (discussing Justice Department's memoranda as they relate to corporate payment of officer and director attorney fees); United States v. Rosen, - F. Supp. 2d -, 2007 WL 1390661 (E.D. Va. May 8, 2007) (discussing Justice Department's memoranda and identifying the various factors used in the memoranda by prosecutors in deciding to prosecute corporations).

[FN8]. Memorandum from Paul J. McNulty, Deputy Attorney General, on Principles of Federal Prosecution of Business Organizations to Heads of Department Components, United States Attorneys (Dec. 12, 2006) [hereinafter "McNulty Memo"], *available online at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf, *reprinted in* Corporate Law and Practice Course Handbook Series, 1592 PLI/Corp 255, 257-77 (Practicing Law Inst. Jan. 19, 2007) (PLI Order No. 12843).

[FN9]. McNulty Memo, *supra* note 8, at Introduction ("The memorandum supersedes and replaces guidance contained in the Memorandum from Deputy Attorney General Larry D. Thompson entitled 'Principles of Federal Prosecution of Business Organizations' (January 20, 2003) (the 'Thompson Memorandum'), and the Memorandum from the Acting Deputy Attorney General Robert D. McCallum, Jr. entitled 'Waiver of Corporate Attorney-Client and Work Product Protections' (October 21, 2005) (the 'McCallum Memorandum')").

[FN10]. McNulty Memo, *supra* note 8, at § I.

[FN11]. McNulty Memo, *supra* note 8, at § II.A.

[FN12]. McNulty Memo, *supra* note 8, at § II.B.

[FN13]. McNulty Memo, *supra* note 8, at § III.A.

[FN14]. McNulty Memo, *supra* note 8, at § III.A.

[FN15]. McNulty Memo, *supra* note 8, at § III.A.

[FN16]. McNulty Memo, *supra* note 8, at § III.A (internal cross-references omitted).

[FN17]. *See, e.g.*, Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 Am. Crim. L. Rev. 53, 89 (2007) ("No particular issue in the current debate has drawn as much criticism as demands for corporate waivers of the attorney-client and work product privileges, an issue widely considered the most pressing concern of the white collar defense bar today."); Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. Tex. L. Rev. 111 (2003).

[FN18]. *See* Memorandum from Larry D. Thompson, Deputy Attorney General, on Principles of Federal Prosecution of Business Organizations 6 (Jan. 20, 2003) [hereinafter "Thompson Memo"), *available on-line at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (last visited July 5, 2007), *reprinted in* Corporate Law and Practice Course Handbook Series, 1571 PLI/Corp 691, 691-701 (Practicing Law Inst. Nov. 2006) (PLI Order No. 9151)).

[FN19]. Thompson Memo, *supra* note 18, at § VI.A.

[FN20]. *See, e.g.*, Finder, *supra* note 17, *passim*; Bharara, *supra* note 17, *passim*.

[FN21]. McNulty Memo, *supra* note 8, at § VII.B.2.

[FN22]. McNulty Memo, *supra* note 8, at § VII.B.2.

[FN23]. McNulty Memo, *supra* note 8, at § VII.B.2.

[FN24]. McNulty Memo, *supra* note 8, at § VII.B.2.

[FN25]. McNulty Memo, *supra* note 8, at § VII.B.2. (emphasis added).

[FN26]. McNulty Memo, *supra* note 8, at § VII.B.2.

[FN27]. McNulty Memo, *supra* note 8, at Introduction.

[FN28]. *See, e.g.*, Statement by ABA President Karen J. Mathis regarding revisions to the Justice Department's Thompson Memorandum (Dec. 12, 2006), *available on-line at* http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=59 (last visited July 5, 2007), stating:

The Justice Department's new corporate charging guidelines for federal prosecutors fall far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product, and employee protections during government investigation.... [T]he McNulty Memorandum threatens to further erode the ability of corporate leaders to seek and obtain the legal guidance they need to effectively comply with the law. In addition, the new policy does not fully protect employees' legal rights in that it continues to allow prosecutors to force companies to take punitive actions against their employees in some cases in return for cooperation credit, long before any guilt is established.

See also N. Richard Janis, *The McNulty Memorandum: Much Ado About Nothing*, Washington Law., Feb. 2007, at 34, providing:

The fundamental problem with the Holder Memorandum, the Thompson Memorandum, and the McNulty Memorandum is that they all reflect a basic misunderstanding about the nature, purpose, and sanctity of the attorney-client privilege, as well as of the role that attorneys should play as counselors and advocates in an adversary system of justice.... In my view, the 'new' Department of Justice policy is simply a dressed-up version of the 'old' Department of Justice policy, and little more than a public relations ploy.... I believe this only highlights the department's unwillingness to revise its policies, and that legislative action must be aggressively pursued.

[FN29]. Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. Rev. 311 (2007).

[FN30]. Griffin, *supra* note 29, at 311-12 ("Under its current practices, the federal government has deferred or declined to bring charges against firms themselves and has shifted liability to the employee level ....").

[FN31]. Griffin, *supra* note 29, at 314 (citing Dale A. Oesterle, Early *Observations on the Prosecutions of the Business Scandals of 2002-2003: On Sideshow Prosecutions, Spitzer's Clash with Donaldson Over Turf, the Choice of Civil or Criminal Actions, and the Tough Tactic of Coerced Cooperation*, 1 Ohio St. J. Crim. L. 443, 443 (2004)).

[FN32]. Griffin, *supra* note 29, at 314.

[FN33]. Griffin, *supra* note 29, at 314 (citing Edward Iwata, *Enron Task Force Faces Big Pressure to Deliver: Some Say Squad Is Moving Too Slowly, but Case Is Huge*, Usa Today, Aug. 21, 2002, at B1).

[FN34]. Griffin, *supra* note 29, at 315.

[FN35]. Griffin, *supra* note 29, at 316.

[FN36]. Griffin, *supra* note 29, at 316-21.

[FN37]. Griffin, *supra* note 29, at 317 (quoting U.S. Sentencing Guidelines Manual § 8C2.5 (2004)).

[FN38]. Griffin, *supra* note 29, at 318 (citing U.S. Sentencing Guidelines Manual § 8C2.5(a)-(e) (2004)).

[FN39]. Griffin, *supra* note 29, at 318.

[FN40]. Griffin, *supra* note 29, at 320.

[FN41]. *See*, *inter alia*, factors # 4 and # 6 in the McNulty Memo, *supra* note 8, at § III.A.

[FN42]. Griffin, *supra* note 29, at 321.

[FN43]. Griffin, *supra* note 29, at 323.

[FN44]. Griffin, *supra* note 29, at 324 (quoting Richard A. Epstein, *The Deferred Prosecution Racket*, Wall St. J., Nov. 28, 2006, at A14).

[FN45]. Griffin, *supra* note 29, at 328.

[FN46]. Griffin, *supra* note 29, at 328.

[FN47]. Griffin, *supra* note 29, at 329.

[FN48]. *Arthur Andersen LLP v. United States*, 374 F.3d 281 (5th Cir. 2004), *rev'd*, 544 U.S. 696 (2005).

[FN49]. Griffin, *supra* note 29, at 329-31.

[FN50]. Griffin, *supra* note 29, at 330.

[FN51]. Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

[FN52]. Griffin, *supra* note 29, at 331.

[FN53]. Griffin, *supra* note 29, at 331-32.

[FN54]. Griffin, *supra* note 29, at 333.

[FN55]. Griffin, *supra* note 29, at 334-35.

[FN56]. Griffin, *supra* note 29, at 335.

[FN57]. Griffin, *supra* note 29, at 337.

[FN58]. Griffin, *supra* note 29, at 344.

[FN59]. Griffin, *supra* note 29, at 347-52.

[FN60]. Griffin, *supra* note 29, at 353-78.

[FN61]. Griffin, *supra* note 29, at 355.

[FN62]. Griffin, *supra* note 29, at 355 (internal citations omitted).

[FN63]. Griffin, *supra* note 29, at 374; *see also* Kastigar v. United States, 406 U.S. 441 (1972) (upholding use and derivative use immunity as a "rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify").

[FN64]. Griffin, *supra* note 29, at 376.

[FN65]. Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 Am. Crim. L. Rev. 53, 57-71 (2007).

[FN66]. Bharara, *supra* note 65, at 86.

[FN67]. Bharara, *supra* note 65, at 81.

[FN68]. Bharara, *supra* note 65, at 91.

[FN69]. Bharara, *supra* note 65, at 65-70.

[FN70]. Bharara, *supra* note 65, at 96.

[FN71]. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).

[FN72]. Bharara, *supra* note 65, at 96-97.

[FN73]. *See* United States v. Stein, 435 F. Supp. 2d 330, 381 (S.D.N.Y. 2006); United States v. Stein, 440 F. Supp. 2d 315, 338 (S.D.N.Y. 2006).

[FN74]. Bharara, *supra* note 65, at 99-100.

[FN75]. Bharara, *supra* note 65, at 100-06.

[FN76]. Bharara, *supra* note 65, at 104-05.

[FN77]. Bharara, *supra* note 65, at 106-13.

[FN78]. Bharara, *supra* note 65, at 93.

[FN79]. Bharara, *supra* note 65, at 107.

[FN80]. Bharara, *supra* note 65, at 108 (quoting Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 Minn. L. Rev. 1095, 1099 (1991)).

[FN81]. Bharara, *supra* note 65, at 108.

[FN82]. Bharara, *supra* note 65, at 109 (quoting Model Penal Code § 2.07(1)(c)).

[FN83]. Bharara, *supra* note 65, at 109 (internal quotations and citations omitted)

[FN84]. Bharara, *supra* note 65, at 109-10.

[FN85]. Bharara, *supra* note 65, at 109-10.

[FN86]. Bharara, *supra* note 65, at 113.

[FN87]. Bharara, *supra* note 65, at 113.

[FN88]. *See, e.g.*, United States v. Stein, 440 F. Supp. 2d 315, 332 (S.D.N.Y. 2006) (finding, *inter alia*, that statements by former KPMG partners to the government were compelled, thereby violating the Fifth Amendment Self-Incrimination Clause).

[FN89]. Griffin, *supra* note 29, at 381 (internal quotations and citations omitted).
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