THE CONSTITUTIONALITY OF FEDERAL RESTRICTIONS ON THE INDEMNIFICATION OF ATTORNEYS' FEES

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INTRODUCTION

Until recently, high-level employees[1] under investigation by the government were often reimbursed by their employers for the attorneys' fees they incurred and the disgorgement and penalties they agreed to pay. This changed over the last several years as government agencies increasingly conditioned settlements[2] with companies on an agreement that the companies withhold such indemnification. Most prominently, the Thompson Memorandum required Department of Justice (DOJ) prosecutors to consider whether a company reimbursed its employees' attorneys' fees in deciding whether to indict the company.[3] The Securities and Exchange Commission (SEC) also developed anti-indemnification policies,[4] but it focused on whether companies were indemnifying their employees' penalties.

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[1] The term "employees" is used in this discussion to refer to past and present employees, officers, and directors (whether or not their relationship to the company is technically considered "employment").

[2] The term "settlement" is used in this discussion to describe settlements in civil and administrative litigation, as well as deferred prosecution, nonprosecution, and plea agreements in criminal prosecutions.

[3] *See* Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys § VI.B (Jan. 20, 2003) [hereinafter Thompson Memorandum], *available at* http://www.usdoj.gov/dag/cftf/business_organizations.pdf (outlining factors for prosecutors to consider in determining what charges to bring against companies, including "whether the corporation appears to be protecting its culpable employees and agents . . . through the advancing of attorney's fees . . .").

[4] *See infra* Part I.C.2. Although governmental restrictions on indemnification are relevant in a variety of contexts, this Comment will focus on their manifestations in the

As the DOJ began to enforce the Thompson Memorandum's indemnification policy more aggressively, a backlash developed among advocacy groups, courts, and legislators. At the core of their criticism was the argument that the policy infringed on the right to counsel. But by focusing on the traditional roots of this right—procedural due process, the Sixth Amendment, and (perhaps less traditionally) substantive due process—critics phrased the constitutional concerns in a manner that does not sufficiently protect defendants' access to counsel. Even after the Thompson Memorandum was replaced by the McNulty Memorandum,[5] observers have continued to express reservations about the DOJ's policy, while also raising the concern that similar policies could be adopted by other agencies, such as the SEC. It is thus essential that the discussion of these policies' constitutional ramifications be framed more effectively.

Unfortunately, the threshold conditions of the Fifth and Sixth Amendment rights do not mesh well with the realities of white-collar investigations. Most significantly, the rights are at their weakest during the investigatory stage, when governmental pressure and the need for qualified counsel are nonetheless very strong. Even when these constitutional guarantees do apply, they do so with very little force, inadequately protecting a white-collar defendant whose access to high-quality legal advice is disrupted by the government.

The Fifth and Sixth Amendments are therefore not up to the task of protecting individual rights in this context, but another doctrine is—the right of access to the courts, which protects litigants' right to legal advice free from government intervention.[6] When viewed under this framework, it becomes more apparent that even after recent revisions, DOJ policy is unconstitutional and in need of further change. The DOJ should continue to constrain indemnification, but it should do so by limiting the indemnification of financial sanctions rather than of attorneys' fees, looking to the SEC's existing policy as a useful model.

This Comment proceeds in four parts. Part I explains the background of indemnification agreements, the government's reaction to them, and the resulting backlash. Part II evaluates the constitutional-

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context of DOJ white-collar criminal prosecutions and SEC enforcement actions, since these actions are at the core of the current debate.

[5] Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys (Dec. 12, 2006) [hereinafter McNulty Memorandum], *available at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

[6] *See infra* Part III.

ity of the anti-indemnification policies under the doctrines commonly invoked by their critics—procedural due process, the Sixth Amendment, and substantive due process—and examines why these doctrines do not adequately protect the right to counsel. Part III then explains why the policies should instead be evaluated under the access-to-courts doctrine. Finally, Part IV discusses how the DOJ's policy could be modified to accomplish important policy goals within constitutional boundaries.

I. INDEMNIFICATION AND GOVERNMENTAL CONSTRAINTS

A. *The Financial Burden of Government Investigations*

Companies are asked to indemnify their employees for three main categories of expenses during white-collar investigations and litigation: attorneys' fees, penalties, and disgorgement. These expenses can amount to millions of dollars for a single employee.

The complexity of modern white-collar cases can lead to substantial attorneys' fees, in part because these cases often involve parallel civil and criminal proceedings with extensive discovery during both the investigation and litigation. Moreover, attorneys may perceive relatively little need to contain the buildup of fees because they expect to be paid by companies rather than the employees themselves.[7] Indeed, recent high-profile cases have generated staggering legal fees. For instance, in a case brought by the SEC that settled shortly before trial,[8] four KPMG accountants together incurred over $20 million in legal fees.[9] Other KPMG employees defending an unrelated DOJ prosecution incurred an average of $1.7 million each in pretrial legal expenses before the case was dismissed.[10] Trials naturally generate even larger costs—senior executives in high-profile securities fraud

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[7] In many cases, a company's insurer, rather than the company itself, might pay the expenses. The impact of these insurance policies is discussed below in Part I.B.2.b.

[8] Four Current or Former KPMG Partners Settle SEC Litigation Relating to Xerox Audits, Litigation Release No. 19,573 (Feb. 22, 2006), http://www.sec.gov/litigation/litreleases/lr19573.htm.

[9] This information was revealed in the context of different litigation against KPMG employees because of their involvement with illegal tax shelters. *See* United States v. Stein, 435 F. Supp. 2d 330, 340 (S.D.N.Y. 2006).

[10] United States v. Stein, 495 F. Supp. 2d 390, 423 (S.D.N.Y. 2007). The defendants also incurred over $3 million in related regulatory inquiries and civil cases. *Id.* at 406-07.

trials have incurred attorneys' fees ranging from $15 to $70 million.[11] Whereas indemnification can enable defendants to hire top-flight firms, withdrawal of those funds can eliminate that option even for wealthy defendants.[12]

The financial sanctions—penalties and disgorgement—in such cases can also be considerable. Penalties in recent cases have often reached hundreds of thousands of dollars.[13] Disgorgement and restitution, which are based on the theory that an employee wrongfully received compensation by participating in illegal activity, can also be substantial.[14] For instance, when an employee is accused of accounting manipulations that inflated her employer's stock price, the government will often seek disgorgement of profits from stock sales or

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[11] *See id.* at 424 (reviewing the trial costs in the Computer Associates, Adelphia, and Enron cases, among others).

[12] *See id.* at 415-16 (reporting that certain defendants were forced to fire attorneys from Jones Day, Cadwalader, Wickersham & Taft, Goodwin Procter, and Arent Fox when KPMG stopped paying the defendants' legal expenses); *id.* at 423-24 (noting that although most of the affected defendants were millionaires, their legal expenses, if indemnified, would have exceeded their assets); *see also* Paul Davies & David Reilly, *In KPMG Case, the Thorny Issue of Legal Fees*, WALL ST. J., June 12, 2007, at C5 (describing the experience of a former Dynegy executive whose litigation resources were severely constrained after Dynegy terminated indemnification pursuant to the DOJ's request for better "cooperation"). For an extensive and illuminating account of the constraints faced by the defendants in *United States v. Stein*, which is discussed in more detail in Part I.C.1.b, see Julie Triedman, *Buried Alive*, LITIG. 2007, Fall 2007, at 80 (supp. to AM. LAW., Nov. 2007).

[13] *See* Press Release, SEC, SEC Settles Options Backdating Case Against William Sorin, Former General Counsel of Comverse Technology, Inc. (Jan. 10, 2007), http://www.sec.gov/news/press/2007/2007-4.htm [hereinafter Comverse Press Release] (announcing a $600,000 penalty); Press Release, SEC, SEC Files Fraud Charges Against Former Restaurant Executives for Undisclosed Compensation and Accounting Fraud (June 7, 2006), http://www.sec.gov/news/press/2006/2006-89.htm (announcing a $500,000 penalty). Recent criminal sentences have resulted in lower fines, but high forfeiture or restitution amounts. *See, e.g.*, Press Release, U.S. Dep't of Justice, Four Former Enterasys Executives Sentenced on Fraud, Conspiracy Charges (July 3, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/July/07_crm_475.html (announcing a $25,000 fine for accounting fraud); Press Release, U.S. Dep't of Justice, Former Enron Chief Accounting Officer Richard Causey Sentenced to 66 Months in Prison for Securities Fraud (Nov. 15, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/November/06_crm_763.html (announcing a $25,000 fine for securities fraud). In a recent SEC trial, a defendant was even ordered to pay a $10 million dollar penalty. Press Release, SEC, Former Chairman and CEO of Gemstar-TV Guide International, Inc. Ordered To Pay Over $22 Million for Role in Accounting Fraud (May 10, 2006), http://www.sec.gov/news/press/2006/2006-67.htm [hereinafter Gemstar Press Release].

[14] Disgorgement can, of course, reach other types of funds, such as profits from insider trading. However, in the indemnification context, compensation is a primary source of disgorgement. There are, of course, distinctions between the theories of disgorgement and restitution, but they are not salient to this discussion.

performance-based compensation such as options and bonuses, causing disgorgement awards to reach millions of dollars.[15]

B. *Corporate Indemnification Policies*

1. Justifications for Indemnification

Indemnification agreements and the statutes that permit or require them are driven by a number of important policy concerns.[16] Companies and legislatures are concerned that the threat of personal liability may discourage officers, directors, and employees from serving in important positions.[17] By neutralizing these individuals' financial exposure, corporations can remove this disincentive. Coupled

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[15] *See, e.g.*, Comverse Press Release, *supra* note 13 (announcing $1.6 million in disgorgement); Gemstar Press Release, *supra* note 13 (announcing $10.6 million in disgorgement); Press Release, U.S. Dep't of Justice, Former Qwest Chief Executive Officer Joseph Nacchio Sentenced to 72 Months in Prison for Insider Trading (July 27, 2007), *available at* http://www.usdoj.gov/criminal/pr/press_releases/2007/07/07-27-07nacchio-sent.pdf (announcing a $52 million restitution award for insider trading). These amounts do not account for substantial prejudgment interest.

[16] However, these justifications are not universally accepted. Commentators have argued, for instance, that expansive indemnification powers allow corporations to overrule judicial rulings about an individual's culpability and liability based only on the corporation's perceived self-interest. *See* Mae Kuykendall, *Symmetry and Dissonance in Corporate Law: Perfecting the Exoneration of Directors, Corrupting Indemnification and Straining the Framework of Corporate Law*, 1998 COLUM. BUS. L. REV. 443, 518 (characterizing corporate indemnification decisions as a "practical veto" over judicial decisions). The indemnification of legal fees has also been criticized "as an indeterminate form of payout to managers with no link to performance" that has "blunted corporations' internal controls" and "induce[d] moral hazard." Peter Margulies, *Legal Hazard: Corporate Crime, Advancement of Executives' Defense Costs, and the Federal Courts* (pt. I), 7 U.C. DAVIS BUS. L.J. 2 (2006), http://blj.ucdavis.edu/article.asp?id=641.

[17] *See* ERNEST L. FOLK, III ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 145.2 (3d ed. 1998) ("The invariant policy of section 145 is to promote the desirable end that corporate officials will resist what they consider unjustified suits and claims [and] . . . to encourage capable persons to serve as corporate directors . . . ." (internal quotation marks omitted)); Joseph W. Bishop, Jr., *Current Status of Corporate Directors' Right to Indemnification*, 69 HARV. L. REV. 1057, 1057 (1956) ("The director's sword of Damocles is the individual liability to which he almost inevitably exposes himself . . . ."); Bernard Black et al., *Outside Director Liability*, 58 STAN. L. REV. 1055, 1059 (2006) (arguing that without indemnification, "qualified people may decide not to serve as directors"); Kuykendall, *supra* note 16, at 452-54 (discussing the perceived need to insulate directors from liability); Kurt A. Mayr, II, Note, *Indemnification of Directors and Officers: The "Double Whammy" of Mandatory Indemnification Under Delaware Law in* Waltuch v. Conticommodity Services, Inc., 42 VILL. L. REV. 223, 233 (1997) (noting that indemnification statutes are intended in part "to encourage capable individuals to serve as corporate directors and officers by allaying their concerns over potential personal liability").

with this is a concern that courts may not evaluate corporate conduct fairly, which could result in unfair judgments.[18] Indemnification may also encourage directors and employees to actively contest frivolous litigation (rather than settling early to avoid large legal bills) with the assurance that the company will compensate them for attorneys' fees incurred in the process.[19] Finally, indemnification is seen as protecting directors' and employees' freedom to act in the corporation's interest without undue fear of litigation.[20]

Companies under investigation by federal authorities today must weigh these benefits of indemnification against the substantial disadvantages of refusing government demands. As discussed in detail below, companies refusing DOJ and SEC demands face substantial risk, regardless of how the merits of the government's case are ultimately decided. Complying with the government's demands can help companies avoid indictment by the DOJ or civil charges by the SEC, preliminary steps that themselves can have severe effects on companies.[21]

2. Authority for Indemnification

a. *Types of Indemnification*

Indemnification has become common in American companies. By the time a government investigation begins, companies are often legally obligated to indemnify their employees for expenses incurred in connection with the investigation. Even if indemnification is not

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[18] *See* Kuykendall, *supra* note 16, at 482-83 (describing permissive indemnification as a means of "adjust[ing] the costs imposed on corporate agents by litigation" by bringing "sound business judgment" to bear); *id.* at 493 (noting that mandatory indemnification was intended to prevent judicial review of the "quality of the underlying facts in a director's successful defense of a lawsuit").

[19] Mayr, *supra* note 17, at 233-34.

[20] *See* Black et al., *supra* note 17, at 1059 (arguing that because "[t]oo much fear of liability" may cause directors to "become excessively cautious," it can "reduce rather than enhance the quality of board decisions"); *see also* Bishop, *supra* note 17, at 1058 ("[A] director serving what he conceives to be the best interests of his corporation may . . . incur substantial personal liability . . . .").

[21] *See* Mary Beth Buchanan et al., *Has the Government Gone Too Far in Its War on Corporate Crime?*, WALL ST. J. (online edition), Nov. 1, 2006, http://online.wsj.com/article/SB116224475563608109.html ("An indictment alone can send a company into a death spiral: negative publicity, revocation of debts, debarment from government business."); *The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the H. Comm. on the Judiciary, Subcomm. on Crime, Terrorism & Homeland Security*, 110th Cong. (2007) [hereinafter *McNulty Memorandum Hearings*] (statement of Andrew Weissman), *available at* LEXIS, CQ Transcriptions database ("[T]he indictment can kill the company.").

legally required, it may still be expected because of longstanding practice. Every state has statutes that allow or require indemnification under various circumstances.[22] For the sake of simplicity, this discussion will focus on the provisions of Delaware corporate law,[23] which applies to the bulk of large American corporations.[24]

There are two categories of indemnification—mandatory and permissive. Under Delaware law, mandatory indemnification only applies to directors and officers. Corporations are required to indemnify their present and former directors and officers (but not other employees) against "expenses (including attorneys' fees) actually and reasonably incurred"[25] in connection with "any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative."[26]

The scope of permissive indemnification is even broader. Companies are permitted to indemnify both present and former employees for both "judgments" and "fines" incurred in civil, criminal, administrative, and investigative proceedings.[27] Companies can also agree to more expansive indemnification than that discussed in the

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[22] *See* Robert P. McKinney, Special Project Note, *Protecting Corporate Directors and Officers: Indemnification*, 40 VAND. L. REV. 737, 737-38 (1987) (describing the scope of laws requiring or allowing indemnification and typical indemnification agreements).

[23] Indemnification is not limited to corporations, however, and can be provided by other business organizations. For instance, it was the "common practice" of the accounting firm KPMG, a limited liability partnership, to indemnify its employees for attorneys' fees. United States v. Stein, 435 F. Supp. 2d 330, 342 (S.D.N.Y. 2006).

[24] *See* Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329, 350 (2001) ("The aggregated choices of a majority of publicly traded U.S. corporations have resulted in a convergence on the Delaware General Corporation Law as a de facto national corporate law."); Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795, 1813 (2002) (finding that the majority of corporations are incorporated in Delaware); Division of Corporations, State of Delaware, http://www.corp.delaware.gov (last visited Dec. 1, 2007) (claiming that more than fifty percent of publicly traded companies are incorporated in Delaware). Although there are some differences in the operation of various states' statutes, *see* McKinney, *supra* note 22, at 738, these differences are not germane to this discussion. The provisions of the Model Business Corporation Act are similar to Delaware law, although they allow somewhat broader indemnification in certain circumstances. *See* James J. Hanks, Jr. & Larry P. Scriggins, *Protecting Directors and Officers from Liability—The Influence of the Model Business Corporation Act*, 56 BUS. LAW. 3, 34 (2000).

[25] DEL. CODE ANN. tit. 8, § 145(c) (2001).

[26] § 145(a); *see also* Mayr, *supra* note 17, at 238, 256-58 (discussing the broad scope of indemnification allowed under section 145).

[27] § 145(a).

statute,[28] and often do so by contract[29] or bylaw.[30] Accordingly, even though this is termed "permissive" indemnification, it may become essentially mandatory for a company due to other agreements it has made with its employees.[31] Moreover, even if companies do not create formal indemnification policies or agreements, they still can and do indemnify employees as a matter of practice.[32] Significantly, these statutory provisions also permit indemnification prospectively—that is, they allow companies to advance legal fees and other expenses to their employees, subject to a requirement that the employee reimburse the company if she is later found to be ineligible for indemnification.[33]

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[28] § 145(f); *see also* Theodore D. Moskowitz & Walter A. Effross, *Turning Back the Tide of Director and Officer Liability*, 23 SETON HALL L. REV. 897, 909 (1993) (noting that most states have laws allowing companies to adopt permissive indemnification schemes).

[29] Even fifty years ago, corporations were advised to make "express contracts of indemnification" to reimburse legal expenses and money damages, as long as the individual's actions were neither knowingly nor "manifestly" illegal and the individual was not found guilty of negligence or willful misconduct. Bishop, *supra* note 17, at 1077. This trend has continued today. *See* Ronald E. Mallen & David W. Evans, *Surviving the Directors' and Officers' Liability Crisis: Insurance and the Alternatives*, 12 DEL. J. CORP. L. 439, 464 (1987) ("In order to attract and retain competent officers and independent outsiders to their boards, many corporations have entered into agreements to indemnify their directors and officers for such expenses.").

[30] *See* § 145(f) (referring to indemnification rights to which individuals "may be entitled under [a] bylaw [or] agreement"); Black et al., *supra* note 17, at 1083 ("Almost all public companies have indemnification agreements with outside directors or bylaws that convert this permission into an obligation to directors by providing that the corporation shall advance legal expenses and indemnify legal fees, damages, and amounts paid in settlement to the fullest extent permitted by law.").

[31] Mayr, *supra* note 17, at 253-54.

[32] *See, e.g.*, United States v. Stein, 435 F. Supp. 2d 330, 340 (S.D.N.Y. 2006) ("While KPMG's partnership agreement and bylaws are silent on the subject [of indemnification], . . . it had been the longstanding voluntary practice of KPMG to advance and pay legal fees . . . for partners, principals, and employees of the firm . . . .").

[33] § 145(e); *see also* Kuykendall, *supra* note 16, at 496-97 (discussing the statutory authority for providing advance commitments). Other states have adopted similar provisions authorizing advance indemnification. Moskowitz & Effross, *supra* note 28, at 911-12. However, firms cannot necessarily expect reimbursement by employees, since "[a] criminal defendant facing a serious sentence of imprisonment has little incentive to leave her own assets unspent at the end of a case, and sanctioning regimes (fines, forfeiture, restitution, and the like) are apt to take most or all of what may be left." Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613, 1658 (2007).

b. *Limitations on Indemnification Powers*

There are two types of constraints on companies' power and obligation to indemnify their employees. Together, they provide a powerful incentive to employees to settle an action on a "neither admit nor deny" basis, rather than to litigate it and risk an adverse judgment or verdict.

The first set of constraints is statutory. Mandatory indemnification is statutorily required only when the officer or director is "successful" in defending the action.[34] There are similar constraints on a corporation's power to award permissive indemnification. A corporation can indemnify only employees who "acted in good faith" and in a manner "reasonably believed to be" legal and consistent with the corporation's interests.[35] As a matter of public policy, indemnification is not allowed when there is a finding that an individual intentionally acted illegally.[36]

Yet these statutory constraints may not be that powerful today. Although indemnification statutes are based on a presumption that a corporation will only choose to indemnify an employee when she acted in the corporation's interest, the modern practice is to allow indemnification without making such factual findings. This is in large part because indemnification contracts and bylaws create a strong threat that an employee denied indemnification will sue the company, making it inefficient for most corporations to withhold payment.[37] Moreover, neither a settlement nor even a conviction necessarily creates a presumption that the actions were taken without the requisite good faith or reasonable belief in their legality.[38] On the other hand, courts generally agree that a settlement in which a defendant neither admits nor denies wrongdoing still qualifies for indemnification under the statute.[39]

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[34] § 145(c).

[35] § 145(a).

[36] Moskowitz & Effross, *supra* note 28, at 905-06.

[37] Kuykendall, *supra* note 16, at 511-12.

[38] *See* § 145(a) ("The termination of any action . . . by judgment, order, settlement, [or] conviction . . . shall not, of itself, create a presumption that the person did not act in good faith and in a manner which the person reasonably believed to be in or not opposed to the best interests of the corporation . . . .").

[39] *See, e.g.*, Waltuch v. Conticommodity Servs., Inc., 88 F.3d 87, 97 (2d Cir. 1996) (holding, based on a review of Delaware law, that the plaintiff was entitled to indemnification for amounts paid in a civil settlement).

In the absence of strong statutory constraints, Directors' and Officers' (D&O) insurance provides a more powerful incentive to pursue settlement. Such insurance pays the costs of indemnification on behalf of companies, and typically covers disgorgement and penalties in addition to attorneys' fees. Since D&O insurance can save companies from making multimillion-dollar payouts, companies have a considerable incentive to satisfy the terms of the insurance policies.[40] The most important of these provisions is an exclusion for acts determined by a final judgment to have been the product of "active and deliberate dishonesty," such as fraud.[41] This exclusion creates an incentive for directors and officers to settle the government's claims, since settlements that "neither admit nor deny" the government's allegations do not trigger the exclusion.[42]

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[40] *See* Moskowitz & Effross, *supra* note 28, at 919 (noting that "insurance can be a director's or officer's only available source of relief"). For a broad survey of D&O insurance policies, see Mallen & Evans, *supra* note 29, and Joseph P. Monteleone & Nicholas J. Conca, *Directors and Officers Indemnification and Liability Insurance: An Overview of Legal and Practical Issues*, 51 BUS. LAW. 573 (1996). Studies have reported that over ninety percent of companies buy D&O insurance. *E.g.*, John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1570 (2006); Sean J. Griffith, *Uncovering a Gatekeeper: Why the SEC Should Mandate Disclosure of Details Concerning Directors' and Officers' Liability Insurance Policies*, 154 U. PA. L. REV. 1147, 1168 (2006). Companies use insurance coverage in part as a recruitment tool for employees whose positions could subject them to liability. Griffith, *supra*, at 1171-72.

[41] *See* Mallen & Evans, *supra* note 29, at 455; *see also* Griffith, *supra* note 40, at 1191 & n.148.

[42] *See* Black et al., *supra* note 17, at 1086; Mallen & Evans, *supra* note 29, at 455; *see also* Susan Beck, *Back in Black: Companies with Backdating Troubles Are Paying Astronomical Legal Fees*, AM. LAW., Oct. 2007, at 22 (reporting that companies subject to options backdating investigations have paid as much as $72 million for employees' legal fees, in part because D&O insurers have denied payment "citing policy exclusions, such as [for] when individuals engage in bad acts for personal profit"). When not covered by insurance, such large payouts can threaten the very viability of a company. *See, e.g.*, Karen Gullo, *Brocade Legal Bills Outpace Profits in Options Cases*, BLOOMBERG.COM, Oct. 10, 2007, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aTLHudB_FXBc# (indicating that over one-third of Brocade Communications' profits in one quarter had been consumed by its employees' legal fees).

C. *Government Anti-Indemnification Policies*

1. DOJ Policy

a. *The Thompson and McNulty Memoranda*

Recently, a new type of constraint has emerged—government policy. The DOJ's policies were most famously codified in the Thompson Memorandum, named for its author, then-Deputy Attorney General Larry Thompson.[43] The Thompson Memorandum, which was issued in early 2003, outlined the factors for prosecutors to consider in determining whether a company was "cooperating" with prosecutors, and allowed prosecutors to reward a high level of cooperation with more lenient terms in a settlement agreement, including the use of a deferred prosecution agreement (DPA) or nonprosecution agreement (NPA) instead of an indictment.[44] One determinant of "coop-

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[43] Thompson Memorandum, *supra* note 3, § VI.B. The Thompson Memorandum was the successor to the "Holder Memorandum" written by former Deputy Attorney General Eric Holder. Memorandum from Eric Holder, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys (June 16, 1999) [hereinafter Holder Memorandum], *available at* http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html. According to Mr. Holder, the initial policy was designed to give prosecutors uniform guidelines for deciding when to indict corporations. *See* Posting of Peter Lattman to WSJ.com Law Blog, http://blogs.wsj.com/law/2006/12/13/the-holder-memo/ (Dec. 13, 2006, 8:47 EST); Interview with Eric Holder, former Deputy Att'y Gen., U.S. Dep't of Justice, in Wash., D.C. (July 27, 2007). In its revisions to the Holder Memorandum, the Thompson Memorandum put "increased emphasis on and scrutiny of the authenticity of a corporation's cooperation" to "make clear that" a company's failure to cooperate "should weigh in favor of a corporate prosecution." Thompson Memorandum, *supra* note 3, at i. And whereas under the Holder Memorandum, prosecutors were "not required to reference [its] factors in a particular case" or treat them as "outcome-determinative," the Thompson Memorandum required prosecutors to consider these factors. Holder Memorandum, *supra*, at 1; *see also* Memorandum from Robert D. McCallum, Jr., Acting Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys (Oct. 21, 2005), *available at* http://www.corporatecrimereporter.com/documents/AttorneyClientWaiverMemo.pdf ("The *Thompson Memorandum* sets forth nine factors that federal prosecutors *must* consider in determining whether to charge a corporation or other business organization." (emphasis added)). For a more extensive history of the evolution from the Holder Memorandum to the McNulty Memorandum, see Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1 (2006).

[44] *See, e.g.*, Deferred Prosecution Agreement ¶ 2, United States v. Monsanto Co., No. 05-0008 (D.D.C. Jan. 6, 2005), *available at* http://www.usdoj.gov/dag/cftf/chargingdocs/monsantoagreement.pdf ("This Agreement reflects MONSANTO COMPANY's previous actions in . . . cooperating in the government's . . . investigation . . . ."); Press Release, U.S. Dep't of Justice, Former Computer Associates Executives Indicted on Securities Fraud, Obstruction Charges (Sept. 22, 2004), *available at*

eration" was whether a company was indemnifying its employees' legal fees.[45] After courts, legislators, and commentators criticized the Thompson Memorandum,[46] the DOJ recrafted it in late 2006. The new version, labeled the McNulty Memorandum after the subsequent Deputy Attorney General, Paul McNulty, considerably softened the language of the policy.[47] Prosecutors are now advised that they "generally" should not consider "whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment."[48] When a corporation is advancing such fees under the requirements of its charter or bylaws, or under an employment agreement, this "cannot be considered a failure to cooperate."[49]

But despite initial DOJ fanfare regarding the McNulty Memorandum's changes to the Thompson Memorandum,[50] concerns about the DOJ's policy have persisted for a variety of reasons.[51] First, the terms

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http://www.usdoj.gov/opa/pr/2004/September/04_crm_642.htm (announcing a DPA "[i]n light of [the company's] . . . continued cooperation"); Press Release, U.S. Att'y, S. Dist. of N.Y., U.S. Enters Non-Prosecution Agreement with Jenkens & Gilchrist in Connection with Its Fraudulent Tax Shelter Activity (Mar. 29, 2007), *available at* http://www.usdoj.gov/tax/usaopress/2007/txdv07jenkins&gilchristnppr.pdf (announcing the defendant's "cooperation with the Government's investigation" as a factor that positively influenced the entry into an NPA).

[45] Thompson Memorandum, *supra* note 3, § VI.B.

[46] This criticism is reviewed below in Part I.C.1.b.

[47] McNulty Memorandum, *supra* note 5. McNulty initially defended the Thompson Memorandum despite the *Stein* court's ruling, arguing that it enhanced the predictability of prosecutions for companies. *See* Lori Calabro, *U.S. Deputy Attorney General Paul McNulty*, CFO.COM, Sept. 1, 2006, http://www.cfo.com/printable/article.cfm/7851821/c_7873404.

[48] McNulty Memorandum, *supra* note 5, § VII.B.3.

[49] *Id.* The Thompson and Holder Memoranda had incorporated similar deference to "a corporation's compliance with governing law." Thompson Memorandum, *supra* note 3, § VI.B n.4; Holder Memorandum, *supra* note 43, § VI.B n.3.

[50] *See, e.g.*, Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, Prepared Remarks at the Lawyers for Civil Justice Membership Conference Regarding the Department's Charging Guidelines in Corporate Fraud Prosecutions (Dec. 12, 2006), *available at* http://www.usdoj.gov/archive/dag/speeches/2006/dag_speech_061212.htm ("The new guidelines now generally prohibit prosecutors from considering whether a corporation is advancing attorneys' fees to employees or agents under investigation or indictment.").

[51] *See, e.g.*, *McNulty Memorandum Hearings*, *supra* note 21 (statement of Karen Mathis, Pres., Am. Bar Ass'n) (arguing that the McNulty Memorandum "continues to erode" employees' "right to effective counsel" by "pressuring [their] employers to take unfair punitive actions against [them] during [government] investigations"); Jonathan Peterson & Kathy M. Kristof, *U.S. Eases Its Tactics on Suspect Firms*, L.A. TIMES, Dec. 13, 2006, at C1 (quoting a law professor saying that the new provisions "won't stop" prosecutors, and instead "will just slow things down a bit"); Andrew Weissmann & Ana R. Bugan, *Thompson Gunners*, DAILY DEAL, Jan. 26, 2007 ("Despite salutary provisions, the

of the policy may themselves be inadequate. The apparent restrictions on considering indemnification are mitigated in a footnote that allows prosecutors to consider the advancement of attorneys' fees "[i]n extremely rare cases, . . . when the totality of the circumstances show that it was intended to impede a criminal investigation" and upon approval by the Deputy Attorney General.[52] Although this may be a significant procedural hurdle,[53] the exception nonetheless indicates to companies that their decision to indemnify their employees could be used against them in the future.

Second, regardless of the McNulty Memorandum's terms, it continues to suggest to the defense bar that the DOJ will view indemnification restrictions favorably. The policy only restricts prosecutors' ability to affirmatively encourage constraints on indemnification—it does not prevent prosecutors from accepting companies' offers to do so. Given the DOJ's recent practice, companies might use indemnification restrictions proactively to appease government decision makers.[54] A former prosecutor has even suggested that the new policy es-

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new policy does not go far enough."). On the other hand, some commentators do believe that the McNulty Memorandum's indemnification provisions "adequately resolve[] the problem of advancing attorneys' fees to employees under investigation." John A. Tancabel, *Reflections on the McNulty Memorandum*, 35 SEC. REG. L.J. 219, 257 (2007).

[52] McNulty Memorandum, *supra* note 5, § VII.B.3 n.3.

[53] Indeed, former Deputy Attorney General Eric Holder has noted that a similar requirement in other contexts has allowed DOJ officials to exercise more effective oversight of line prosecutors. Interview with Eric Holder, *supra* note 43.

[54] *See* Lynnley Browning, *U.S. Moves To Restrain Prosecutors*, N.Y. TIMES, Dec. 13, 2006, at C1 ("[T]he message to . . . the company [is still,] 'Well, if we [withhold indemnification], we might just score some brownie points.'" (citation omitted)); Abbe D. Lowell et al., *Is the DOJ's New Policy on Prosecuting Corporations Real Reform or Business as Usual?*, LAW.COM, Jan. 31, 2007, http://www.law.com/jsp/llf/PubArticleFriendlyLLF.jsp?id=1170151352731 ("The pressure on corporations to accede to a prosecutor's 'request' . . . to make life difficult for suspected employees is still too great so long as the practical reality of failing to do what the government wants is corporate suicide. Without an actual ban of these tactics, prosecutors can wink and nod, and companies will feel that the best way to avoid indictment is to do that which the government used to demand directly."); Martha Neil, *Thompson Memo Changes Not Enough, ABA Says*, ABA J. EREPORT, Dec. 15, 2006, http://www.abanet.org/journal/ereport/d15specter.html (quoting American Bar Association (ABA) officials commenting that since the new policy still allows prosecutors to give companies cooperation credit, it was just a "baby step"); Julie O'Sullivan, Professor, Georgetown Univ. Law Ctr., Remarks at the American Criminal Law Review Symposium, Corporate Criminality: Legal, Ethical, and Managerial Implications (Mar. 15, 2007), http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=324 (commenting that the McNulty Memorandum's procedural protections may "create a deterrent for borderline requests," but the "big exception that threatens to swamp the policy is that none of these approval requirements are applicable where

sentially encourages companies to simply fire employees in lieu of restricting indemnification of their expenses.[55] Naturally, this situation can affect how vigorously an individual employee will fight the government's charges.[56]

Finally, as will be discussed in greater detail in Part IV, the scope of the policy may be too narrow. It could be more effectively targeted to contain the indemnification of financial sanctions, rather than attorneys' fees. Accordingly, it should also be applied by the DOJ not only in settlement negotiations with companies, but in negotiations with employees themselves.

b. *The Backlash*

The DOJ's anti-indemnification policy achieved notoriety in mid-2006 after a judge in the Southern District of New York held the policy unconstitutional in *United States v. Stein*.[57] *Stein* arose from a massive federal investigation of tax shelters designed by KPMG. The investigation threatened to result in a potentially devastating indictment of the firm, encouraging KPMG leaders to negotiate with prosecu-

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the corporation 'volunteers,'" which is the typical practice); *see also McNulty Memorandum Hearings*, *supra* note 21 (statement of Richard White, Chairman, Association of Corporate Counsel) (arguing that the McNulty Memorandum infringes employee rights to effective assistance of counsel, and that it "misses the point" because "federal enforcement officials rely almost exclusively, in practice, on informal demands").

Indeed, it is not clear that underlying DOJ preferences have changed at all. While speaking about the component of the McNulty Memorandum protecting against requests for privilege waivers, the Chief of Staff to Deputy Attorney General McNulty noted that it is "in the interest of corporations that are under investigation . . . [to] ultimately make the decision to waive the attorney-client privilege." Michael Elston, Chief of Staff and Counselor, Office of the Deputy Att'y Gen., Remarks at the American Criminal Law Review Symposium, Corporate Criminality: Legal, Ethical, and Managerial Implications (Mar. 15, 2007) [hereinafter Elston], *available at* http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=324.

[55] *McNulty Memorandum Hearings*, *supra* note 21 (statement of Andrew Weissman); *see also id.* (statement of William M. Sullivan Jr., Partner, Winston & Strawn, LLP) (noting that even after the issuance of the McNulty Memorandum, he had received requests from the DOJ to threaten to fire employees in lieu of withholding indemnification).

[56] *See* Lowell et al., *supra* note 54 ("[Under the Thompson Memorandum,] companies . . . cut off [employees'] defense fees to avoid a corporate death sentence that could result merely from being charged. These actions often led the employees caught in the crossfire to enter plea bargains, not because they truly felt they had violated the law but because they could not fight both the prosecutors and their employers.").

[57] 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

tors.[58] During these negotiations, prosecutors indicated that under the Thompson Memorandum, KPMG was more likely to be indicted if it continued to reimburse its employees' legal expenses.[59] To avoid indictment, the firm would need to break from the "longstanding voluntary practice of KPMG to advance and pay legal fees . . . in any civil, criminal or regulatory proceeding involving activities arising within the scope of the individual's duties and responsibilities as a KPMG partner, principal, or employee."[60] Although this policy was not embodied in KPMG's bylaws or partnership agreement, it was well established: even as KPMG was considering the DOJ's demand, four of its partners were together accruing over $20 million defending an SEC lawsuit in a separate matter.[61]

A few weeks later, KPMG acquiesced. It informed its employees facing investigation that the firm would only pay their legal expenses if they cooperated with the government[62] and were not indicted.[63] It also imposed a $400,000 cap on reimbursement.[64] Pursuant to the DOJ's request, KPMG later issued another memorandum to its employees suggesting that they may not need to be represented by counsel at all.[65] The government also regularly notified KPMG when its employees "failed to comply with government demands," and KPMG responded by threatening to withhold indemnification.[66] When an

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[58] *See* David Reilly, *How a Chastened KPMG Got by Tax-Shelter Crisis*, WALL ST. J., Feb. 15, 2007, at A1 (calling the investigation "a near-death experience" for KPMG).

[59] *See Stein*, 435 F. Supp. 2d. at 344 ("[W]hile the [DOJ] did not say in so many words that it did not want KPMG to pay legal fees, no one at the meeting could have failed to draw that conclusion.").

[60] *Id.* at 340 (citation omitted).

[61] *Id.*

[62] Among other things, if an employee asserted the Fifth Amendment self-incrimination privilege, this would be considered uncooperative behavior. *Id.* at 345.

[63] *Id.* at 345-46.

[64] *Id.* at 345. Compare this figure to the multimillion-dollar attorneys' fees incurred by individuals in similar situations. *See supra* notes 9-11 and accompanying text.

[65] *See id.* at 346 ("KPMG capitulated to the USAO demand. It put out in 'Q & A' format a document containing the following language: 'Do I have to be assisted by a lawyer? Answer: No. Although we believe that it is probably in your best interests to consult with a lawyer before speaking to government representatives, whether you do so is entirely your choice. . . . [Y]ou may deal directly with government representatives without counsel. In any event, the Firm expects you to cooperate fully with the government representatives and provide complete and truthful information to them.'" (citation and emphasis omitted)).

[66] *Id.* at 347.

employee did not comply, the firm terminated both her employment and the reimbursement of her legal fees.[67]

The government eventually agreed not to indict the firm, instead entering into a DPA[68] with KPMG.[69] The DPA contained a require-

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[67] *Id.* The events at KPMG were not unique. In one case involving facts similar to those in *Stein*, a defendant ignored his attorney's advice not to participate in an interview by government agents because he "felt constrained by the need to maintain his employment and secure indemnification for his legal fees." Memorandum of Law in Support of Defendant Robert D. Graham's Motion in Limine To Exclude His Statements at Trial at 5, United States v. Ferguson, No. 06-0137 (D. Conn. Aug. 1, 2007), *available at* 2007 WL 2776447. In another case, Dynegy suspended payments of legal fees during an employee's trial in an effort to comply with the Thompson Memorandum's dictates. *See* Memorandum of Points and Authorities in Support of Jamie Olis' Motion To Set Aside His Conviction Pursuant to 28 U.S.C. § 2255, at 44, United States v. Olis, No. 03-0217 (S.D. Tex. Oct. 5, 2007) [hereinafter Olis Habeas Petition], *available at* http://blog.kir.com/archives/images/3F%20Olis%20Memo%20in%20support%20of%20mtn%20to%20set%20aside.pdf.

[68] DPAs "are a form of probation" in which "the government agrees to suspend charges against a company so long as the company fulfills every obligation set forth in a detailed 'contract.'" Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 321 (2007). The terms of DPAs can be extensive:

> Entry into a DPA ordinarily will coincide with the filing of formal criminal charges against a company, the suspension of Speedy Trial Act considerations, and the tolling of the statute of limitations. Prosecutors agree not to pursue the charges and to dismiss them after a period of time (generally between one and two years) if the corporation honors all of the terms of the agreement. In return, corporations undertake reforms, pledge active and complete cooperation with the ongoing investigation, and pay substantial civil penalties and victim restitution. Companies will often be required to engage the services of a monitor or examiner during the diversion period to review and report on compliance efforts. DPAs . . . also include a version of allocution: a recitation of the alleged illegalities and acceptance of responsibility for them.

Id. at 322 (footnotes omitted).

Prosecutors have increasingly used DPAs rather than indictments in order to address conduct in more "creative and flexible ways" than judicially imposed sanctions, which can often result in undesired "collateral consequences" for employees and shareholders. Christopher J. Christie & Robert M. Hanna, *A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Myers Squibb Co.*, 43 AM. CRIM. L. REV. 1043, 1043-44 (2006); *see also* Griffin, *supra*, at 330 ("Prosecutors are justifiably reluctant to cause such extensive economic harm."); Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP. FIN. & COM. L. 45, 57 tbl.A (2006) (documenting the recent rise in the use of DPAs and NPAs); *id.* at 55-56 (noting that companies prefer DPAs to indictments because they are less widely publicized and more subject to the company's control than judicial sentences). Accordingly, most DPAs require the company to institute a compliance program to address the problems that initially prompted the investigation. Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 894-95 (2007). DPAs have also been criticized, however, for causing the corporation to be "effectively deputize[d]" as a government agent in investigations of employees. Griffin,

ment that "KPMG agree[] to cooperate fully and actively with . . . the government . . . regarding any matter relating to [this] investigation."[70] But the DPA only applied to proceedings against the firm; the government soon indicted certain individuals, triggering the firm's new policy of terminating indemnification.[71] These defendants then moved to dismiss the indictment, claiming "that the government had interfered improperly with the advancement of attorneys' fees by KPMG in violation of their constitutional and other rights."[72] In response, the DOJ announced that it would not construe KPMG's advancement of legal fees as a violation of the DPA.[73]

Despite this concession, the court held the Thompson Memorandum's fee indemnification provisions unconstitutional.[74] It identified two constitutional violations. Applying the framework announced by the Supreme Court in *Washington v. Glucksberg*,[75] the court held that the government had violated the defendants' substantive due process right "to obtain and use in order to prepare a defense resources lawfully available to [them], free of knowing or reckless government interference."[76] The court also determined that the Thompson Memorandum violated the defendants' Sixth Amendment right to counsel of their choice.[77] A year later, the court dismissed the indictments against the individuals deprived of indemnification.[78]

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supra, at 336. NPAs are similar to DPAs, but instead provide that the government will not "file charges at all if certain conditions are met." *Id.* at 321 n.42; *see also* Finder & McConnell, *supra* note 43, at 17 (finding that the other terms of NPAs and DPAs are similar). For summaries of the terms of recent DPAs and NPAs, see Finder & McConnell, *supra* note 43, at 36 app.; Garrett, *supra*, at 938 app. A; and Orland, *supra*, at 86-87 tbls.I & II.

[69] *Stein*, 435 F. Supp. 2d at 349-50.

[70] Deferred Prosecution Agreement at 9, United States v. KPMG, LLP, No. 05-0903 (S.D.N.Y. Aug. 29, 2005).

[71] *Stein*, 435 F. Supp. 2d at 350.

[72] *Id.* For more on the effect of the KPMG policy on the defendants in *Stein*, see *supra* notes 10, 12, and accompanying text.

[73] *Stein*, 435 F. Supp. 2d at 351.

[74] *Id.* at 382.

[75] 521 U.S. 702 (1997).

[76] *Stein*, 435 F. Supp. 2d at 361; *see also id.* at 362, 365.

[77] *Id.* at 365-66.

[78] United States v. Stein, 495 F. Supp. 2d 390, 427 (S.D.N.Y. 2007). The court had initially attempted to force KPMG to indemnify its employees by creating an ancillary proceeding for the individual defendants to sue KPMG. *Stein*, 435 F. Supp. 2d at 380. This effort was short-lived: the Second Circuit responded by issuing a writ of mandamus, holding that the district court's "exercise of ancillary jurisdiction . . . [had been]

In the wake of *Stein*, criticism of the Thompson Memorandum grew. Business[79] and other advocacy groups[80] began to argue for its revision. Congress held hearings regarding the policy and introduced legislation to restrict it—the Attorney-Client Privilege Protection Act, which would prevent federal prosecutors and enforcement officials from basing charging decisions on whether a company "is cooperating with the Government," such as through "the provision of counsel to, or contribution to the legal defense fees or expenses of, an employee."[81] In part to avoid these statutory restrictions, the DOJ issued the McNulty Memorandum; yet, as discussed, commentators argued that the new policy had a similar impact on access to counsel.[82]

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clearly outside [proper] boundaries." Stein v. KPMG, LLP, 486 F.3d 753, 760 (2d Cir. 2007).

[79] A representative example of this criticism is the report of the Committee on Capital Markets Regulation, a group of corporate executives and attorneys. The report recommended "that the Justice Department revise its prosecutorial guidelines to *prohibit* federal prosecutors from seeking . . . the denial of attorneys' fees to employees, officers, or directors." COMM. ON CAPITAL MARKETS REGULATION, INTERIM REPORT 14 (2006), http://www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf. Defense attorneys have made similar statements. *See, e.g.*, David Hechler, *New York AG Presses Companies To Stop Paying Indicted Employees' Legal Bills*, LAW.COM, Nov. 2, 2006, http://www.law.com/jsp/article.jsp?id=1162375516746 (quoting a defense attorney arguing that settlements barring indemnification are "fundamentally a denial of due process").

[80] *See* Elkan Abramowitz & Barry A. Bohrer, *Assault on Thompson Memo: KPMG and Beyond*, N.Y. L.J., Sept. 5, 2006, at 3, 3 (reporting on an ABA recommendation that prosecutors not consider whether an "organization provided counsel to, or advanced, reimbursed or indemnified the legal fees and expenses of, an employee"); Brian W. Walsh, The Heritage Found., What We Have Here Is Failure To Cooperate: The Thompson Memorandum and Federal Prosecution of White-Collar Crime 13 (Nov. 6, 2006), http://www.heritage.org/research/legalissues/upload/lm_19.pdf ("[A]ll of the Memorandum's references to a company's payment of its employees' legal fees should be eliminated. Justice traditionally has been best served when all parties to criminal litigation are well represented by experienced, diligent counsel."); *see also* Lynnley Browning, *Judges Press Companies That Cut Off Legal Fees*, N.Y. TIMES, Apr. 17, 2006, at C1 (reviewing criticisms of the Thompson Memorandum).

[81] *See* Attorney-Client Privilege Protection Act of 2007, S. 186, H.R. 3013, 110th Cong. § 3(a) (2007) ("In any Federal investigation or criminal or civil enforcement matter, an agent or attorney of the United States shall not . . . condition a civil or criminal charging decision relating to a[n] organization, or person affiliated with that organization, on, or use as a factor in determining whether an organization, or person affiliated with that organization, is cooperating with the Government[,] . . . the provision of counsel to, or contribution to the legal defense fees or expenses of, an employee of that organization . . . ."); *see also* Lynnley Browning, *Justice Department Is Reviewing Corporate Prosecution Guidelines*, N.Y. TIMES, Sept. 13, 2006, at C3 (reporting that Senators Specter and Leahy called the policies "coercive").

[82] *See supra* notes 54-56 and accompanying text.

2. SEC Policy

The SEC has adopted a different strategy in its anti-indemnification policy. First, and most significantly, it does not penalize a company for indemnifying attorneys' fees. Rather, it attempts to control inappropriate indemnification through its policy against the indemnification of penalties. Second, the SEC has made it clear that it will enforce its policy directly against individual defendants, rather than indirectly by persuading companies to cut off funding for their employees.

Like the DOJ policy, the SEC policy has taken form only in recent years, and has developed as a matter of agency policy rather than through legislation or rulemaking. To a limited extent, SEC rules do embody the agency's anti-indemnification position: securities registration statements must include a recital of the SEC's position that indemnification for liabilities arising under the Securities Act (that is, liabilities related to the registration of securities) "is against public policy as expressed in the Act and is therefore unenforceable."[83] But this position does not appear to have directly influenced SEC enforcement policy.[84]

Nor does the SEC rely on statutory authority for its indemnification policy. Although a few statutes bar indemnification, this is the exception rather than the rule.[85] For instance, a provision of the Investment Company Act prohibits indemnification for certain violations by officers and directors.[86] Similarly, the Foreign Corrupt Practices Act (FCPA), which provides for fines against employees of U.S. companies for bribing foreign officials,[87] mandates that "such fine[s] may not be paid, directly or indirectly, by [the] issuer."[88] Finally, the SEC may have authority under the Sarbanes-Oxley Act to bar indem-

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[83] 17 C.F.R. § 229.510 (2007); *see also* Griffith, *supra* note 40, at 1196-97 (reviewing SEC policies on indemnification).

[84] *See* Coffee, *supra* note 40, at 1568 ("[N]either courts nor the SEC have extended this policy to apply to settlement payments or defense costs where the defendants do not admit liability.").

[85] *See* Dale A. Oesterle, *Limits on a Corporation's Protection of Its Directors and Officers from Personal Liability*, 1983 WIS. L. REV. 513, 559-61 (discussing the "few selected areas" in which federal law regulates corporate indemnification of directors and officers).

[86] 15 U.S.C. § 80a-17(h) (2000).

[87] 15 U.S.C. § 78dd-1.

[88] 15 U.S.C. § 78ff(c)(3).

nification payments, although the agency's use of this authority has been infrequent.[89]

The SEC's pertinent anti-indemnification policy has instead evolved largely as a matter of SEC Enforcement practice,[90] which has built on a 2001 policy statement known as the "Seaboard Report."[91] The Report outlines the criteria that the SEC uses to determine whether to bring enforcement actions against companies (rather than just individuals), focusing on two categories of behavior: the nature of the misconduct and the extent of the company's cooperation with the Enforcement investigation.[92] Although the Seaboard Report was the first statement to reach even that level of detail,[93] it mentions only vague criteria regarding cooperation, asking whether the company "cooperate[d] completely" and made "all reasonable efforts to secure [its employees'] cooperation."[94] In 2003, the Chairman of the SEC

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[89] This authority may come in two forms. First, section 1103 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 78u-3(c)(3)(A)(i) (Supp. III 2004), authorizes the SEC to freeze "extraordinary payments" to their employees during an investigation, a power that the agency has used at least once to freeze indemnification payments. *See* Complaint, SEC v. WorldCom, Inc., No. 02-4963 (S.D.N.Y. June 26, 2002), *available at* http://www.sec.gov/litigation/complaints/complr17588.htm (applying for an injunction against WorldCom "making any extraordinary payments" to employees, including "indemnification payments"). Second, section 402, 15 U.S.C. § 78m(k), prohibits "personal loan[s]" to officers and directors, and some commentators have suggested that the advancement of legal fees could be deemed to be a loan. *See* Robert S. Bennett et al., *Internal Investigations and the Defense of Corporations in the Sarbanes-Oxley Era*, 62 BUS. LAW. 55, 75-76 (2006). However, the SEC does not appear to have adopted this interpretation, *see id.*, and at least one court has rejected it. *See* Envirokare Tech, Inc. v. Pappas, 420 F. Supp. 2d 291, 293-94 (S.D.N.Y. 2006).

[90] *See* Dale A. Oesterle, *Early Observations on the Prosecutions of the Business Scandals of 2002–03: On Sideshow Prosecutions, Spitzer's Clash with Donaldson over Turf, the Choice of Civil or Criminal Actions, and the Tough Tactic of Coerced Cooperation*, 1 OHIO ST. J. CRIM. L. 443, 463-65 (2004) (reviewing government policies regarding indemnification and "cooperation," and describing their application in recent cases); Marvin G. Pickholz & Jason R. Pickholz, *Investigations Put Employees in Tough Spot*, N.Y. L.J., July 24, 2006, at 10, 10 (describing the evolution of the SEC's policy).

[91] Report of Investigation Pursuant to Section 21(A) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,969 (Oct. 23, 2001) [hereinafter Seaboard Report], *available at* 2001 WL 1301408.

[92] *Id.*

[93] *See* U.S. CHAMBER OF COMMERCE, REPORT ON THE CURRENT ENFORCEMENT PROGRAM OF THE SECURITIES AND EXCHANGE COMMISSION 30 (2006), http://www.uschamber.com/publications/reports/0603sec.htm ("[P]rior to the issuance of the [Seaboard] Report . . . , the Commission had not issued formal guidance on the benefits of cooperation." (footnote omitted)).

[94] Seaboard Report, *supra* note 91, at *3. The SEC reaffirmed the importance of cooperation in a 2006 press release that explained the Commission's view on "whether,

publicly announced his belief that it is inappropriate, as a matter of public policy, for companies to pay their employees' disgorgement and penalties.[95] In a prominent application of this policy, the SEC announced that Lucent would pay an especially high penalty in part because the company had "expanded the scope of employees that could be indemnified against the consequences of [the] SEC enforcement action" "without being required to do so by state law or its corporate charter."[96]

The SEC also extended this policy to individuals. Rather than just encouraging companies to withhold indemnification from their employees, the Commission now requires all "settling parties to forgo any rights they may have to indemnification, reimbursement by insurers, or favorable tax treatment of penalties."[97] (As noted above, indemnification law and D&O insurance encourage defendants to settle cases rather than litigating them to trial.[98] Settlements thus give Enforcement staff considerable latitude to shape sanctions.) This policy has been widely enforced in recent years. Although the policy has generally been applied only to the indemnification of penalties,[99] the SEC

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and if so to what extent, to impose civil penalties against a corporation." Press Release, SEC, Statement of the Securities and Exchange Commission Concerning Financial Penalties (Jan. 4, 2006), http://www.sec.gov/news/press/2006-4.htm. The statement announced that "the appropriateness of a penalty on [a] corporation . . . turns principally on" the existence of a "direct benefit to the corporation" and the "degree to which the penalty will . . . further harm" shareholders. *Id.* However, it also reiterated that the "degree to which a corporation has . . . cooperated with the investigation and remediation of [an] offense" was an important consideration for the Commission. *Id.*

[95] *See* William H. Donaldson, Chairman, SEC, Remarks Before the New York Financial Writers Association (June 5, 2003), *available at* http://www.sec.gov/news/speech/spch060503whd.htm ("I'm concerned about companies that, under permissive state laws, indemnify their officers and directors against disgorgement and penalties ordered in law enforcement actions . . . . [T]his just isn't good public policy.").

[96] Press Release, SEC, Lucent Settles SEC Enforcement Action Charging the Company with $1.1 Billion Accounting Fraud (May 17, 2004), http://www.sec.gov/news/press/2004-67.htm.

[97] Stephen M. Cutler, Dir., SEC Div. of Enforcement, Speech by SEC Staff: 24th Annual Ray Garrett Jr. Corporate & Securities Law Institute (Apr. 29, 2004), http://www.sec.gov/news/speech/spch042904smc.htm.

[98] *See supra* Part I.B.2.b.

[99] *See, e.g., SEC Wants Execs To Pay Fines Out of Their Own Pockets*, L.A. TIMES, June 17, 2003, at C5 (reporting that in their settlement with the SEC, Xerox executives were forced to pay $3 million in penalties out of pocket, but not $19 million in disgorgement); Press Release, SEC, The Securities and Exchange Commission, NASD and the New York Stock Exchange Permanently Bar Henry Blodget from the Securities Industry and Require $4 Million Payment (Apr. 28, 2003), *available at* http://www.sec.gov/news/press/2003-56.htm (announcing that the defendant had "agreed that he will not seek reimbursement or indemnification for the penalties he pays").

has occasionally insisted that defendants relinquish rights to the indemnification of disgorgement as well.[100]

Thus far, however, the SEC has not attempted to restrict the indemnification of attorneys' fees. Yet it has not escaped the concern of critics who believe that the SEC is either informally penalizing companies for indemnifying attorneys' fees or will change its policy in the future. In February 2007, for instance, the American Bar Association sent a letter to the Chairman of the SEC expressing concern that the "reasonable efforts"[101] language in the Seaboard Report might one day be interpreted as mandating restrictions on the indemnification of attorneys' fees.[102] The letter urged revisions clarifying that fee indemnification should not be considered in corporate charging decisions.[103]

3. The Government's Justifications for Restricting Indemnification

The McNulty Memorandum's indemnification provisions are justified as fulfilling several goals. First, the policy promotes greater transparency and consistency in decisions to charge corporations

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[100] *See, e.g.*, Healthsouth Founder Settles SEC Fraud Action for $81 Million, Litigation Release No. 20,084 (Apr. 23, 2007), http://www.sec.gov/litigation/litreleases/2007/lr20084.htm ("Scrushy has agreed to refrain from seeking indemnification or reimbursement from any third-party for any part of the $81 million [in penalties and disgorgement] required by the Final Judgment . . . ."); Consent of Defendant Jack Benjamin Grubman ¶ 6, SEC v. Grubman, No. 03-2938 (S.D.N.Y. Apr. 2003), *available at* http://www.sec.gov/litigation/litreleases/consent18111b.htm ("Defendant agrees that he shall not seek or accept, directly or indirectly, reimbursement or indemnification, including but not limited to payment made pursuant to any insurance policy, with regard to all amounts that Defendant shall pay pursuant to . . . the Final Judgment . . . .").

[101] *See supra* notes 91-94 and accompanying text.

[102] Letter from Karen J. Mathis, President, Am. Bar Ass'n, to Christopher Cox, Chairman, SEC (Feb. 5, 2007), *available at* http://www.abanet.org/poladv/letters/attyclient/2007feb05_privwaivsec_l.pdf. The U.S. Chamber of Commerce has made similar recommendations. *See* U.S. CHAMBER OF COMMERCE, *supra* note 93, at 8 ("The Commission should not impose fines on corporations for lack of cooperation in its investigations . . . [and] should make clear that it does not disfavor and will not deem uncooperative corporations that either indemnify or advance legal expenses for their employees in connection with SEC investigations or litigation."). Moreover, the SEC's actions in certain settlements have triggered some concern—not necessarily justified—that the SEC silently imposes harsher penalties on corporations for indemnifying their employees' legal expenses. *See id.* at 33 ("[T]he Commission should reevaluate whether it is appropriate to impose penalties for providing for the legal representation of corporate employees.").

[103] *See* Letter from Karen J. Mathis to Christopher Cox, *supra* note 102.

rather than just individual wrongdoers.[104] Second, it discourages companies from using their indemnification leverage to prevent employees from testifying or otherwise providing information to the government.[105] Third, this in turn ensures that companies are charged based on a full understanding of the evidence.[106] Fourth, by rewarding companies that cooperate, the policy promotes fairness—the relatively good actor is treated better than the relatively bad actor.[107] Fifth, it facilitates government investigations of corporate misconduct. This has three secondary benefits: it allows the DOJ to "conserve[] public resources" for other investigations,[108] it serves the public interest by preserving investor confidence in the markets,[109] and it helps corporations under investigation protect their stock prices by promoting a rapid resolution to an investigation.[110]

The SEC policy generally focuses on different concerns. Like the DOJ, the SEC initially formulated its policy to make corporate charging decisions more transparent and consistent.[111] Instead of focusing on the indemnification of attorneys' fees, however, the SEC discour-

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[104] *See McNulty Memorandum Hearings*, *supra* note 21 (statement of Barry M. Sabin, Deputy Assistant Att'y Gen.) (describing the McNulty Memorandum as the DOJ's "attempt[] to transparently and thoughtfully articulate the manner in which it goes about its corporate criminal charging decisions"); Interview with Eric Holder, *supra* note 43 (noting that the Holder Memorandum was prompted by the defense bar's desire for greater consistency).

[105] *See* Paul J. McNulty, *supra* note 50 ("Corporations may use advancement . . . to stop the flow of information from the company to the government so that we cannot investigate the conduct effectively."); *see also* United States v. Stein, 495 F. Supp. 2d 390, 396 (S.D.N.Y. 2007) (noting that prosecutors construed the Thompson Memorandum to discourage indemnification "when the Government believed such payments were part of an effort . . . to appear cooperative while protecting culpable employees" (citation omitted)). Although the DOJ embraces this as a primary goal of the anti-indemnification policy today, this concern did not play a significant role in motivating the Holder Memorandum. Interview with Eric Holder, *supra* note 43.

[106] *See McNulty Memorandum Hearings*, *supra* note 21 (statement of Barry M. Sabin, Deputy Assistant Att'y Gen.) ("We are seeking to ensure that we have [a] full and complete understanding of a factual nature [of the conduct], in order to make appropriate charging decisions . . . .").

[107] *See* Elston, *supra* note 54 ("[I]f a corporation cooperates in an investigation, [it] deserve[s] credit for that cooperation. . . . [N]ot all corporations cooperate.").

[108] *Id.*

[109] *Id.*

[110] *See* Paul J. McNulty, Deputy Att'y Gen., Cooperation and Corporate Stewardship, Remarks to the Corporate Counsel Institute (Mar. 8, 2007), http://www.usdoj.gov/dag/speech/2007/dag_speech_070308.htm.

[111] *See* Press Release, SEC, *supra* note 94 ("The Commission believes it important to provide the maximum possible degree of clarity, consistency, and predictability in explaining the way that its corporate penalty authority will be exercised.").

aged the indemnification of penalties. In the SEC's view, allowing companies to pay employees' attorneys' fees serves the useful role of promoting effective representation.[112] Allowing indemnification of penalties and disgorgement, on the other hand, potentially defeats the purposes of these sanctions. An employee whose company is paying her penalty is not penalized for her illegal actions, and the penalty is less likely to serve as an effective deterrent to others.[113]

II. TRADITIONAL CONSTITUTIONAL ANALYSIS OF ANTI-INDEMNIFICATION POLICIES

Criticism of DOJ policy has focused on its possible violations of the right to counsel incorporated in the Fifth and Sixth Amendments.[114] Although these embodiments of the right are certainly implicated by the anti-indemnification policies, they have too many exceptions to effectively protect defendants' access to counsel. This Part reviews the deficiencies of procedural due process, the Sixth Amendment, and substantive due process as protections of the right to counsel in this context. Part III then argues that we should instead turn to the access-to-courts doctrine—a doctrine that could more effectively protect litigants against governmental interference with their right to seek legal advice.

A. *Procedural Due Process*

It is well established that the right to procedural due process incorporates a right to counsel. As the Court has recognized, due process requires notice and a hearing,[115] and under *Powell v. Alabama*, a

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[112] *See, e.g.*, Jill E. Fisch et al., Panel Discussion, *Bigger Carrots and Bigger Sticks: Issues and Developments in Corporate Sentencing*, 11 FORDHAM J. CORP. & FIN. L. 161, 183 (2006) (quoting Steve Cutler, the former Director of the SEC's Division of Enforcement, saying that the SEC did not discourage the indemnification of legal fees because "[w]e like there to be good lawyers representing all interested parties").

[113] *See id.* at 183-84 ("If an individual can look to his or her employer to pay the freight and bear the cost of a penalty, . . . [w]hat deterrence have we really achieved?"); Cutler, *supra* note 97 ("Despite the fact that penalties, like disgorgement, can now be used to compensate harmed investors, they are still fundamentally a punitive measure intended to enhance deterrence of securities laws violations.").

[114] *See, e.g.*, Olis Habeas Petition, *supra* note 67, at 45-69; *see also supra* notes 51, 54, and 74-77.

[115] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); *see also* Goldberg v. Kelly, 397 U.S. 254, 270-71 (1970) (requiring that a welfare recipient be "allowed to retain an attorney if he so desires" and that the attorney be permitted at a hearing regarding the termination of benefits); Powell v. Alabama, 287 U.S. 45, 68

"hearing" necessarily includes "the right to the aid of counsel when desired and provided by the party asserting the right."[116] Under *Chandler v. Fretag*, a criminal defendant's "right to be heard through his own counsel" is "unqualified."[117] Although the due process and Sixth Amendment rights to counsel share philosophical underpinnings, they establish independent constitutional guarantees.[118] For instance, prospective defendants have a due process right to retained counsel before indictment, even where they would not have a Sixth Amendment right to it.[119] Moreover, procedural due process, unlike the Sixth Amendment,[120] applies to civil actions, such as those brought by the SEC.[121]

There seem to be two plausible ways in which the anti-indemnification policies may violate the due process right to counsel.

(1932) (pointing to notice, hearing, and proper jurisdiction as the "basic elements of the constitutional requirement of due process").

[116] *See Powell*, 287 U.S. at 68-69 (identifying the right to counsel as an element of due process in both civil and criminal cases, and applying it to the states); *see also* U.S. Dep't of Labor v. Triplett, 494 U.S. 715, 720 (1990) (recognizing a "due process right to obtain legal representation"). Of course, in certain proceedings, there is no due process right even to retained counsel. For instance, when the presence of counsel would make proceedings unjustifiably adversarial or would reduce efficiency, the Court has held that there is no right to retained counsel. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 120-22 (1975) (holding that the presence of counsel is not constitutionally required at probable cause hearings because "adversary safeguards are not essential for the . . . determination"); Wolff v. McDonnell, 418 U.S. 539, 570 (1974) (denying inmates the right to retained counsel at prison disciplinary proceedings); Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973) (suggesting that "the significant interests in informality, flexibility, and economy" may override the right to retained counsel in parole proceedings). However, since the government does not dispute individuals' right to the presence of counsel at pretrial proceedings, this exception would not defeat the due process right to counsel.

[117] Chandler v. Fretag, 348 U.S. 3, 9 (1954); *see also* Ross v. Moffitt, 417 U.S. 600, 616 (1974) (recognizing a defendant's right to "privately retain[]" a "legal arsenal" to establish her innocence).

[118] *See Powell*, 287 U.S. at 66.

[119] *See* Evitts v. Lucey, 469 U.S. 387, 393 (1985) (suggesting that due process rights apply when the government creates proceedings that form "an integral part of the . . . system for finally adjudicating [an individual's] guilt" (quoting Griffin v. Illinois, 351 U.S. 12, 18 (1956)) (internal quotation marks omitted)); *In re* Winship, 397 U.S. 358, 365-66 (1970) (affirming that due process rights apply even when proceedings are not styled as criminal prosecutions); *In re* Gault, 387 U.S. 1, 36, 41 (1967) (finding a right to counsel because a proceeding could cause an individual's freedom to be curtailed).

[120] *See infra* note 147.

[121] *See, e.g.*, SEC v. McCarthy, 322 F.3d 650, 659 (9th Cir. 2003) (requiring due process in a subpoena enforcement action by the SEC); *cf.* MFS Sec. Corp. v. SEC, 380 F.3d 611, 617-18 (2d Cir. 2004) (acknowledging that decisions made by the Commission are constrained by due process).

First, by interfering with a defendant's capacity to pay for counsel, the government may be unconstitutionally restricting a defendant's choice of counsel. Second, the government may be interfering with a defendant's right to adequate representation, either by creating a conflict of interest between an attorney's duty to her client and her reliance on the employer for compensation, or by causing a defendant to switch counsel so close to trial that she receives poor representation. Before these applications of due process are explored, however, a threshold condition must be assessed: whether there is even a "deprivation" that triggers due process rights.

1. "Deprivation"

The biggest drawback of analyzing the constitutionality of the McNulty Memorandum under a due process framework is that due process simply may not protect many individuals. Due process only applies when the government causes a qualifying deprivation "of life, liberty, or property."[122] If the government never brings an action against an individual, it will not have caused a deprivation of liberty or property in the classic sense.[123] Thus, due process rights are unlikely to serve potential defendants well in most investigations. There are two exceptions to this. If an employee is fired for failing to cooperate with an investigation, she may be able to argue that the government caused a deprivation of property by inducing the company to fire her.[124] Arguably, however, it was the employee rather than the government that caused this result. Similarly, an employee might assert a property interest in indemnification expenses, but this is a tenuous argument where a company is not legally obligated to provide indemnification; and where a company is legally obligated to provide indemnification, the government has demonstrated greater reluctance to intervene.[125] As a general matter, many individuals affected by anti-indemnification policies may therefore not even be in a position to invoke due process to challenge constraints on their access to counsel.

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[122] U.S. CONST. amend. V.

[123] *Cf.* SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 742 (1984) ("The Due Process Clause is not implicated [during an investigation] because an administrative investigation adjudicates no legal rights . . . ."); Hannah v. Larche, 363 U.S. 420, 442 (1960) ("[W]hen governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used.").

[124] For illustrations of this, see *supra* notes 55, 67, and accompanying text.

[125] *See supra* note 49 and accompanying text.

It might be tempting to argue that a deprivation occurs when the government starts an investigation of an individual, because of the harm that such an investigation can do to her reputation. Indeed, the Court has occasionally protected a "liberty interest in reputation"[126]—due process may be required when "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him."[127] This seems justified because, as Justice Stevens has noted in dissent, "an official accusation of serious crime has a direct impact on a range of identified liberty interests."[128] But the reach of this principle is limited. In *Paul v. Davis*, the Court rejected a claim that the plaintiff's liberty interest was injured when the police posted his name and photograph on a flyer about "active shoplifters," despite any reputational damage he may have suffered.[129] It thus seems unlikely that the Court would extend this principle to protect against the mere initiation of an investigation.

2. Right to Choice of Counsel

Once defendants' due process rights do attach, however, they may receive associated protections of their right to counsel. The Court has suggested that it is "fundamental" under due process that "a defendant is not to be denied the privilege of representation by counsel of his choice."[130] Accordingly, the Court in *Commissioner v. Tellier* used due process to bar an agency from burdening a defendant's payment of attorneys' fees, rejecting an IRS argument that an individual could not deduct legal expenses (which he had incurred defending a prose-

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[126] *See* Goss v. Lopez, 419 U.S. 565, 576 (1975) (requiring due process for suspensions from school).

[127] *See* Wisconsin v. Constantineau, 400 U.S. 433, 434, 437 (1971) (rejecting a state practice of posting a notice that an individual could not purchase alcohol when she had engaged in "excessive drinking"); *see also* Bd. of Regents v. Roth, 408 U.S. 564, 573 (1972) (finding that since an employee's reputation was not impugned by his state employer, his liberty interests were not infringed when the employer fired him).

[128] Albright v. Oliver, 510 U.S. 266, 296 (1994) (Stevens, J., dissenting).

[129] 424 U.S. 693, 697, 701 (1976); *see also* Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 7 (2003) (rejecting a claim that disclosure of the identities of sexual offenders under Connecticut's Megan's Law impairs a liberty interest and triggers due process protections); *cf. Albright*, 510 U.S. at 274 (plurality opinion) (declining to recognize a due process violation when a criminal defendant was prosecuted without probable cause); *id.* at 296 n.9 (Stevens, J., dissenting) (arguing that the "commencement of a criminal prosecution . . . certainly" infringes liberty interests by causing reputational harm).

[130] Betts v. Brady, 316 U.S. 455, 468 (1942), *overruled on other grounds by* Gideon v. Wainwright, 372 U.S. 335, 339, 344 (1963).

cution under the Securities Act) from his income tax payments. The Court there noted that "[n]o public policy is offended when a man faced with serious criminal charges employs a lawyer . . . [because in] an adversary system of criminal justice, it is a basic of our public policy that a defendant in a criminal case have counsel to represent him."[131]

Yet this principle does not extend as far as it initially appears, and it is not clear that it would actually constrain the McNulty Memorandum. In *Department of Labor v. Triplett*,[132] a later case evaluating statutory limitations on attorneys' fees, the Court set a high standard for finding a due process violation. Although the Court recognized that a "restriction upon the fees a lawyer may charge" might "deprive[] the lawyer's prospective client of a due process right to obtain legal representation,"[133] this was not enough. Rather, the Court required the plaintiffs to show both that they "could not obtain representation" and that this "was attributable to the Government's fee regime."[134]

Under this higher standard, the due process right to choice of counsel is unlikely to provide reliable protection from the McNulty Memorandum.[135] Few defendants could make the showing required by *Triplett*. First, the typical effect of the policy is not to deny individuals access to any lawyers at all, but merely to restrict the number of lawyers available to them. Second, given that explicit statutory restrictions on attorneys' fees were insufficient to trigger the Court's protection, it seems unlikely that the more oblique operation of the McNulty Memorandum would do so (even though it might implicitly cap attorneys' fee payments by constraining an employee's access to indemnification). Nor would *Tellier* afford relief:[136] First, the relatively indirect operation of the McNulty Memorandum does not rise to the level of the IRS action in *Tellier*. Second, whereas the IRS decision appeared to the Court to be inconsistent with congressional action on tax policy, the DOJ is arguably just exercising its prosecutorial discretion in an area that, thus far at least, Congress has left alone.

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[131] 383 U.S. 687, 694 (1966).

[132] U.S. Dep't of Labor v. Triplett, 494 U.S. 715 (1990).

[133] *Id.* at 720.

[134] *Id.* at 722.

[135] Nor would it protect defendants if the SEC were to adopt a similar policy.

[136] It is also telling that the Court never again relied on *Tellier* for this proposition.

3. Right to Adequate Representation

Due process also incorporates the right to adequate representation as a "necessary corollary" of the right to counsel.[137] This requires that a defendant "be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth."[138] A defendant therefore has a due process right to have "the assistance of zealous and earnest counsel"[139] and "to have sufficient time to advise with counsel and prepare his defense."[140]

DOJ policy may violate this right in two ways. First, it introduces a conflict of interest into an employee's relationship with her attorney—a conflict that could deprive the employee of her due process right to "zealous and earnest counsel." In light of the DOJ's position on cooperation, a company may be forced to choose between its own survival and payment of an employee's legal expenses. Since the company is likely to insist that an employee "cooperate" with the government to receive indemnification, the attorney's continued compensation may be in jeopardy. The attorney is thus forced into a conflict: If she advises the employee to resist the government's demands, she risks forcing the employee to seek other, more affordable representation. If she advises the employee to cooperate, on the other hand, she can be better assured of continued payment via the company. The conflict between the employer's and employee's interests would essentially infect the attorney-client relationship,[141] depriving the defendant of "zealous and earnest counsel" and amounting to a due process violation. Yet this may not always be true. For instance, if a court finds that the employee was correctly advised to cooperate—and that often is the best solution in government investigations—the court may be reluctant to find that this conflict amounts to a due

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[137] Chandler v. Fretag, 348 U.S. 3, 10 (1954).

[138] *Id.*; *see also* Ferguson v. Georgia, 365 U.S. 570, 596 (1961) (holding that a criminal defendant is entitled to assistance of counsel during trial).

[139] Avery v. Alabama, 308 U.S. 444, 450 (1940).

[140] Powell v. Alabama, 287 U.S. 45, 59 (1932).

[141] *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 134(1) (2000) ("A lawyer may not represent a client if someone other than the client will wholly or partly compensate the lawyer for the representation, unless the client consents . . . ."); *see also id.* § 125 ("Unless the affected client consents . . . , a lawyer may not represent a client if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's financial or other personal interests.").

process violation. As a result, this aspect of due process protection would not provide a sufficient guard against government interference.

The McNulty Memorandum may still violate the adequate representation right in a second way, by essentially forcing a defendant to change counsel at a stage in the litigation that would impact the defendant's ability "to have sufficient time to advise with counsel and prepare his defense."[142] That is, by causing a defendant's funding for attorneys' fees to be terminated, the government might force a defendant to find a cheaper attorney—one she can afford on her own. If this change occurred at an inopportune stage in the litigation, it could hinder the defendant's ability to prepare for trial. At the extreme, if the government forces an employer to cut off an employee's entitlement to indemnification during or on the eve of trial, it seems clear that the government would be violating the employee's due process rights. But that situation seems unlikely.

What is more likely is that funding would stop upon indictment—as happened in *Stein*[143]—or at some time between indictment and trial as a result of continued negotiations with the company. While this seems unfair, it is not clear that suspending funding under such circumstances would be barred by due process considerations. The defendant could still have sufficient time to prepare her defense, and as long as the period between the retention of counsel and a proceeding is reasonable in light of the complexity of the case, it is constitutionally sufficient.[144]

B. *Sixth Amendment*

The Sixth Amendment might seem to offer better protection. Even to the extent that DOJ policy does not violate due process, it may violate the Sixth Amendment's grant to a criminal defendant of a right "to have the assistance of counsel for his defence."[145] Sixth Amendment rights invoke issues similar to those raised by due process, but the Sixth Amendment standard is arguably much more de-

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[142] *Powell*, 287 U.S. at 59.

[143] United States v. Stein, 435 F. Supp. 2d 330, 345-46 (S.D.N.Y. 2006).

[144] *See* Ungar v. Sarafite, 376 U.S. 575, 590 (1964) (considering the availability of evidence and the complexity of the legal claims in assessing whether five days was "a constitutionally inadequate time to hire counsel and prepare a defense").

[145] U.S. CONST. amend. VI; *see also* Johnson v. Zerbst, 304 U.S. 458, 467-68 (1938) (holding that the "Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel," and that a violation of this right "stands as a jurisdictional bar" to the imposition of sentences).

manding of the government.[146] There are two salient components of this right: the right to the effective assistance of counsel and the right to representation by counsel of one's choice.

Before defendants can avail themselves of these guarantees, however, they must meet two important threshold conditions, which can be difficult in white-collar cases. Since Sixth Amendment rights only apply in criminal actions, they do not protect defendants against civil actions by the SEC, DOJ, or other agencies.[147] Similarly, the Sixth Amendment applies only to the postindictment context, thus limiting its usefulness against applications of the McNulty Memorandum during investigations.

1. The Attachment of Sixth Amendment Rights

Sixth Amendment rights attach only upon "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[148] This impedes defendants' efforts to invoke the Sixth Amendment to challenge government conduct that occurs during investigations. As one observer has noted, it can be difficult to map "the lawyer of *Gideon* and *Strickland*" onto white-collar investigations, in large part because "she arrives much earlier" than the attorney envisioned by traditional principles of criminal procedure.[149]

Nonetheless, some lower courts have recognized an exception to this principle. For instance, the Seventh Circuit has noted that "the right to counsel presumptively does not attach" before indictment, but that this presumption could be rebutted by a showing that the government had informally "crossed the constitutionally significant divide from fact-finder to adversary."[150] It is conceivable that this exception could help some defendants, but it could not be utilized in the many

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[146] *See* United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2562 (2006) (rejecting an argument that the demands of due process and the Sixth Amendment are the same).

[147] *See, e.g.*, Elliott v. SEC, 36 F.3d 86, 88 (11th Cir. 1994) (denying a Sixth Amendment right to counsel in administrative proceedings); FTC v. World Wide Factors, Ltd., 882 F.2d 344, 347 (9th Cir. 1989) (denying a Sixth Amendment right to counsel in a civil action by a federal agency).

[148] Kirby v. Illinois, 406 U.S. 682, 689 (1972); *see also* United States v. Gouveia, 467 U.S. 180, 188 (1984) (reviewing cases affirming this principle).

[149] *See* Buell, *supra* note 33, at 1630.

[150] United States v. Larkin, 978 F.2d 964, 969 (7th Cir. 1992) (internal quotation marks omitted).

instances where the government secures the company's cooperation before deciding which employees to charge.

The *Stein* court took an even more generous approach, summarily carving out an exception where the government's preindictment actions would create "an unconstitutional effect upon indictment."[151] Such an analysis has two flaws. First, it is inconsistent with the Supreme Court's reluctance to allow the Sixth Amendment "to wrap a protective cloak around the attorney-client relationship for its own sake," since "[b]y its very terms, [the Amendment] becomes applicable only when the government's role shifts from investigation to accusation."[152] Second, it rests on a blanket assumption that the government's actions will have a postindictment effect that is unconstitutional under the Sixth Amendment. As will be discussed in the remainder of this Section, such an assumption is unrealistic under Sixth Amendment case law.

2. Right to Effective Assistance of Counsel

The right to "assistance of counsel" implies a requirement that the "assistance" be effective.[153] The Court has established two pathways to an ineffective assistance claim. In *Strickland v. Washington*, the Court formulated the primary standard for ineffective assistance, requiring defendants to show both ineffectiveness and prejudice. It described the meaning of "effective" in various ways: that the representation meet "an objective standard of reasonableness,"[154] that the attorney "fulfill the role in the adversary process that the [Sixth] Amendment envisions,"[155] and that the attorney exercise "reasonable professional

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[151] United States v. Stein, 435 F. Supp. 2d 330, 366 (S.D.N.Y. 2006). The Eastern District of Virginia followed *Stein*'s lead in another case challenging the Thompson Memorandum's fee provisions. The court accepted the argument about postindictment effects on the ground that doing otherwise "would leave important interests unserved": "[s]imply because there is no right to appointed counsel at a particular stage of an investigation, it does not follow that the government has *carte blanche* to interfere in preexisting attorney-client relationships at that stage." United States v. Rosen, 487 F. Supp. 2d 721, 733-34 (E.D. Va. 2007).

[152] Moran v. Burbine, 475 U.S. 412, 430 (1986).

[153] Strickland v. Washington, 466 U.S. 668, 686 (1984); Cuyler v. Sullivan, 446 U.S. 335, 344 (1980); *see also* Evitts v. Lucey, 469 U.S. 387, 396 (1985) ("[A] party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.").

[154] *Strickland*, 466 U.S. at 688.

[155] *Id.*

judgment."[156] It also required that courts "be highly deferential" in evaluating the quality of representation.[157] In addition to showing that the representation was ineffective, a defendant making an ineffective assistance claim must show prejudice, which requires errors so serious as to deprive the defendant of a fair and reliable trial. In most cases, the defendant must establish a "reasonable probability" that the outcome of the trial would have been different if the representation had been effective.[158]

It seems unlikely that a defendant stymied by indemnification restrictions could meet this standard. A new attorney could still meet "an objective standard of reasonableness,"[159] "fulfill the role in the adversary process that the [Sixth] Amendment envisions,"[160] and exercise "reasonable professional judgment,"[161] despite being retained at an inconvenient time or being relatively inexperienced. And even if the representation were "ineffective," it would not necessarily be so severe as to prejudice the defendant by causing a different outcome at trial.[162] *Strickland* thus does not provide a reliable source of protection from the McNulty Memorandum.[163]

Alternatively, the circumstances of trial preparation could justify a "presumption of ineffectiveness," and thus of a Sixth Amendment violation, "without inquiry into [counsel's] actual performance at trial."[164] This presumption is triggered when it would be "unreasonable" in light of the complexity of the case "to expect that counsel could adequately

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[156] *Id.* at 690.

[157] *Id.* at 689.

[158] *Id.* at 695.

[159] *Id.* at 688.

[160] *Id.*

[161] *Id.* at 690.

[162] *See* Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 3 ("Even if Monday-morning quarterbacking helps to satisfy the first prong [of *Strickland*], the air of inevitability and the confirmatory bias make it hard to satisfy the second."); *id.* at 11 (arguing that "traditional *Strickland* review has no teeth").

[163] *See* Buell, *supra* note 33, at 1650-51 ("The Sixth Amendment promises no particular quantity of resources; the question is simply whether *some* counsel has been provided and whether that counsel was able to perform 'effectively' under a standard of ex post review that excuses all manner of deficient lawyering. The importance or complexity of a case certainly drives up defense costs, but it does not have much impact on what the Constitution guarantees. . . . The effective assistance doctrine thus turns out to be mostly inapplicable to the setting of the organizational criminal case.").

[164] United States v. Cronic, 466 U.S. 648, 661 (1984).

prepare for trial during [the available] period of time."[165] But the standard is high, since "[n]ot every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel."[166] Moreover, the mere fact that an attorney is inexperienced (as might be the case when an employee must pay for counsel on her own) does not give rise to a presumption of ineffectiveness.[167] Conceivably, the government could intervene at such a critical stage of trial preparation that a presumption of ineffectiveness would be warranted. But since the Court has noted that inexperience of counsel and limitations on trial preparation time are insufficient to justify a presumption of ineffectiveness, this claim also seems unlikely to succeed.

Nonetheless, there are two more ways for a defendant to establish a Sixth Amendment violation without showing prejudice. First, she could demonstrate that the state impeded her attorney's ability to advise her.[168] However, some state intrusions into the relationship are allowable, especially when the Court finds such intrusions necessary to effective law enforcement investigations. For instance, in one case the Court found that the government had not infringed the Sixth Amendment by allowing its informant to attend a meeting between a defendant and his attorney. In approving this practice, the Court referred to the "necessity" of the practice and its "value . . . to effective law enforcement."[169] Similarly, the law enforcement interests asserted by the government in the context of the McNulty Memorandum would probably outweigh the comparatively small intrusion into the attorney-client relationship.

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[165] *Id.*; *see also id.* at 664-65 (considering the preparation time in light of the accessibility of evidence, the nature of the charges against the defendant, and the existence of factual disputes).

[166] Morris v. Slappy, 461 U.S. 1, 11 (1983).

[167] *See Cronic*, 466 U.S. at 665 ("[A] particular lawyer's experience . . . does not justify a presumption of ineffectiveness . . . .").

[168] *See* United States v. Morrison, 449 U.S. 361, 364 (1981) ("Our cases have . . . been responsive to proved claims that governmental conduct has rendered counsel's assistance to the defendant ineffective."); Geders v. United States, 425 U.S. 80, 91 (1976) (finding impermissible an order preventing attorney-client consultations during trial); Herring v. New York, 422 U.S. 853, 857 (1975) ("[T]he right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process . . . .").

[169] Weatherford v. Bursey, 429 U.S. 545, 557 (1977). In *Weatherford*, the informant was invited to the attorney-client meeting by the defendant, and the informant did not communicate privileged details of the meeting to the government. *Id.* at 558.

Second, a defendant might be able to show that an attorney's conflict of interest deprived her of effective representation if the conflict "adversely affected [the] lawyer's performance" so as to "impermissibly imperil [the defendant's] right to a fair trial."[170] Although a defendant making such a claim would not need to show prejudice, she would need to show that the conflict "actually affected the adequacy of his representation."[171] As discussed with regard to the analogous due process claim, the attorney's reliance on the defendant's employer for payment could create a conflict between the attorney's and the defendant's interests.[172] But since representation in the white-collar context often entails advising a defendant to cooperate with the government, a defendant may receive the same advice from an attorney with a conflict as from an attorney without a conflict—a situation that would undercut the claim of an "actual" effect.

3. Right to Choice of Counsel

The Sixth Amendment also protects a defendant from government interference with her choice of counsel. The Court recently held in *United States v. Gonzalez-Lopez* that the "right to select counsel of one's choice" is in fact "the root meaning of [this] constitutional guarantee."[173] Consequently, if the state prevents "the accused [from being] defended by the counsel he believes to be best," the Sixth Amendment is violated, and "[n]o additional showing of prejudice is required to make the violation 'complete.'"[174] Rather than being reviewed for harmless error, violation of this aspect of the Sixth Amendment right is so severe as to constitute structural error and thus require reversal.[175]

Yet there are important limitations on this protection. For instance, a defendant does not have a right to hire an attorney with a conflict of interest (even if the defendant waives the conflict),[176] or to

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[170] Cuyler v. Sullivan, 446 U.S. 335, 348 (1980); *see also* Holloway v. Arkansas, 435 U.S. 475, 484-85 (1978) (citing Glasser v. United States, 315 U.S. 60, 71 (1942)).

[171] *Cuyler*, 446 U.S. at 349-50.

[172] *See supra* Part II.A.3.

[173] 126 S. Ct. 2557, 2563 (2006).

[174] *Id.* at 2562.

[175] *Id.* at 2564-65.

[176] *See* Wheat v. United States, 486 U.S. 153, 159-60 (1988) ("[A] defendant [may not] insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party . . . ."); *see also id.* at 159 (noting that counsel must be a member of the bar).

request certain counsel in bad faith to delay proceedings.[177] "Thus, while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, [its] essential aim . . . is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers."[178]

Critical to the indemnification context, the Court has also held that "a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant."[179] In *Caplin & Drysdale v. United States*, the Court upheld a federal forfeiture statute against a challenge that it infringed a defendant's right to hire counsel of his choice.[180] Pursuant to the statute, the DOJ had convinced the district court to freeze assets of the defendant, Christopher Reckmeyer. Despite the asset freeze, Reckmeyer retained the law firm of Caplin & Drysdale to represent him, expecting to rely on some of the assets as payment. After he entered a plea agreement and agreed to forfeit the assets, Caplin & Drysdale petitioned for $195,000 of the forfeited funds as compensation for its services and eventually challenged the statute's constitutionality (nominally on Reckmeyer's behalf).[181]

Although the Court recognized that the Sixth Amendment protected a right to choice of counsel, it held that this right did not extend past what the defendant could afford.[182] The Court even went so far as to say that a "defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice."[183] *Caplin & Drysdale* therefore appears to deny defendants Sixth Amendment protection from the McNulty Memorandum. That is, the DOJ can pressure a company to withhold indemnification of its employees, even if that prevents the employee from being "defended by the counsel he believes to be best."[184] There

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[177] Morris v. Slappy, 461 U.S. 1, 13 (1983).

[178] *Wheat*, 486 U.S. at 159.

[179] *Id.*

[180] Caplin & Drysdale, Chtd. v. United States, 491 U.S. 617, 624-25, 635 (1989).

[181] *Id.* at 619-21, 623-24 n.3.

[182] *Id.* at 624-26.

[183] *Id.* at 626. Of course, if the government's action causes a defendant to have insufficient funds to hire any attorney, that would trigger the defendant's right to appointed counsel. *Id.* at 624-25; *see also* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (requiring appointment of counsel for criminal defendants who cannot afford it).

[184] *See* United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2562 (2006).

would be no Sixth Amendment violation, since there is "no Sixth Amendment right to spend another person's money for services rendered by an attorney."[185]

It could be argued that *Caplin & Drysdale* does not actually reach this far. Although the decision referred to "another person's money," that language glossed over an important nuance: under forfeiture law, the government had asserted a property interest in the funds,[186] and Rechmeyer had conceded it.[187] Since the forfeited funds never legally belonged to Rechmeyer, he had no Sixth Amendment right to spend it on a lawyer. By contrast, an employee entitled to indemnification arguably has a greater property interest in the attorneys' fee funding than someone like Rechmeyer, who had obtained the money through illegal narcotics sales. Assuming that the employee is entitled to the funds, she may therefore be protected by the Sixth Amendment from government intervention. Coupled with the *Gonzalez-Lopez* Court's recent elevation of the right to choice of counsel from being merely "comprehended by the Sixth Amendment"[188] to being its "root meaning,"[189] this narrower reading of *Caplin & Drysdale* would suggest the existence of stronger Sixth Amendment protections.

This view seems overly optimistic. First, the DOJ has denied any intent to interfere with legally binding indemnification requirements. Its indemnification policy applies (at least on its face) only when the money for attorneys' fees legally belongs to the company, not the employee. The situation is thus similar to the forfeiture scenario, where the funds belonged to the government, not the defendant. Second, although the *Gonzalez-Lopez* Court spoke in strong language about the right to choice of counsel, in that case state procedural rules had directly interfered with a defendant's attempt to retain a specific lawyer by preventing the lawyer's pro hac vice admission.[190] The *Stein* court, finding that the DOJ had "forced [the defendants] to limit their defenses . . . for economic reasons,"[191] apparently viewed the DOJ's actions in the same light as the state rules in *Gonzalez-Lopez*. In reality,

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[185] *See Caplin & Drysdale*, 491 U.S. at 626.

[186] *See* 18 U.S.C. § 981(f) (2000) ("All right, title, and interest in property [subject to forfeiture] . . . shall vest in the United States upon commission of the act giving rise to forfeiture under this section.").

[187] *Caplin & Drysdale*, 491 U.S. at 621.

[188] Wheat v. United States, 486 U.S. 153, 159 (1988).

[189] *Gonzalez-Lopez*, 126 S. Ct. at 2563.

[190] *Id.* at 2560-61.

[191] United States v. Stein, 495 F. Supp. 2d 390, 418-19 (S.D.N.Y. 2007).

however, the operation of the McNulty Memorandum is more circumspect; rather than directly constraining an employee's choice of counsel, it discourages companies from using their discretion to finance the employee's choice of counsel.[192] As others have noted, "[t]he controversy . . . is not . . . whether a firm's agent may spend her own funds on her defense, but rather . . . whether the *firm's* funds may be deployed for the agent's defense."[193] *Caplin & Drysdale* therefore seems more apposite than *Gonzalez-Lopez*. Viewed under that framework, the Sixth Amendment is not a strong bulwark against the force of the McNulty Memorandum.

C. *Substantive Due Process*

In the absence of adequate protection from the Sixth Amendment and procedural due process, it is tempting to turn to substantive due process to protect defendants' right to counsel. Recognizing a substantive due process right in this area would subject the McNulty Memorandum to demanding standards—and might very well prove fatal to the policy. Indeed, *Stein* took this road to find the Thompson Memorandum unconstitutional. But when properly applied, substantive due process is not an appropriate repository for the right to counsel.

1. Use of the *Glucksberg* Analysis

Stein relied on the *Glucksberg* analysis to assess the substantive due process implications of the Thompson Memorandum. *Glucksberg* had been announced nearly a decade earlier in the context of a statute barring assisted suicide. Yet even if one accepts the use of *Glucksberg* to evaluate executive action (an assumption that itself seems inconsistent with the case law[194]), this argument fails. Noting that due process "guarantees more than fair process,"[195] the *Glucksberg* Court declared that to be protected under substantive due process, an asserted right

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[192] Indeed, prosecutors' power in the forfeiture context is similar to their power in constraining indemnification. *See* David Rudovsky, *The Right to Counsel Under Attack*, 136 U. PA. L. REV. 1965, 1969 (1988) (describing forfeiture proceedings as allowing "the prosecution [to] preclude any criminal defendant from retaining counsel of choice").

[193] Buell, *supra* note 33, at 1651; *see also* Peter Margulies, *Legal Hazard: Corporate Crime, Advancement of Executives' Defense Costs, and the Federal Courts* (pt. II), 7 U.C. DAVIS BUS. L.J. 2 (2006), http://blj.ucdavis.edu/article.asp?id=650 (arguing that *Stein*'s interpretation of the right to choice of counsel was too generous).

[194] *See infra* Part II.C.2.

[195] Washington v. Glucksberg, 521 U.S. 702, 719 (1997).

must be "deeply rooted in this Nation's history and tradition."[196] But before conducting this analysis, the right must be "careful[ly] descri[bed]."[197] If an asserted right is found to be protected under substantive due process, governmental action infringing it must be "narrowly tailored to serve a compelling state interest."[198] If not, the action must merely be "rationally related to legitimate government interests."[199]

The threshold inquiry under *Glucksberg* is therefore to define what interest is actually being protected. The *Stein* court identified the interest at issue as a defendant's right "to obtain and use in order to prepare a defense resources lawfully available to him or her, free of knowing or reckless government interference."[200] If this were an appropriate interest under *Glucksberg*, it would seem unassailable—such a right is surely "deeply rooted." But this interest is framed too broadly to be consistent with the Court's requirement that the interest be "carefully described."[201] A more appropriate statement of the right at issue would be "the right to indemnification of attorneys' fees by one's employer." Framed this way, the right is not "deeply rooted," as *Stein* suggests. The common law did not encourage such indemnification;[202] rather, it is the result of modern statutes and corporate practice. Under this more faithful interpretation of the *Glucksberg* substan-

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[196] *Id.* at 720-21 (citing Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)). The Court has applied a similar requirement to determine whether to protect rights related to family relationships. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality opinion) (noting that "the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court"); Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (plurality opinion) (emphasizing that to be protected under substantive due process, a liberty interest must be both fundamental and "traditionally protected by our society").

[197] *Glucksberg*, 521 U.S. at 721 (citing Reno v. Flores, 507 U.S. 292, 302 (1993)).

[198] *Id.* Although some commentators claimed that *Lawrence v. Texas*, 539 U.S. 558 (2003), announced a new, less restrictive approach to substantive due process doctrine, this may have been overly optimistic. *See* Brian Hawkins, Note, *The* Glucksberg *Renaissance: Substantive Due Process Since* Lawrence v. Texas, 105 MICH. L. REV. 409, 425-26 (2006) (determining, based on a review of over one hundred post-*Lawrence* cases, that "every element" of *Glucksberg*'s methodology "remains alive and well").

[199] *Glucksberg*, 521 U.S. at 728.

[200] United States v. Stein, 435 F. Supp. 2d 330, 361 (S.D.N.Y. 2006).

[201] The *Stein* court also alluded to the potential existence of a substantive due process "right to fairness in criminal proceedings," but denied that it was going so far as to hold that such a right exists. *Id.* at 361. This characterization of the right would be objectionable for the same reason.

[202] *See, e.g.*, Bishop, *supra* note 17, at 1068-69 ("[T]he common law governing a director's right to indemnification for costs of litigation is a welter of confusion.").

tive due process analysis, it seems unlikely that the McNulty Memorandum amounts to a substantive due process violation.

2. Evaluation of Executive Actions

Yet *Glucksberg* may not even be the proper framework in which to evaluate the McNulty Memorandum. Even after *Glucksberg*, the Court has continued to evaluate executive actions (such as prosecutorial actions by an executive agency like the DOJ) using a different standard,[203] since the "criteria to identify what is fatally arbitrary [under substantive due process] differ depending on whether it is legislation or a specific act of a governmental officer that is at issue."[204] The standard for executive actions was initially described as prohibiting government conduct that "shocks the conscience"[205] or infringes rights that are the "essence of a scheme of ordered liberty."[206] Despite the high threshold set by these early characterizations of the substantive due process right, "the core of the concept [is] protection against arbitrary action."[207] That is, substantive due process "bar[s] certain government actions regardless of the fairness of the procedures used to implement them."[208]

In the context of executive action, "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,'"[209] since "the Due Process Clause was intended to prevent government officials from abusing [their] power, or employing it as an

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[203] *See* County of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998).

[204] *Id.* at 846. A notable exception to this practice may be *Reno v. Flores*, 507 U.S. 292 (1993), which employed a *Glucksberg*-type analysis to evaluate a challenge to an agency regulation promulgated through notice-and-comment rulemaking. The *Stein* court argued that *Glucksberg* applies because the "Thompson Memorandum in substance was a regulation," and was therefore legislative in nature. United States v. Stein, 495 F. Supp. 2d 390, 412 (S.D.N.Y. 2007).

Although it seems reasonable to treat the product of formal rulemaking as inherently legislative, the McNulty Memorandum is more like routine executive action since it was more informally developed and is more flexibly applied. *Cf.* United States v. Mead Corp., 533 U.S. 218, 233-34 (2001) (distinguishing notice-and-comment rulemaking from more informal agency rulings). In any event, the claim of a substantive due process violation is weak under either *Glucksberg* or *Lewis*.

[205] Rochin v. California, 342 U.S. 165, 172 (1952).

[206] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[207] *Lewis*, 523 U.S. at 845.

[208] *Id.* at 840 (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)) (internal quotation marks omitted).

[209] *Id.* at 846 (quoting Collins v. City of Harker Heights, 503 U.S. 115, 129 (1992)).

instrument of oppression."[210] Unlike when evaluating legislation, when evaluating executive action a court must first ask whether the conduct is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."[211] Although that initial inquiry can "be informed by a history of liberty protection," its primary focus is "an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them."[212] An action is certainly conscience-shocking if an official "intend[s] to injure" an individual without justification by a government interest, but it is a "closer call[]" if an officer is merely reckless or grossly negligent in assessing the consequences of her conduct.[213]

Despite the unfairness of government interference with reimbursement of defendants' legal expenses, it does not reach the level of shocking the conscience. Although constraints on indemnification might reflect a disregard for the right to counsel, it seems excessive to view them as intentional injury to individuals. DOJ officials do not appear to be trying to harm potential defendants in the sense that they are "abusing [their] power, or employing it as an instrument of oppression."[214] Even characterizing the indemnification policy as reckless or grossly negligent, and therefore within the "closer call[]" territory identified by the Court,[215] seems to be inaccurate for the majority of cases. Even if the conduct were reckless, however, it is still unlikely that it would amount to a substantive due process violation since the Court has rejected such claims even when government actions may have resulted in human deaths.[216] Despite the sanctity of the right to counsel, it would be a stretch to say that it competes with the interest in life. At most, it seems that courts would find that the policy "shocks the conscience" only in situations like that in *Stein*, where prosecutors regularly asked the company to rescind individual

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[210] *Id.* at 840 (alteration in original) (citations and internal quotation marks omitted).

[211] *Id.* at 848 n.8.

[212] *Id.*

[213] *Id.* at 849; *see also Collins*, 503 U.S. at 126-28 (rejecting a claim premised on a city's "deliberate indifference" to its employees); DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195-96 (1989) (rejecting a claim that the government had a substantive due process obligation to protect individuals "from each other").

[214] *Lewis*, 523 U.S. at 846 (alteration in original) (internal quotation marks omitted).

[215] *See id.* at 849.

[216] *See, e.g., id.*; *Collins*, 503 U.S. at 128.

employees' indemnification rights.[217] If prosecutors used more delicate tactics, as seems likely under the terms of the McNulty Memorandum,[218] there would be much less room to find the conduct conscience-shocking.

In addition, the Court is generally reluctant to recognize a substantive due process right when another constitutional protection could suffice. When another constitutional provision "provides an explicit textual source of constitutional protection against" the challenged conduct, it is that guarantee, "not the more generalized notion of 'substantive due process,' [that] must be the guide for analyzing these claims."[219] Here, the Fifth and Sixth Amendments provide explicit sources of constitutional protection. Admittedly, the protection they provide is far from perfect.[220] But that is not the standard—the textual protections need not protect every individual for the Court to decline to recognize substantive due process rights.

III. ACCESS TO THE COURTS

In light of the deficiencies of due process and the Sixth Amendment, the access-to-courts doctrine would provide better protection for employees to receive indemnification for legal expenses without DOJ interference. The doctrine holds that when the government intrudes on individuals' access to legal advice, it must have a compelling reason for doing so.[221] By analyzing the McNulty Memorandum under this doctrine, it is possible to identify the constitutional deficiencies of DOJ policy while avoiding the roadblocks presented by due process and the Sixth Amendment.

A. *The Right of Access to the Courts*

In essence, the right of access to the courts entitles litigants to legal advice free of government intervention—that is, a right to avoid "systemic official action" that "frustrates" a litigant's ability to use the

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[217] *See supra* notes 66-67 and accompanying text (describing the ongoing communications between KPMG and prosecutors about the level of cooperation offered by KPMG employees).

[218] *See supra* text accompanying note 48.

[219] Albright v. Oliver, 510 U.S. 266, 273 (1994) (plurality opinion) (internal quotation marks omitted) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)).

[220] *See supra* Part II.A-B.

[221] *See In re* Primus, 436 U.S. 412, 432 (1978).

courts to vindicate her rights.[222] Despite the characterization of the right as "access to the courts," it "extends to all departments of the Government," and can therefore encompass interactions with administrative agencies rather than just litigation in the courts.[223]

The Court recently described the right in the context of legal services funding in *Legal Services Corp. v. Velazquez*.[224] The Court's core concern was that governmental action could result in "two tiers of cases": cases where litigants received representation free of governmental intrusion and those where governmental intervention had resulted in "truncated representation" that deprived litigants of their entitlement to "complete analysis of the case, full advice to the client, and proper presentation to the court."[225]

The right of access to the courts is "grounded . . . in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, [and] the Fifth Amendment Due Process Clause."[226] Because it derives from First Amendment rights, it applies even when there is ultimately no deprivation of life, liberty, or property (unlike due process), and applies even when a criminal trial is not envisioned (unlike the Sixth Amendment).

The government can constitutionally infringe on the right of access to the courts only if its actions survive scrutiny under a compelling interest standard. That is, "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."[227] The interest must be strong enough to "subordinat[e]" the rights of litigants, and the regulation must be "closely drawn to avoid unnecessary abridgment" of these rights.[228]

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[222] Christopher v. Harbury, 536 U.S. 403, 413 (2002).

[223] Cal. Motor Transp. Co. v. Trucking Unltd., 404 U.S. 508, 510-11 (1972).

[224] 531 U.S. 533 (2001).

[225] *Id.* at 546. Although *Legal Services* focused on a different context—conditions imposed by Congress on its funding for Legal Services Corporation, which provides legal services to indigents—the core values of the decision are still relevant.

[226] *Harbury*, 536 U.S. at 415 n.12 (citations omitted). This discussion does not address the Fourteenth Amendment and equal protection roots of the doctrine. For a helpful examination of the use of the access-to-courts doctrine in a different context, see Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 565-76 (2002).

[227] NAACP v. Button, 371 U.S. 415, 438 (1963).

[228] *In re* Primus, 436 U.S. 412, 432 (1978) (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976)).

B. *Development of the Right*

Modern use of the access-to-courts doctrine to protect the right to counsel arose in the 1960s as an effort to safeguard the rights of minorities and union members. This line of cases began with *NAACP v. Button*, in which the Court struck down a Virginia regulation that prevented lawyers working under the auspices of the NAACP from contacting potential litigants.[229] The effect of this regulation was to impose criminal liability on "a person who advises another that his legal rights have been infringed and refers him to a particular attorney," as well as on "the attorney who knowingly renders assistance under such circumstances."[230] In holding that "the First Amendment . . . protects vigorous advocacy . . . against governmental intrusion,"[231] the Court noted several aspects of the attorney-client relationship that are also applicable to the indemnification context. First, the NAACP determined whether the litigant was entitled to the organization's assistance. Second, if a litigant was deemed eligible, the NAACP selected and retained the attorney and then paid for "all expenses of litigation."[232] Third, the attorneys did not "receive[] a salary or retainer from the NAACP," but were paid for their services on specific cases.[233] Finally, "[t]he actual conduct of assisted litigation [was] under the control of the attorney, although the NAACP continue[d] to be concerned that the outcome of the lawsuit should be consistent with" its interests.[234] The same features characterize companies' retention of attorneys for their employees today.

The next year, the Court in *Brotherhood of Railroad Trainmen v. Virginia* extended *Button* to a new context—assistance provided by unions to help their members prosecute worker's compensation claims.[235] The Court interpreted *Button* as standing for the broad proposition that "in regulating the practice of law a State cannot ignore the rights

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[229] 371 U.S. at 444. For reviews of the development of the access-to-court doctrine since *Button*, see Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 563-89 (1999), and Julie M. Spanbauer, *The First Amendment Right To Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 43-49 (1993).

[230] *Id.* at 434.

[231] *Id.* at 429.

[232] *Id.* at 420.

[233] *Id.*

[234] *Id.* at 421.

[235] 377 U.S. 1, 8 (1964).

of individuals secured by the Constitution."[236] Although *Button* had appeared to be premised on the special nature of equal rights litigation,[237] *Trainmen* instead based the right on the concern raised in *Gideon v. Wainwright* that "[l]aymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries."[238] "The right to petition the courts" thus incorporated the rights both to use "the courts to vindicate . . . legal rights" and to "advise one another."[239] The Court found the state's attempt to control this form of legal representation objectionable even despite the union's history of requiring a kickback of attorneys' fees and influencing the outcomes of certain cases.[240] Even a commendable desire to protect potential litigants thus could not justify the government's actions. A few years later, the Court reaffirmed that unions have "the right to hire attorneys . . . to assist [their] members in the assertion of their legal rights."[241] The state therefore could not constitutionally restrict the union program on the basis that it "constitute[s] the unauthorized practice of law."[242]

The Court later characterized this principle in the following manner: "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment," but this "right would be a hollow promise if courts could deny [organizations] the means of enabling their members to meet the costs of legal representation."[243] In doing so, the Court struck down an injunction[244] that would have violated this right in two ways that are salient to the indemnification context—by preventing

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[236] *Id.* at 6.

[237] *See Button*, 371 U.S. at 431 (noting that "association for litigation may be the most effective form of political association" for NAACP-funded litigants).

[238] *Trainmen*, 377 U.S. at 7 (citing Gideon v. Wainwright, 372 U.S. 335 (1963)); *see also* United Mine Workers of Am. v. Ill. State Bar Ass'n, 389 U.S. 217, 223 (1967) (rejecting the argument "that the principles announced in *Button* were applicable only to litigation for political purposes"); Bruce J. Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How To Avoid It*, 43 U. MIAMI L. REV. 765, 829-30 (1989) (arguing that the access-to-courts doctrine is "not limited to political speech" and could be used to protect access to counsel when forfeiture has impeded a defendant's ability to pay for an attorney).

[239] *Trainmen*, 377 U.S. at 7.

[240] *Id.* at 9 (Clark, J., dissenting).

[241] *United Mine Workers*, 389 U.S. at 221-22.

[242] *Id.* at 218.

[243] United Transp. Union v. State Bar of Mich., 401 U.S. 576, 585-86 (1971).

[244] *Id.* at 586.

the union from "employ[ing] counsel to represent its members"[245] and by limiting the fees charged by attorneys it hired or recommended.[246]

In *Boddie v. Connecticut*, the Court then extended the doctrine to protect divorce litigants trying to exercise fundamental rights in the "only forum effectively empowered to settle their disputes."[247] Although *Boddie* explicitly limited its holding to the matter at issue,[248] this language does suggest a broader view that the access-to-courts doctrine applies in other situations where governmental restrictions limit the ability to use the courts to vindicate fundamental rights. Indeed, the Court later characterized *Boddie* as protecting family rights because they are "ranked as 'of basic importance in our society'" and are constitutionally protected "against the State's unwarranted usurpation, disregard, or disrespect."[249] On the other hand, *Boddie* does not protect litigants in proceedings that the Court does not believe implicate fundamental interests, such as bankruptcy cases[250] and welfare appeals.[251]

In a similar vein, the doctrine has been applied to protect prisoners' access to the courts. In this context, the right "assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights"[252] related to the fact or conditions of their imprisonment.[253] Accordingly, despite the deference that the courts usually afford prison administrators, prisons must meet a high standard before burdening

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[245] *Id.* at 581.

[246] *Id.* at 584.

[247] 401 U.S. 371, 376 (1971).

[248] *Id.* at 382.

[249] M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (quoting *Boddie*, 401 U.S. at 376).

[250] *See* United States v. Kras, 409 U.S. 434, 444-45 (1973) (holding that the interest in eliminating debts "does not rise to the same constitutional level" as the "freedom to pursue . . . protected associational activities" at issue in *Boddie*).

[251] *See* Ortwein v. Schwab, 410 U.S. 656, 659 (1973) (per curiam) (holding that an interest in increased welfare payments is of "far less constitutional significance" than the interest in *Boddie*).

[252] Wolff v. McDonnell, 418 U.S. 539, 579 (1974); *see also* Kreimer & Rudovsky, *supra* note 226, at 565 (referring to this guarantee as a "deeply rooted constitutional norm").

[253] *See, e.g.*, Lewis v. Casey, 518 U.S. 343, 355 (1996) (requiring that prisoners be provided the tools to challenge conditions of their confinement); Johnson v. Avery, 393 U.S. 483, 490 (1969) (rejecting restrictions on prisoners providing legal assistance to each other); *Ex parte* Hull, 312 U.S. 546, 549 (1941) ("[T]he state . . . may not abridge or impair [a prisoner's] right to apply to a federal court for a writ of habeas corpus.").

prisoners' ability to consult legal resources in preparing section 1983[254] complaints or habeas petitions.[255] Moreover, prisons must affirmatively ensure that "inmate access to the courts is adequate, effective, and meaningful."[256] This right has been applied to allow prisoners access to legal assistance, such as "adequate law libraries or adequate assistance from persons trained in the law,"[257] although not necessarily to appointed counsel.[258]

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[254] 42 U.S.C. § 1983 (2000) (providing a cause of action against government officials for civil rights violations).

[255] *Wolff*, 418 U.S. at 579; *see also* Procunier v. Martinez, 416 U.S. 396, 419 (1974) ("[P]risoners [must] be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights. This means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid."), *rev'd on other grounds*, Thornburgh v. Abbott, 490 U.S. 401 (1989).

[256] Bounds v. Smith, 430 U.S. 817, 822 (1977). The government's affirmative obligations are, nonetheless, rather limited: "the access doctrine is not about assisting the petitioner in developing the best possible petition; instead, it is about (1) removing government-imposed hurdles that directly interfere with the petitioner's ability to prepare and properly file the petition, and (2) providing only the minimal help necessary to facilitate such access." Celestine Richards McConville, *The Meaninglessness of Delayed Appointments and Discretionary Grants of Capital Postconviction Counsel*, 42 TULSA L. REV. 253, 262 (2006) (footnotes and internal quotation marks omitted).

[257] *Id.* at 828; *see also Procunier*, 416 U.S. at 419 (striking down a restriction on assistance by law students and paralegals); *Avery*, 393 U.S. at 490 (striking down a regulation that barred prisoners from providing legal assistance to each other, since it effectively prevented illiterate and uneducated prisoners from filing habeas petitions).

[258] *See, e.g.*, Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (holding that prisoners have no right to appointed counsel for collateral review of convictions); Ross v. Moffitt, 417 U.S. 600, 610 (1974) (holding that prisoners have no right to appointed counsel for discretionary appeals). The right of prisoners to seek legal advice has been a focus of the lower federal courts' access-to-courts jurisprudence, although they have recognized that it extends beyond the context of prisoner litigation. *See, e.g.*, Snyder v. Nolen, 380 F.3d 279, 291 (7th Cir. 2004) ("The right of access to the courts is the right of an individual, whether free or incarcerated, to obtain access to the courts without undue interference."); Bourdon v. Loughren, 386 F.3d 88, 92 & n.8 (2d Cir. 2004) (recognizing the right of access to courts, and noting that although it "applies beyond criminal litigation," it "has particular application to prisoners"); *see also* White v. Kautzky, 494 F.3d 677, 680 (8th Cir. 2007) (recognizing that a prisoner can make an access-to-courts claim by demonstrating that "the state has not provided an opportunity to litigate a claim challenging the prisoner's sentence or conditions of confinement in a court of law"); Arthur v. Allen, 452 F.3d 1234, 1250 (11th Cir. 2006) ("To guarantee prisoners their constitutional right of access to the courts, prison authorities are required to provide prisoners with adequate law libraries or legally trained assistance to prepare and file meaningful legal papers."), *amended by* 459 F.3d 1310 (11th Cir. 2006); Simkins v. Bruce, 406 F.3d 1239, 1242 (10th Cir. 2005) (recognizing an access-to-courts claim for a prison's interference with access to legal mail).

C. *Exceptions to the Right*

There are important limitations on the right of access to the courts. For instance, states may still regulate the practice of law, although the Court has generally approved restrictions only when they primarily burden the lawyer and not the client. Such restrictions can be treated as "economic and professional regulation" and therefore outside the scope of the access-to-courts doctrine.[259] "[N]arrowly drawn rules to proscribe solicitation that in fact is misleading, overbearing," or deceptive are thus permissible under this framework.[260] But this limitation only goes so far. It is not enough to claim merely that a regulation is intended as a prophylactic protection against unscrupulous lawyers, because a regulation cannot burden litigants' First Amendment rights without protecting against any apparent harm.[261]

The access-to-courts doctrine may also not apply to frivolous claims and defenses, since the Court has held that baseless litigation is less protected by the First Amendment than meritorious claims.[262] But it appears that this exception is limited to claims between private parties, since the Court has not applied it to prisoners' section 1983 and habeas claims despite the widely held perception that such claims are often frivolous. This practice recognizes the heightened protection that litigants should and do receive in defending against actions by the government.

The scope of the right is also limited in the context of hearings that the Court believes benefit from informality (and, therefore, from the lack of counsel). In *Walters v. National Ass'n of Radiation Survivors*,[263] the Court was unwilling to allow the access-to-courts doctrine to circumvent the use of the *Mathews v. Eldridge*[264] analysis. The *Radia-*

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[259] *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 459 (1978); *see also id.* at 459 n.16 (discussing the distinction between regulating the commercial activities of lawyers and restricting access to legal advice).

[260] *In re* Primus, 436 U.S. 412, 438-39 (1978); *see also Ohralik*, 436 U.S. at 464-67 (upholding a state regulation that was based on the state's well-founded "perception of the potential for harm").

[261] *See In re Primus*, 436 U.S. at 437-38 (holding that state regulation of attorneys must be more "precis[e]" when it implicates First Amendment rights).

[262] *See, e.g.*, BE&K Constr. Co. v. NLRB, 536 U.S. 516, 531 (2002) (noting that "baseless litigation" receives less protection than meritorious litigation); Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 743 (1983) ("[S]uits based on insubstantial claims . . . are not within the scope of First Amendment protection . . . .").

[263] 473 U.S. 305, 334-35 (1985).

[264] *See* 424 U.S. 319, 335 (1976) (holding that the requirements of due process are determined by an evaluation of "the private interest that will be affected by the official

tion Survivors plaintiffs were challenging a statutory provision that prevented veterans from paying more than ten dollars to attorneys representing them in claims for veterans' benefits.[265] Under the *Mathews* analysis, the governmental interest in having informal proceedings outweighed the claimant's interest in representation, especially because the benefits had been designed to be adjudicated in a nonadversarial proceeding.[266] Because the Court viewed the core concerns of the access-to-courts and due process analyses as identical, it found that there was no additional right to counsel.[267]

D. *Analyzing the McNulty Memorandum Under the Access-to-Courts Doctrine*

The right of access to the courts provides strong protection for the right to counsel, without the drawbacks of the due process and Sixth Amendment rights. Indemnification of employees' legal expenses in the context of government investigations draws together elements from each of the three main contexts in which the right has previously been recognized: organizational funding of legal services, the vindication of fundamental rights in the only available forum, and challenges to the government's use of its coercive authority. Much like the NAACP in *Button* and the union in *Trainmen* did for their members, companies today pay for legal services on behalf of their employees to ensure that they can vindicate important legal rights. Yet the government is trying to interfere with access to these legal services.

Unlike in those cases, the employees here are defending rather than bringing actions in the courts. This makes the right even more applicable. As the Court recognized in *Boddie* and the prisoner cases, access to the courts is especially crucial in this context: The government is exercising its coercive authority over employees, and has nearly complete control over the forum in which litigants can vindicate these rights since it chooses where to charge defendants.[268] At the same time, the employees are seeking to vindicate fundamental

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action," "the risk of an erroneous deprivation of such interest," "the probable value, if any, of additional or substitute procedural safeguards," and "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail").

[265] 473 U.S. at 305, 307.

[266] *Id.* at 331-33.

[267] *Id.* at 334-35.

[268] *See* Kreimer & Rudovsky, *supra* note 226, at 566 (describing the access-to-courts doctrine as protecting "claims of right over which the state exercises a monopoly").

rights—the right to put forth a full defense to the government's charges and possibly the right to be free from unjustified punishment.

Nor do any of the exceptions to the right impede its application here. The McNulty Memorandum is not an attempt to protect litigants from the harm of deceptive lawyering, or some other form of economic regulation. Moreover, Congress has not created a hearing system that benefits from informality; indeed, the presence of counsel is the norm during interactions with the DOJ in white-collar cases.[269] Finally, this is not a situation where defendants are being accused of asserting frivolous defenses, and in any event, that exception appears to apply only to private litigation.

Since the McNulty Memorandum thus appears to infringe on the right of access to the courts,[270] it must serve "a compelling state interest"[271]—an interest that is "within the State's constitutional power to regulate" and that "subordinat[es]" the rights of the employees[272]—and it must be "closely drawn to avoid unnecessary abridgment" of these rights.[273] This is a difficult standard for the government to meet. The regulation at issue in *Button* was invalid because the state could not show "a serious danger . . . of professionally reprehensible" conduct that would outweigh the right "to seek vindication of constitutional rights."[274] The Court has even held that companies' right of access to the courts is superior to both the government's interest in enforcing the antitrust laws[275] and employees' interest in avoiding retaliation for legally protected activity.[276]

As discussed above, the DOJ has set forth three general justifications for the McNulty Memorandum: the promotion of transparency and fairness in corporate charging decisions, the facilitation of inves-

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[269] *See* Peter J. Henning, *Targeting Legal Advice*, 54 AM. U. L. REV. 669, 676 (2005) ("For white collar and corporate crime investigations, the presence of lawyers . . . is commonplace.").

[270] *See* Kreimer & Rudovsky, *supra* note 226, at 569 ("[T]he Supreme Court has recognized that a theoretical opportunity to petition the courts can be made unavailable in practice by government policies that burden . . . that right.").

[271] NAACP v. Button, 371 U.S. 415, 438 (1963).

[272] *Id.* at 438-39.

[273] *In re* Primus, 436 U.S. 412, 432 (1978) (internal quotation marks omitted) (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam) (reviewing the standards used in evaluating encroachments on First Amendment rights)).

[274] *Button*, 371 U.S. at 443; *see also* Bhd. of R.R. Trainmen v. Virginia, 377 U.S. 1, 8 (1964) (declaring that the State "failed to show any appreciable public interest" to justify its actions).

[275] Cal. Motor Transp. Co. v. Trucking Unltd., 404 U.S. 508, 510-11 (1972).

[276] Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 743 (1983).

tigations, and the preservation of investor confidence in the markets.[277] All of these interests are concededly within the state's power to regulate, but none of them are superior to the right to counsel. Indeed, it would be absurd to insist that the interests of the corporation or the investing public allow the government to infringe on constitutional rights in law enforcement investigations. The goal of facilitating investigations seems more credible; the Court has recognized in other contexts that law enforcement interests can supersede individual constitutional rights.[278] But this principle has never given law enforcement unbridled discretion in its investigations. Moreover, impeding access to experienced counsel can even work against the government's interest, further undercutting a claim that the policy serves a compelling interest. Defense attorneys who are experienced in white-collar investigations can actually assist investigations by helping their clients make educated decisions on the benefits of cooperation. They can also help the government reach the right result, rather than one that results only from pressure on financially strapped employees.

Finally, even if the interests driving the McNulty Memorandum were "compelling," the policy is not "closely drawn to avoid unnecessary abridgment" of these rights.[279] There is no indication that the McNulty Memorandum is designed to promote cooperation while ensuring that constitutional rights are not unnecessarily impeded. DOJ policy therefore fails the compelling interest test, and unconstitutionally infringes the right of access to the courts.

The access-to-courts doctrine can thus provide much better protection for the right to counsel than due process and the Sixth Amendment. Unlike due process, it does not require a deprivation of liberty or property, and unlike the Sixth Amendment, it does not require criminal charges. Under this framework, the government cannot evade constitutional constraints by interfering with an employee's access to counsel during an investigation and then never indicting that employee. Moreover, if the SEC were to adopt a policy similar to the DOJ's (as some commentators fear[280]), it would be similarly constrained. Perhaps the biggest advantage of this framework is that it lessens the individual's burden of proof. Rather than being required

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[277] *See supra* notes 104-110 and accompanying text.

[278] *See supra* note 169 and accompanying text.

[279] *See supra* notes 271-273 and accompanying text.

[280] *See supra* notes 102-103 and accompanying text.

to demonstrate that she received ineffective assistance of counsel or that her choice of counsel was actually constrained by the government's actions, an employee can make the somewhat easier claim that government action interfered with her access to legal advice. This could help bolster a claim that even when a company restricted indemnification "voluntarily"—to seek credit more informally, or to avoid punishment under the "exception" of the McNulty Memorandum[281]—government action had unconstitutionally impeded access to counsel. This doctrine therefore flexibly protects against government restrictions on indemnification without the substantial emphasis on specific circumstances imposed by other constitutional doctrines.

IV. AN EFFECTIVE AND CONSTITUTIONAL POLICY

When analyzed under the access-to-courts doctrine, it becomes clear that DOJ policy requires further revision. This change should have two basic elements. In order to protect individuals' access to legal advice, the policy should prevent the government from giving companies or employees any credit for limitations on indemnification of attorneys' fees. At the same time, it should prevent the indemnification of penalty and disgorgement payments, in order to preserve the deterrent and punitive effects of these sanctions. The SEC's policy,[282] which successfully balances constraints on indemnification with the preservation of access to counsel, could serve as a useful model for the DOJ in this effort. By making these revisions, the DOJ could still accomplish its goal of encouraging cooperation, but without infringing defendants' constitutional rights, impeding legal conduct by corporate employees, or allowing defendants to escape the force of sanctions they accept in settlement.

A. *A Blanket Prohibition*

Most importantly, the policy must be constitutional. It must respect the right to counsel embodied in the access-to-courts doctrine and the Fifth and Sixth Amendments. Employees should be free to use the most competent counsel they or their willing employer can pay for, throughout the investigation and litigation. Moreover, employees should not face the possibility that their employer will withdraw financial support because of government intervention, so nei-

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[281] *See supra* notes 52-55 and accompanying text.

[282] *See supra* Part I.C.2.

ther prosecutors nor companies should be able to bargain away indemnification of attorneys' fees during settlement negotiations.

To accomplish this, the policy must universally prohibit prosecutors from considering whether a company is paying its employees' legal expenses when making prosecutorial decisions. Although it is tempting to allow the DOJ to penalize at least those companies using indemnification as a tool to discourage their employees from cooperating with the government, such a solution would be too vulnerable to abuse.[283] Indeed, companies might feel pressured, as they do today,[284] to restrict indemnification in order to avoid any appearance that they are using it improperly. Nor is such an exception even necessary; the DOJ has plenty of other tools at its disposal to deal with this type of conduct.[285] A blanket prohibition, on the other hand, will ensure that the policy is facially constitutional and that the DOJ continues to apply it in a constitutional manner.

This prohibition will also promote two other subconstitutional but still critical sets of values: fairness in governmental action and the benefits of corporate indemnification. Employees can incur substantial attorneys' fees before an employee's guilt is even assessed by the agency. The DOJ and SEC commonly target individuals for investigation without sufficient evidence to bring a claim against them. This practice is a routine part of law enforcement investigations, but it can have severe repercussions for individuals. Long before charges are filed—assuming they ever are—employees' careers can be disrupted and their legal bills can be immense. These investigations, even in their earliest stages, can be hugely complex; discovery alone can be incredibly resource intensive. Since few employees have the resources to adequately confront such litigation, the quality of legal representation suffers in the absence of indemnification.[286] Employees are also

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[283] Indeed, the excesses under the Thompson Memorandum arguably arose not from the Memorandum itself as much as from prosecutors' realization that it gave them a "tactical advantage" in their investigations. Interview with Eric Holder, *supra* note 43.

[284] *See supra* notes 54-56 and accompanying text (citing commentators who argue that without an outright ban, companies will still attempt to restrict indemnification to satisfy the DOJ's perceived demands).

[285] *See, e.g.*, 18 U.S.C. § 1512 (2000) (authorizing fines and penalties for witness tampering, harassment, intimidation, and obstruction of federal proceedings).

[286] *See, e.g.*, Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After* Booker, 47 WM. & MARY L. REV. 721, 738 (2005) (describing the considerable impact that the skill and experience of a white-collar defendant's lawyer can have on her success in negotiations with the government); *cf.* Rudovsky, *supra* note 192, at 1969

likely to feel pressure to accede to the government's demands merely because of a lack of resources. In the long run, this practice can discourage even law-abiding individuals from serving in corporate positions that are likely to be the subject of government investigations, such as senior management and financial reporting positions. It can also increase the likelihood that prosecutorial resources will be targeted at the wrong individuals. These consequences should concern the government, even agencies with prosecutorial functions.

Finally, it would be in the DOJ's interest to revise its policy. At least one judge has determined that the appropriate response to applications of DOJ policy is the dismissal of the DOJ's indictments.[287] Members of Congress have shown their willingness to constrain prosecutorial action through legislation.[288] As imperfect as these efforts may be,[289] they have the potential to constrain prosecutorial discretion. Presumably, the DOJ would prefer to protect its prosecutors' prerogatives and its flexibility in assessing cooperation in future cases. Moreover, lifting restrictions on the indemnification of attorneys' fees would likely facilitate investigations by enabling defendants to hire attorneys experienced with the DOJ's practices who thus know when to advise their clients that cooperation is in their best interest, and who can help the DOJ to achieve more accurate results in its investigations.

B. *Postjudgment Restrictions*

On the other hand, the DOJ should follow the SEC's lead and restrict the indemnification of restitution and fines, much as the SEC policy restricts the indemnification of penalties (and, to a lesser extent, disgorgement).[290] By reimbursing such payments, companies are allowing employees to circumvent statutory sanctions for wrongdoing.

("Some criminal charges are so complex that specialized and well paid advocates are essential to a fair defense.").

[287] United States v. Stein, 495 F. Supp. 2d 390, 427 (S.D.N.Y. 2007).

[288] *See supra* note 81 and accompanying text.

[289] For criticisms of the approach used by the *Stein* court, see Part II. The Attorney-Client Privilege Protection Act has been criticized for "tell[ing] the executive branch that it may not consider something in the exercise of its discretion" and "inadvisably prevent[ing] the state from considering *anything* having to do with employer policies on regulatory interviews." Buell, *supra* note 33, at 1648.

[290] It would also be appropriate for Congress to expand the statutory ban on indemnification of fines from statutes like the FCPA. *See supra* note 88 and accompanying text. This would have the advantage of imposing these restrictions even outside of the settlement context, where the government has less power to shape sanctions.

Indemnification of fines guts their punitive and deterrent functions.[291] Indemnification of restitution allows employees to profit from illegal activity[292] at the expense of company shareholders.[293] By preventing indemnification of these payments, on the other hand, the DOJ could ensure that crime is less profitable, wrongdoers are punished, and others are deterred from similar conduct.[294] Such a policy may even promote cooperation during the government's investigation,[295] just as the DOJ hopes to do with the McNulty Memorandum.

Moreover, restrictions on the indemnification of financial sanctions, unlike restrictions on the indemnification of attorneys' fees, do not violate constitutional rights. Naturally, the rights to counsel and access to the courts are not implicated by the imposition of financial sanctions. Nor is there a colorable due process claim here, since corporate employees certainly have "notice" that illegal actions can be investigated and prosecuted, and their right to a hearing (assisted by counsel) would not be impeded. Although large fines can run afoul of the Eighth Amendment's excessive fines clause,[296] their constitu-

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[291] *See* Lisa M. Fairfax, *Spare the Rod, Spoil the Director? Revitalizing Directors' Fiduciary Duty Through Legal Liability*, 42 HOUS. L. REV. 393, 433-34 (2005) ("[F]inancial sanctions . . . are a powerful source of deterrence because they make the costs of illegal behavior outweigh the benefits.").

[292] *See* Cutler, *supra* note 97; Donaldson, *supra* note 95.

[293] Even if an insurer then reimburses the company for its expenses, the insurer's costs are passed on to shareholders in the long run through insurance premiums. *See* Griffith, *supra* note 40, at 1182 (noting that bad corporate governance leads to insurance payouts and, ultimately, higher D&O insurance premiums, an expense that is "borne by the shareholders").

[294] There are potential downsides to such an approach. The threat of paying large disgorgement awards could discourage corporate service by individuals who fear being innocently caught up in a government investigation. State lawmakers might resent the added intrusions of the federal government into the indemnification arena, which has traditionally been considered the province of the states. Perhaps most importantly, mandating out-of-pocket payment of disgorgement years after an illegal act can simply impede the collection of disgorgement and restitution awards—indemnification may actually help to ensure that disgorgement awards are paid, and thus disbursed to shareholders or other victims of crime. *See, e.g.*, Ross Todd, *Three Cents on the Dollar*, LITIG. 2007, Fall 2007, at 68, 68, 69 (supp. to AM. LAW., Nov. 2007) (noting that although "[j]udges have handed down some staggering restitution orders," "the balance of uncollected fines and restitution continues to grow").

[295] *See* Wallace P. Mullin & Christopher M. Snyder, Targeting Employees for Corporate Crime and Forbidding Their Indemnification 5 (Apr. 2005) (unpublished manuscript), *available at* http://ssrn.com/abstract=558341 (arguing that a bar on indemnification of financial sanctions will encourage cooperation with government investigations).

[296] *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed . . . .").

tionality under that amendment is a function of the actual fine imposed, not of who pays it.[297]

Similarly, constraints on the indemnification of financial sanctions do not implicate the fairness concerns involved in the context of attorneys' fees. When the government causes the indemnification of attorneys' fees to be terminated during an investigation, it acts before even prosecutors have determined that the employee has acted illegally. When the government acts during litigation, it does so before a court has made that determination. But if the government constrains only the indemnification of financial sanctions, it merely enforces a sanction approved by a court or agreed to in settlement by an employee.

Finally, the typical justifications for indemnification[298] do not apply here with the same force. Indemnification is often justified as encouraging qualified employees to serve in important corporate positions and to act in the corporation's best interest while in those positions. But when the government and a court have determined that an individual has acted illegally, these justifications are no longer valid.[299] Although we want qualified people to be officers and directors, we do not want wrongdoers in those positions. And since illegal action is often contrary to the corporation's long-term interest (especially when it is discovered by the government), we do not want to protect it through indemnification.

To be fully effective, restrictions on indemnification of penalties must be enforced on both companies and employees, as they are by the SEC. Settlement agreements between companies and the government should prohibit companies from indemnifying their employees for any financial sanctions assessed against them. Similarly, settlements between employees and the government should uniformly forbid employees from seeking indemnification for financial sanctions. Similar treatment of companies and employees would help to

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[297] *See, e.g.*, Austin v. United States, 509 U.S. 602, 609-10 (1993) (holding that the Eighth Amendment's applicability turns on whether the purpose of a sanction is punitive or remedial); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 264 (1989) (holding that the Eighth Amendment does not apply "when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded").

[298] *See supra* Part I.B.1.

[299] *See* Stifel Fin. Corp. v. Cochran, 809 A.2d 555, 561 (Del. 2002) (describing the "express purpose of" Delaware's indemnification provisions as the "protect[ion] [of] directors from personal liability for *corporate* expenses" (emphasis added)).

ensure that the public receives an acceptable bargain in exchange for the settlement.

CONCLUSION

It is unsettling when government policy constrains access to counsel, and the legal community has understandably leapt to the defense of the right to counsel in reaction to the Thompson and McNulty Memoranda. Unfortunately, the traditional roots of the right to counsel do not aid this effort as much as the critics of DOJ policy hope. Although in certain contexts, the McNulty Memorandum could be held unconstitutional under procedural due process and the Sixth Amendment, these provisions provide only imperfect protection for defendants. Substantive due process fares even worse. The access-to-courts doctrine, on the other hand, is an effective device for revealing the unconstitutionality of the McNulty Memorandum's burden on access to counsel. Viewed in this light, the need for revisions to DOJ policy becomes more clear.

Fortunately, the DOJ took a step in the right direction when it replaced the Thompson Memorandum with the McNulty Memorandum. But there is more work to be done, starting with a blanket prohibition on considering the indemnification of attorneys' fees in charging decisions. At the same time, the DOJ should follow the SEC's lead by restricting the indemnification of restitution and fines. Such a policy would recognize the appropriate role for governmental restrictions on indemnification in promoting the effectiveness of financial sanctions, without going too far by impeding individuals' access to counsel.