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# Prosecutorial Discretion of the Department of Justice in Corporate Criminal Cases

## HOW FAR IS TOO FAR?

### I. INTRODUCTION

Increasingly common incidents of corporate scandal and malfeasance have resulted in an unparalleled era of corporate crime.<sup>1</sup> The crimes committed by executives and employees of corporations such as Enron<sup>2</sup> and Worldcom<sup>3</sup> deprived hundreds of thousands of innocent employees of their jobs<sup>4</sup> or life savings.<sup>5</sup> The bankruptcy of the Enron corporation alone resulted in losses to Enron employee pension plans of approximately \$1.2 billion.<sup>6</sup> The era of corporate malfeasance has also

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<sup>1</sup> KENNETH R. GRAY ET AL., CORPORATE SCANDALS: THE MANY FACES OF GREED 1 (2005) (“[T]he twenty-first century has witnessed unprecedented corporate scandal, malfeasance, and financial crisis.”). The U.S. Sentencing Commission reported that in 2006, there were 217 sentences handed down against organizations for offenses in which “pecuniary loss or harm can be more readily quantified, such as fraud, theft, and tax offenses.” U.S. SENTENCING COMMISSION, 2006 ANNUAL REPORT 40 (2006). The number of such sentences in 2006 constituted a 16% increase from 2005 and a 67% increase from 2004. *Id.* The most common offense committed by an organization sentenced in federal court was fraud. *Id.* at 41 (Fraud accounted for 32.7% of the 217 cases sentenced.).

<sup>2</sup> Enron was “one of the largest energy-producing and trading organizations in the United States” prior to its final collapse in 2001. GRAY ET AL., *supra* note 1, at 49. Enron executives hid huge company losses through “highly complicated financial engineering, convoluted partnerships, off-balance-sheet debt, and exotic hedging techniques.” *Id.* In addition, when the hidden losses became public, “company managers sold millions of dollars in company stock while prohibiting their employees from selling theirs,” thus causing immense losses to innocent company employees. *Id.*

<sup>3</sup> WorldCom, a telecommunications company, was the nation’s second-largest long-distance carrier in June 2002. Simon Romero & Alex Berenson, *WorldCom Says It Hid Expenses, Inflating Cash Flow \$3.8 Billion*, N.Y. TIMES, June 26, 2002, at A1. The company admitted that “it had overstated its cash flow by more than \$3.8 billion during the last five quarters.” *Id.* The Securities and Exchange Commission (“SEC”) filed fraud charges against WorldCom on June 26, 2002 for the falsely reported profits. Simon Romero, *Turmoil at WorldCom: The Overview; WorldCom Facing Charges of Fraud; Inquiries Expand*, N.Y. TIMES, June 27, 2002, at A1.

<sup>4</sup> GRAY ET AL., *supra* note 1, at 63 (“More than five hundred thousand telecom workers lost their jobs since 2000.”).

<sup>5</sup> *Id.* at 2 (“Many loyal workers who had invested in company 401(k)s, pensions, and mutual funds had seen their life savings wiped out.”).

<sup>6</sup> JERRY W. MARKHAM, A FINANCIAL HISTORY OF MODERN U.S. CORPORATE SCANDALS: FROM ENRON TO REFORM 106 (2006) (The bankruptcy of the Enron corporation “was claimed to have resulted in [total] losses of \$1.2 billion to Enron employee pension plans. The employees’ actual out-of-pocket loss, as measured by their personal cash contributions plus some moderate rate of return, is unknown.”).

caused a significant loss of investor confidence in the financial market and a strong distrust of corporations and their leaders.<sup>7</sup>

Prosecution of corporate crimes is crucial to protect employees and investors, as well as to restore confidence in corporate leaders and the financial market. In response to criminal conduct committed by corporations and their employees since the Enron scandal in 2001,<sup>8</sup> the Department of Justice (“DOJ”) revised its standards for the prosecution of corporations when an employee has committed an illegal act that somehow benefited the corporation.<sup>9</sup> After Enron, the DOJ standards were set out in the Thompson Memorandum,<sup>10</sup> which revised the Holder Memorandum established in 1999.<sup>11</sup> The Thompson Memorandum provided detailed methods and practices for DOJ prosecutors to use in prosecuting corporations and individuals accused of corporate crimes.<sup>12</sup> From 2002 to 2006, federal prosecutors brought charges against more than 200 chief executive officers, company presidents, and chief financial officers, and obtained more than 1000 convictions or guilty pleas in white collar cases.<sup>13</sup> In 2007, the DOJ revised the Thompson Memorandum and issued the McNulty Memorandum, which established the new DOJ policy regarding prosecution of corporate crimes.<sup>14</sup> This new policy was created after members of the corporate legal community complained that DOJ practices regarding prosecution of corporations were impeding corporate employees’ ability to fully and frankly communicate with legal counsel.<sup>15</sup> As a result of further criticism of DOJ practices after the implementation of the McNulty Memorandum, on

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<sup>7</sup> GRAY ET AL., *supra* note 1, at 2.

<sup>8</sup> See *supra* note 2 and accompanying text.

<sup>9</sup> Introduction to Memorandum from Paul J. McNulty, Deputy Attorney Gen., to Heads of Dep’t Components and U.S. Attorneys, Principles of Federal Prosecution of Business Organizations 1 (Dec. 12, 2006) [hereinafter Introduction to McNulty Memorandum], available at [http://www.usdoj.gov/dag/speeches/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf); Memorandum from Larry D. Thompson, Deputy Attorney Gen., to Heads of Dep’t Components and U.S. Attorneys, Principles of Federal Prosecution of Business Organizations 1 (Jan. 20, 2003) [hereinafter Thompson Memorandum], available at [http://www.usdoj.gov/dag/cftf/business\\_organizations.pdf](http://www.usdoj.gov/dag/cftf/business_organizations.pdf). The Thompson Memorandum replaced the Holder Memorandum from June 16, 1999, which provided the “factors that should be considered in deciding whether to institute criminal charges against a corporation.” Memorandum from Eric H. Holder, Jr., Deputy Attorney Gen., to Heads of Dep’t Components and U.S. Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999) [hereinafter Holder Memorandum], available at [http://www.afda.org/afda/news/agency\\_doj\\_corp.htm](http://www.afda.org/afda/news/agency_doj_corp.htm). For details regarding the Thompson and McNulty Memoranda, see Parts II.C.1 and II.C.2 respectively.

<sup>10</sup> Thompson Memorandum, *supra* note 9.

<sup>11</sup> Holder Memorandum, *supra* note 9.

<sup>12</sup> Thompson Memorandum, *supra* note 9.

<sup>13</sup> Paul Davies & Kara Scannell, *Guilty Verdicts Provide “Red Meat” to Prosecutors Chasing Companies*, WALL ST. J., May 26, 2006, at A1.

<sup>14</sup> Introduction to McNulty Memorandum, *supra* note 9. For changes made to the Thompson Memorandum in the McNulty Memorandum see Part III.C.2.

<sup>15</sup> Introduction to McNulty Memorandum, *supra* note 9, at 1.

August 28, 2008 Deputy Attorney General Filip announced revised guidelines (“Filip Guidelines”) for criminal prosecution of corporations.<sup>16</sup>

Prosecutors have wide discretion to determine whether to prosecute individuals and corporations accused of criminal wrongdoing. However, in the arena of corporate criminal liability, the DOJ may have taken prosecutorial discretion too far. In determining whether to prosecute corporations for the illegal act of their employees under the McNulty Memorandum, the DOJ has taken into account the corporation’s cooperation in the investigation, which includes the corporation’s response to a DOJ request to waive the corporation’s attorney-client privilege.<sup>17</sup> Although this is merely a “request” for waiver of privileges, the DOJ policy has, in effect, perpetuated the culture of waiver created under the Thompson Memorandum, whereby a corporation must cooperate by granting the DOJ request of waiver or face indictment. Due to market pressures encountered by a corporation,<sup>18</sup> indictment even without conviction generally means the death of the corporation.<sup>19</sup> Therefore, the DOJ’s policy of pressured waiver has placed undue pressure on corporations to waive their attorney-client privilege and turn over confidential communications between its employees and corporate counsel upon DOJ request.<sup>20</sup> Although the DOJ recently announced new guidelines for the prosecution of corporate criminals that provide greater protection to the corporate attorney-client privilege,<sup>21</sup> it is unlikely that these revisions will remedy the current culture of waiver created by the Thompson and McNulty Memoranda.

This Note will argue that, consistent with principles of justice and the reasoning developed by the court in *United States v. Stein* (*Stein*

<sup>16</sup> Memorandum from Mark R. Filip, Deputy Attorney Gen., to Heads of Dep’t Components and U.S. Attorneys, Principles of Federal Prosecution of Business Organizations 9-28.000 (Aug. 28, 2008) [hereinafter Filip Guidelines], available at <http://www.usdoj.gov/opal/documents/corp-charging-guidelines.pdf>. For details regarding the Filip Guidelines, see Part II.C.3.

<sup>17</sup> Memorandum from Paul J. McNulty, Deputy Attorney Gen., to Heads of Dep’t Components and U.S. Attorneys, Principles of Federal Prosecution of Business Organizations 4, 9-10 (Dec. 12, 2006) [hereinafter McNulty Memorandum], available at [http://www.usdoj.gov/dag/speeches/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf) (“A corporation’s response to the government’s request for waiver of privilege for Category I information may be considered in determining whether a corporation has cooperated in the government’s investigation,” and “[p]rosecutors may always favorably consider a corporation’s acquiescence to the government’s waiver request in determining whether a corporation has cooperated in the government’s investigation.”).

<sup>18</sup> Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 73 (2007) (Corporations are inherently vulnerable and “corporate defendants, subject as they are to market pressures, may not be able to survive indictment, much less conviction and sentencing.”).

<sup>19</sup> See *United States v. Stein* (*Stein I*), 435 F. Supp. 2d 330, 337 n.11 (S.D.N.Y. 2006), *aff’d*, 541 F.3d 130 (2d Cir. 2008) (“[N]o major financial services firm has ever survived a criminal indictment.”); Dale A. Oesterle, *Early Observations on the Prosecutions of the Business Scandals of 2002-03*, 1 OHIO ST. J. CRIM. L. 443, 471-76 (2004) (“[A]n indicted firm is a dead firm . . .”). As Oesterle observes, for certain businesses, “the damage is done with the indictment” and “[v]indication, if gained at trial, comes far too late for many in this community.” *Id.* at 472.

<sup>20</sup> Oesterle, *supra* note 19, at 477-78.

<sup>21</sup> Filip Guidelines, *supra* note 16, ch. 9-28.700-720.

I),<sup>22</sup> courts should find prosecutorial pressure on corporations to waive their attorney-client privilege to be unconstitutional because it fails strict scrutiny analysis. Even if the courts do not find DOJ pressure on corporations to waive their attorney-client privilege to be unconstitutional, pressured waiver should be rejected as unnecessary and harmful to corporations, employees, and shareholders. Furthermore, this Note will propose that the proper method of remedying the culture of waiver is legislation that prohibits the government from requesting corporate waiver of attorney-client privilege or from giving any consideration to a corporation's waiver of attorney-client privilege in its decision to indict the corporation. Although the Filip Guidelines announced August 28, 2008 are an improvement from the McNulty Memorandum, this Note argues that they offer only a temporary solution and are not enough to cure the current culture of waiver.<sup>23</sup>

Part II of this Note will introduce the basis of prosecutorial discretion, as well as explain the history and current standard for corporate criminal liability. Part II will also discuss attorney-client privilege in general, and the effect of the DOJ policy on this privilege. Part III will examine why the DOJ policy and practice of pressuring corporations to waive their corporate attorney-client privilege should be rejected as unconstitutional, unnecessary, and harmful to corporations, corporate employees, and shareholders. Part III will also discuss the implications of the court's decision in *Stein I*, and its impact on the DOJ's pressure on corporations to waive their attorney-client privilege. Finally, Part IV will explore potential solutions to the problem of protecting a corporation's privileges, while simultaneously meeting the DOJ's goal of investigating and punishing criminal conduct by corporations and corporate employees.

## II. BACKGROUND

### A. *DOJ Prosecution of Corporations and Employees Accused of Criminal Corporate Wrongdoing*

During the Enron scandal, in addition to losing his job, one Enron employee's 401(k) investments "drop[ped] from \$1.3 million to

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<sup>22</sup> *Stein I*, 435 F. Supp. 2d at 330.

<sup>23</sup> See generally Filip Guidelines, *supra* note 16; Statement of H. Thomas Wells Jr., ABA President, New U.S. Dep't of Justice Corp. Charging Guidelines (Aug. 28, 2008) [hereinafter ABA President Wells Statement], available at <http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=437> (ABA President H. Thomas Wells Jr. argued that "[u]nlike legislation, guidelines can provide no certainty that critical attorney-client privilege, work product, and employee constitutional rights will be protected in the future. These bedrock legal rights are sacrosanct and must not be dependent on the personal leanings of each new deputy attorney general."). In addition, the new Filip Guidelines only apply to the Justice Department, and "do[] nothing to change the similar policies adopted by the Securities and Exchange Commission, the Environmental Protection Agency and the Department of Housing and Urban Development, or the informal waiver practices of many other agencies." *Id.*

\$8,200 when the company declared bankruptcy.”<sup>24</sup> Another employee’s retirement account “dropped from \$485,000 to \$22,000 before she sold the stock.”<sup>25</sup> In addition, the corporate criminal wrongdoing by Enron executives resulted in significant losses for other Americans whose 401(k) accounts were invested in the Enron corporation.<sup>26</sup> These and other losses sustained by working Americans from a series of corporate scandals since 2001 have resulted in a loss of confidence in corporations and the financial market.<sup>27</sup>

In this post-Enron era of corporate fraud and wrongdoing, the DOJ must forcefully prosecute corporations and corporate employees who are guilty of committing illegal acts that somehow benefit the corporation. Such prosecution is necessary to protect the public and to restore confidence in corporations and the financial market.<sup>28</sup> The DOJ defines corporations as “‘legal persons,’ capable of suing and being sued, and capable of committing crimes.”<sup>29</sup> Under the torts doctrine of *respondeat superior*,<sup>30</sup> “a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents.”<sup>31</sup> “To hold a corporation liable for these [illegal acts], the government must establish that the corporate agent’s actions (i) were within the scope of his duties, and (ii) were intended, at least in part, to benefit the corporation.”<sup>32</sup>

<sup>24</sup> MARKHAM, *supra* note 6, at 105.

<sup>25</sup> *Id.* at 106.

<sup>26</sup> *Id.* at 106-07. Markham observes that

[s]ome 42 million Americans held 401(k) accounts at 350,000 employers and had \$2 trillion invested at the time of Enron’s collapse. At the end of June 2002, the value of those accounts had dropped to \$1.3 trillion. Employees at Intel, the computer chip maker, saw the value of their holdings of Intel stock drop \$366 million in 2002. Lucent Corporation employees had as much as 80 percent of their assets in Section 401(k) accounts invested in that company’s stock as its price declined by over 90 percent between 1999 and 2001. Forty percent of assets held in Polaroid’s Section 401(k) accounts were invested in that company’s stock at the time of its bankruptcy.

*Id.*

<sup>27</sup> GRAY ET AL., *supra* note 1, at 2 (Since the Enron scandal in 2001, there has been a loss of investor confidence in the financial market and a strong distrust of corporations and their leaders.).

<sup>28</sup> McNulty Memorandum, *supra* note 17, at 1.

<sup>29</sup> Filip Guidelines, *supra* note 16, ch. 9-28.200(B); Holder Memorandum, *supra* note 9, at 2; McNulty Memorandum, *supra* note 17, at 2; Thompson Memorandum, *supra* note 9, at 1.

<sup>30</sup> The rule of *respondeat superior* and the doctrine of collective knowledge have established the standard that a corporation is criminally liable even if the corporation had reasonable policies in place to prevent the criminal conduct, the corporation had no knowledge or notice of the criminal conduct, “the criminal activity was performed by a low-level employee[,] the primary purpose was to benefit only the . . . employee . . . no single individual had the requisite intent or knowledge sufficient to violate the law[,]” or a reasonable corporation would not have known of the criminal conduct. Bharara, *supra* note 18, at 64-65.

<sup>31</sup> Filip Guidelines, *supra* note 16, ch. 9-28.200(B); Holder Memorandum, *supra* note 9, at 2; McNulty Memorandum, *supra* note 17, at 2; Thompson Memorandum, *supra* note 9, at 2.

<sup>32</sup> Filip Guidelines, *supra* note 16, ch. 9-28.200(B); Holder Memorandum, *supra* note 9, at 2; McNulty Memorandum, *supra* note 17, at 2; Thompson Memorandum, *supra* note 9, at 2. There is ongoing discussion within corporate and academic arenas questioning the harshness of this

In accordance with these principles, and in the wake of the 2001 Enron Scandal,<sup>33</sup> the DOJ created a standard for corporate criminal liability in an effort to punish wrongdoers and protect the investing public.<sup>34</sup> This DOJ standard for prosecution of corporate crimes was initially expressed in the Thompson Memorandum,<sup>35</sup> later in the revised McNulty Memorandum,<sup>36</sup> and recently in the DOJ guidelines announced by Deputy Attorney General Mark R. Filip on August 28, 2008.<sup>37</sup> From 2001 through 2007, facilitated by the Thompson and then McNulty Memoranda, the DOJ obtained over “1,200 corporate fraud convictions and recovered billions of dollars for investors and shareholders.”<sup>38</sup> While the government’s interest in prosecuting corporations and corporate employees guilty of criminal wrongdoing is undoubtedly important, it must be balanced with the right, protected by the attorney-client privilege, of corporate employees to fully and frankly communicate with legal counsel.<sup>39</sup>

### B. *Importance of Attorney-Client Privilege in the Corporate Context*

Attorney-client privilege applies to both individual clients and corporations.<sup>40</sup> The privilege is a result of balancing the need for disclosure in criminal cases against the social interest in protecting confidentiality and encouraging attorney-client communications.<sup>41</sup> The

standard for corporate criminal liability upon corporations. *See, e.g.*, John A. Tancabel, *Reflections on the McNulty Memorandum*, 35 SEC. REG. L.J. 219 (2007).

<sup>33</sup> *See supra* note 2 and accompanying text.

<sup>34</sup> Thompson Memorandum, *supra* note 9, at 2.

<sup>35</sup> *Id.* The Thompson Memorandum was created in 2003, and expressed the DOJ’s policy of prosecuting corporations whose employee(s) acted illegally with intent, at least in part, to benefit the company. *Id.* at 1-2.

<sup>36</sup> McNulty Memorandum, *supra* note 17. The McNulty Memorandum was implemented in 2007 as a revision of the Thompson Memorandum and in response to complaints by the corporate legal community that DOJ practices under the Thompson Memorandum “may [have] be[en] discouraging full and candid communications between corporate employees and legal counsel.” *Id.* at 1.

<sup>37</sup> Press Release, DOJ, Justice Department Revises Charging Guidelines for Prosecuting Corporate Fraud (Aug. 28, 2008), available at <http://www.usdoj.gov/opa/pr/2008/August/08-odag-757.html>; Filip Guidelines, *supra* note 16.

<sup>38</sup> *Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum: Hearing Before the S. Comm. On the Judiciary*, 110th Cong. 5 (2007) [hereinafter *McNulty Hearings*] (statement of Karin Immergut, U.S. Attorney, District of Oregon).

<sup>39</sup> *American Civil Liberties Union Welcomes Attorney-Client Privilege Protection Act*, U.S. FED. NEWS (Dec. 7, 2006) (noting that the right of all individuals to speak freely and frankly with their attorneys “is fundamental and vital to the court system”).

<sup>40</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981); *United States v. Louisville & Nashville R.R. Co.*, 236 U.S. 318, 336 (1915).

<sup>41</sup> EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 13 (5th ed. 2007); JOHN WILLIAM GERGACZ, *ATTORNEY-CORPORATE CLIENT PRIVILEGE* 1-6 (Garland Law Publishing 1987) (finding courts have based their holdings in attorney-client context cases on “interests of justice: to encourage client communication with counsel and to provide all relevant facts to the decision-maker”).

purpose of attorney-client protection is to “encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”<sup>42</sup> The rationale behind full disclosure is based upon the lawyer’s need to be fully informed by her client in order to provide fair and proper representation.<sup>43</sup> In addition, the attorney-client privilege facilitates voluntary compliance with regulatory laws, which leads to effective administration of the laws.<sup>44</sup>

Attorney-client privilege is particularly important to corporations in order to ensure that employees feel free to discuss issues with corporate counsel and to gain advice and guidance regarding conduct at work. The proper functioning of the privilege directly impacts the corporation’s ability to assist in criminal investigations of their employees and to implement proper compliance programs to prevent future corporate misconduct.<sup>45</sup> The attorney-client privilege in the corporate sector exists between the corporation and corporate counsel.<sup>46</sup> There is no duty between corporate counsel and the individual employees of the corporation.<sup>47</sup> Nonetheless, all discussions relevant to legal matters within the corporation between the corporate counsel and employees of the corporation are protected under the attorney-client privilege.<sup>48</sup>

<sup>42</sup> *Upjohn*, 449 U.S. at 389. The right of all individuals to speak freely and frankly with their attorneys “is fundamental and vital to the court system,” and “[p]reserving the right to counsel allows all Americans the opportunity to protect themselves and others.” *American Civil Liberties Union Welcomes Attorney-Client Privilege Protection Act*, *supra* note 39.

<sup>43</sup> *Upjohn*, 449 U.S. at 389 (explaining that the attorney-client privilege “exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice”).

<sup>44</sup> This voluntary compliance with the laws is facilitated through the promotion of a client’s freedom of consultation with his attorney. EPSTEIN, *supra* note 41, at 8. Without a client’s freedom to communicate freely with her attorney, attorneys would be less able to provide advice to clients regarding requirements of the law, and this would consequently “diminish the ability of attorneys to urge clients to follow the law.” EPSTEIN, *supra* note 41, at 8.

<sup>45</sup> See Tancabel, *supra* note 32, at 221 (“[E]rosion of the [attorney-client] privilege inhibits frank communications between employees and company counsel and therefore deters corporate compliance with the law.”). The problem arises when employees no longer speak freely to corporate counsel because they are aware of the possibility of waiver, which would result in the information the employee shared with corporate counsel being provided to the prosecutor. This generally prevents corporations from conducting successful internal investigations, which consequently restricts the ability of a corporation to fix the harm done by the wrongdoing and to prevent the harm from occurring in the future.

<sup>46</sup> The default rule is that corporate counsel represents the corporation, not the individual. EPSTEIN, *supra* note 41, at 164.

<sup>47</sup> Although there is no duty between corporate counsel and the corporation’s employees, if corporate counsel believes an employee may have personal liability, professional ethics may require the corporate counsel to give a “Miranda” warning to inform the employee of his right to separate counsel and to ensure that the individual understands he is not personally represented by corporate counsel, before corporate counsel questions the employee on any matters related to the corporation. *Id.* at 165. An individual’s subjective belief that he was personally represented by corporate counsel is not sufficient to create an attorney-client relationship, thus no privilege will attach to the individual’s communication with corporate counsel. *Id.*

<sup>48</sup> *Upjohn*, 449 U.S. at 394-95. The *Upjohn* court found that the attorney-client privilege can extend to middle-level and lower-level employees because these employees have the relevant information required by corporate counsel to adequately assess risks and provide complete and



However, if the corporation waives its attorney-client privilege,<sup>49</sup> it waives all information provided by the employees and officers of the corporation to corporate counsel, unless the officer or employee can show he consulted with corporate counsel in an individual capacity instead of as an officer of the corporation.<sup>50</sup> Accordingly, if the culture of waiver continues, employees will be less likely to discuss any potential employee wrongdoing with corporate counsel because the employee will know their conversations will likely be disclosed to prosecutors when the corporation waives its attorney-client privilege.<sup>51</sup> Thus, this Note demonstrates that corporate attorney-client privilege must be protected to ensure that employees continue to disclose information regarding employee misconduct to the corporation. These disclosures will enable the corporation to improve compliance programs and prevent future criminal activity by its employees. Protection of the corporate attorney-

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intelligent advice to the corporate client. *Id.* at 391 (“[I]t is only natural that [middle-level-and lower-level] employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.”).

<sup>49</sup> Only the corporation’s management, which is normally its officers and directors, may waive the corporate attorney-client privilege. *Commodity Future Trading Comm’n v. Weintraub*, 471 U.S. 343, 349 n.5 (1985). Furthermore, when a board of directors determines that the corporation will not waive the attorney-client privilege, an individual director cannot waive the privilege. EPSTEIN, *supra* note 41, at 29.

<sup>50</sup> EPSTEIN, *supra* note 41, at 155; *United States v. De Lillo*, 448 F. Supp. 840, 842-43 (E.D.N.Y. 1978) (Where a former trustee of the corporate board did not show he consulted corporate counsel in an individual capacity rather than in his official capacity as a corporate board member, the trustee could not assert the attorney-client privilege on his own behalf.). The default assumption is that a corporate officer or employee is consulting with corporate counsel in the capacity of an officer of the corporation rather than in an individual capacity. EPSTEIN, *supra* note 41, at 157. An employee or corporate officer must prove five factors in order to claim a personal privilege for communications with the corporate counsel, and thus prevent the corporation’s attorney-client privilege waiver from consequently waiving the personal privileged communications of the individual employee or officer. These five factors are that the employee must show: (1) he approached corporate counsel for the purpose of seeking legal advice; (2) he made clear that he was seeking advice not as a corporate representative, but as an individual employee; (3) the corporate counsel knew a conflict could arise but still spoke with the employee in the employee’s individual capacity; (4) the conversations the employee engaged in with the corporate counsel were confidential; and (5) the substance of the conversations between himself and the corporate counsel “did not concern matters within the company or the general affairs of the company.” *In re Bevil*, 805 F.2d 120, 125 (3d Cir. 1986); see also EPSTEIN, *supra* note 41, at 155 (summarizing these required factors). See *infra* Part III.B.2.

<sup>51</sup> See *Tancabel*, *supra* note 32, at 221. In *Upjohn*, the court found that “if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected” and “[a]n uncertain privilege . . . is little better than no privilege at all.” *Upjohn*, 449 U.S. at 393. Thus if the “purpose of the attorney-client privilege is to be served,” it cannot be probable that the conversations between employee and corporate counsel will not be protected. *Id.*; see also ABA Task Force on the Attorney-Client Privilege, *Report of the American Bar Association’s Task Force on the Attorney-Client Privilege*, 60 BUS. LAW. 1029, 1037 (2005) [hereinafter *ABA Report on Attorney-Client Privilege*] (“If a client fears that information revealed to his attorney will be made known to others, then the client will withhold information and the attorney will be left with less than all of the information needed to provide competent legal advice.”); Introduction to McNulty Memorandum, *supra* note 9, at 1 (“Many of those associated with the corporate legal community have expressed concern that [DOJ] practices may be discouraging full and candid communications between corporate employees and legal counsel. . . . Therefore, [the DOJ has] decided to adjust certain aspects of [its] policy . . .”).

client privilege must be balanced, however, with the need for the stringent prosecution of corporate criminal wrongdoers.

### C. *Prosecutorial Discretion and the Culture of Waiver*

Prosecutors have broad discretion in investigating individuals and corporations accused of criminal wrongdoing. Prosecutors also decide whether to prosecute individual or corporate clients.<sup>52</sup> They negotiate plea agreements for criminal defendants in exchange for valuable information or for conservation of government resources.<sup>53</sup> Prosecutorial discretion, used in various criminal contexts, is crucial to properly allocate resources for criminal prosecutions and to ensure that the true legislative goals of criminal statutes are met.<sup>54</sup> Prosecutors can, and often do, negotiate the waiver of an individual's Fifth Amendment right to remain silent<sup>55</sup> in exchange for leniency in prosecution.<sup>56</sup>

Similarly, prosecutorial discretion is used in the investigation and prosecution of corporations accused of criminal wrongdoing.<sup>57</sup> However, unlike an individual's waiver of her Fourth or Fifth Amendment rights, which must be done "voluntarily, knowingly and intelligently,"<sup>58</sup> the DOJ policy and the existing culture of waiver pressure corporations to turn over confidential communications between employees of the corporation and corporate counsel without the consent of the individual employees involved. When an individual waives her constitutional right to remain silent or to counsel, she waives only her

<sup>52</sup> See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."). This discretion results from "the recognition that the decision to prosecute is particularly ill-suited to judicial review." *Wayte v. United States*, 470 U.S. 598, 607 (1985). But this prosecutorial discretion is limited by the Constitution. *Id.* at 608.

<sup>53</sup> Ian Weinstein, *Regulating the Market for Snitches*, 47 *BUFF. L. REV.* 563, 627-28 (1999).

<sup>54</sup> *Id.* at 627. The legislature drafts broad criminal statutes to criminalize certain behavior, but prosecutors use their expertise to prosecute only certain potential defendants in order to "maximize the benefit of limited law enforcement resources and achieve individualized justice." *Id.* at 627-28; see also Paul M. Secunda, Note, *Cleaning Up the Chicken Coop of Sentencing Uniformity: Guiding the Discretion of Federal Prosecutions Through the Use of the Model Rules of Professional Conduct*, 34 *AM. CRIM. L. REV.* 1267, 1273 (1997) (discussing the expansion of the Prosecutor's role in sentencing since the Federal Guidelines were put in place).

<sup>55</sup> U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .").

<sup>56</sup> *Roberts v. United States*, 445 U.S. 552, 570 (1980) (Marshall, J., dissenting) ("[I]t is fully appropriate to encourage [cooperation with the authorities] by offering leniency in exchange for 'cooperation.'"). Furthermore, "a confession made in the hope of leniency does not invalidate a resulting confession . . ." Lawrence Rosenthal, *Against Orthodoxy: Miranda is Not Prophylactic and the Constitution is Not Perfect*, 10 *CHAP. L. REV.* 579, 611 n.140 (2007). Also, "when a defendant elects to waive his right to remain silent and testify at trial, he does so under the threat that the prosecution's case, if left un rebutted, will likely result in conviction." *Id.* at 596.

<sup>57</sup> See *infra* Part II.C.1.

<sup>58</sup> *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (waiver of right to remain silent).

own right. In contrast, a corporation that waives its attorney-client privilege simultaneously provides the prosecution with confidential communications between all employees and corporate counsel, unless the employee can prove she met with corporate counsel in an individual capacity.<sup>59</sup>

Until the recent revisions to the DOJ policy for prosecution of corporate criminal activity,<sup>60</sup> prosecutorial discretion in the corporate arena was guided by the McNulty Memorandum,<sup>61</sup> which established that the DOJ may choose not to indict a corporation if it determines that the corporation cooperated with prosecutors during their investigation.<sup>62</sup> The McNulty Memorandum revised the previous policy, which was established in the Thompson Memorandum.<sup>63</sup> The McNulty Memorandum was implemented in response to concerns by the corporate legal community that DOJ practices under the Thompson Memorandum were “discouraging full and candid communications between corporate employees and legal counsel.”<sup>64</sup> The Filip Guidelines announced by the DOJ on August 28, 2008 were implemented due to similar concerns about the McNulty Memorandum.<sup>65</sup>

### 1. Thompson Memorandum

The Thompson Memorandum was issued in 2003 to establish the DOJ’s policy of prosecuting corporations whose employee(s) acted illegally and, in doing so, somehow benefited the company.<sup>66</sup> The Thompson Memorandum provided that, in deciding whether to indict a corporation, the prosecutor should weigh all factors normally considered in the exercise of prosecutorial judgment,<sup>67</sup> as well as, *inter alia*, consider the corporation’s willingness to cooperate in the DOJ’s investigation.<sup>68</sup>

<sup>59</sup> See *infra* note 50 and accompanying text.

<sup>60</sup> See generally Filip Guidelines, *supra* note 16.

<sup>61</sup> McNulty Memorandum, *supra* note 17.

<sup>62</sup> *Id.* at 4, 7 (prosecutors may consider several “factors in determining whether to charge a corporation” including the corporation’s “willingness to cooperate in the investigation”).

<sup>63</sup> See generally *id.*

<sup>64</sup> Introduction to McNulty Memorandum, *supra* note 9, at 1.

<sup>65</sup> Filip Guidelines, *supra* note 16, ch. 9-28.710 (prefacing its change in policy with the assertion that “the contention, from a broad array of voices, is that the Department’s position on attorney-client privilege and work product protection waivers has promoted an environment in which those protections are being unfairly eroded to the detriment of all”).

<sup>66</sup> Thompson Memorandum, *supra* note 9, at 1.

<sup>67</sup> Factors normally considered in the exercise of prosecutorial judgment include: “the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches.” *Id.* at 2.

<sup>68</sup> *Id.* at 3-4. In addition, the United States Sentencing Guidelines provide that lenience is appropriate for a business entity if the business reports an offense

prior to an imminent threat of disclosure or government investigation; and . . . within a reasonably prompt time after becoming aware of the offense, [the business] reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and

The corporation's waiver of attorney-client privilege, if deemed necessary by the DOJ, was considered in the DOJ's determination of the corporation's cooperation with prosecutors.<sup>69</sup> The Thompson Memorandum maintained that, in exchange for cooperation, prosecutors may agree not to prosecute the corporation.<sup>70</sup> Specifically, when a corporation's "timely cooperation" seems "necessary to the public interest" and there are no other available or effective "means of obtaining the desired cooperation," a prosecutor may forgo prosecution.<sup>71</sup> This "credit" or leniency for cooperation<sup>72</sup> is similar to that of a natural person who may be given immunity, lesser charges, or sentencing considerations "for turning [herself] in, making statements against [her]

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clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct . . . .

2007 FEDERAL SENTENCING GUIDELINES § 8C2.5(g)(1)(2007), available at [http://www.ussc.gov/2007guid/8c2\\_5.html](http://www.ussc.gov/2007guid/8c2_5.html).

<sup>69</sup> Thompson Memorandum, *supra* note 9, at 7 ("One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client . . . protection[ ] . . .").

<sup>70</sup> *Id.* at 6-8 (Although "a corporation's offer of cooperation does not automatically entitle it to immunity from prosecution," non-prosecution agreements are permitted "in exchange for cooperation when a corporation's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective.") (internal quotation marks omitted).

<sup>71</sup> *Id.* at 5-6.

<sup>72</sup> Under the Federal Sentencing Guidelines, in determining a culpability score for a convicted corporation, a sentencing court will consider the nature and seriousness of the corporation's conduct, whether "high level personnel" were involved in the wrongful conduct, and whether the "high level personnel" condoned, participated in, or willfully ignored the behavior. Stephen James Binkak, *When Everything Goes Wrong: How the Federal Government Decides Whether to Prosecute a Business Organization and How the Courts Determine Punishment*, A.L.I. 349, 356 (Nov. 18-20, 2004). If these circumstances are present, then points will be added to the basic score, which results in a more severe sentence. *Id.* The U.S. Federal Sentencing Guidelines also allow for leniency or "credit" for certain things, which results in a less severe sentence. According to § 8C2.5, in determining the culpability score for sentencing of organizations, the court should start with five points and then increase or decrease the culpability score according to several factors. 2007 FEDERAL SENTENCING GUIDELINES § 8C2.5(a), available at [http://www.ussc.gov/2007guid/8c2\\_5.html](http://www.ussc.gov/2007guid/8c2_5.html). The score is increased if, among other things, "an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense[.]" the "tolerance of the offense by substantial authority personnel was pervasive throughout the organization[.]" *id.* § 8C2.5(b), and if there was prior history of "a criminal adjudication based on similar misconduct." *Id.* § 8C2.5(c). Two points are subtracted from an organization's culpability score "[i]f the organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct[.]" *Id.* § 8C2.5(g)(2). Five points will be subtracted from the organization's culpability score if in addition to full cooperation in the investigation and "recognition and affirmative acceptance of responsibility for its criminal conduct," the organization did so "prior to an imminent threat of disclosure or government investigation; and . . . within a reasonably prompt time after becoming aware of the offense, [and the organization also] reported the offense to the appropriate governmental authorities." *Id.* § 8C2.5(g)(1). Therefore, if the corporation wants to be granted either the five point or two point decrease in its culpability score for sentencing, it will do everything possible to "fully cooperate." Thus, similar to the pressure felt by the corporation to waive its attorney-client privilege to avoid indictment by the DOJ, the corporation is given comparable pressure to waive its privilege in order to "fully cooperate" and obtain the decrease in its culpability score for sentencing under the U.S. Sentencing Guidelines. McNulty Memorandum, *supra* note 17, at 8; 2007 FEDERAL SENTENCING GUIDELINES § 8C2.5(g)(2).

penal interest, [or] cooperating in the government's investigation of [her] own and others' wrongdoing . . . ."<sup>73</sup>

Thus, the Thompson Memorandum made the corporation's cooperation during a government investigation an important factor in the DOJ's decision of whether to indict the firm.<sup>74</sup> The sufficiency of the corporation's cooperation in the investigation was determined partially by the corporation's grant of the DOJ's requested waiver of attorney-client privilege.<sup>75</sup> The corporation would thereby have to waive its attorney-client privilege in order to fully cooperate with the government. Therefore, the DOJ policy under the Thompson Memorandum made granting the DOJ's request for waiver of attorney-client privilege essentially a necessity for the corporation's survival, as indictment generally means failure of the company.<sup>76</sup>

As a result, a culture of waiver was created under the Thompson Memorandum whereby corporations felt obligated to waive their attorney-client privilege in order to avoid indictment by the DOJ. Furthermore, corporations began waiving their attorney-client privilege before the DOJ officially requested such waiver because of implied pressure on corporations to either waive or face indictment.<sup>77</sup> The culture of waiver that developed eventually resulted in the implementation of the McNulty Memorandum, which revised the DOJ policy as embodied in the Thompson Memorandum.<sup>78</sup>

## 2. McNulty Memorandum

In the years following the implementation of the Thompson Memorandum, pressure began to mount from the legal community to change existing DOJ practices as they were negatively affecting corporate employees' ability to fully and frankly communicate with legal

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<sup>73</sup> Thompson Memorandum, *supra* note 9, at 4.

<sup>74</sup> *Id.* at 3 (listing one of the nine factors to be considered by prosecutors in "reaching a decision as to the proper treatment of a corporate target" as the corporation's "willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection").

<sup>75</sup> *Id.*

<sup>76</sup> Lauren E. Taigue, *Justice Department's Policy on Corporate Prosecutions Under Attack: United States v. Stein Assails Thompson Memorandum*, 52 VILL. L. REV. 369, 369-70 (2007); see also Bharara, *supra* note 18, at 73 (Due to market pressures, corporate defendants "may not be able to survive indictment, much less conviction and sentencing."); Oesterle, *supra* note 19, at 471-78 (describing the pressure felt by a company facing indictment by stating that "[s]ince an indicted firm is a dead firm, a decision to defend an indictment is suicide.").

<sup>77</sup> As evidenced by more than forty recent cases, as a result of the "culture of waiver" that has been established through DOJ policy and tactics, it is no longer necessary for the DOJ to demand waiver of privileges. Editorial, *Abuse of Privilege*, WALL ST. J., Sept. 20, 2007, at A12. This is because companies "read between the lines" and waive their privileges in accordance with what prosecutors want "for fear that the alternative [i]s indictment." *Id.*

<sup>78</sup> McNulty Memorandum, *supra* note 17.

counsel.<sup>79</sup> As a result, the DOJ revised the Thompson Memorandum. In 2007, the DOJ provided its new policy regarding the prosecution of corporate crimes in the McNulty Memorandum.<sup>80</sup> In the McNulty Memorandum, the DOJ argued that a corporation's disclosure of privileged information could allow the government to expedite its investigation and might be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure.<sup>81</sup> The McNulty Memorandum also granted prosecutors "wide latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law."<sup>82</sup>

In contrast to the Thompson Memorandum, the McNulty Memorandum provided that waiver of attorney-client privilege was not a prerequisite to a DOJ finding that a corporation had cooperated in the government's investigation.<sup>83</sup> Further unlike the Thompson Memorandum, the McNulty Memorandum established that prosecutors may only request a waiver of attorney-client privilege where there was a "legitimate need for the privileged information to fulfill their law enforcement obligations."<sup>84</sup> Whether there is a legitimate need depends

<sup>79</sup> Introduction to McNulty Memorandum, *supra* note 9, at 1 ("Many of those associated with the corporate legal community have expressed concern that [DOJ] practices may be discouraging full and candid communications between corporate employees and legal counsel . . . [t]herefore [the DOJ has] decided to adjust certain aspects of [its] policy . . .").

<sup>80</sup> *Id.* at 2. Some argue that the McNulty Memorandum did not actually change the majority of the substance of the Thompson Memorandum since it maintained: mandatory consideration of the nine factors by prosecutors in determining whether to indict a corporation, the fundamental emphasis on corporate cooperation, and the DOJ's support of its current corporate criminal liability standard. Bharara, *supra* note 18, at 78.

<sup>81</sup> McNulty Memorandum, *supra* note 17, at 8. In the McNulty Memorandum, the DOJ also stated that by prosecuting corporate crimes, the DOJ "plays an important role in protecting investors and ensuring public confidence in business entities and in the investment markets in which those entities participate." *Id.* at 1.

<sup>82</sup> *Id.* at 5. While this leaves a lot to prosecutorial discretion, such discretion is used for all criminal cases. Prosecutors choose who to prosecute and who not to prosecute, so the standard is not any harsher simply because it is in the context of corporate crime.

<sup>83</sup> *Id.* at 8 (providing that "[w]aiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation").

<sup>84</sup> *Id.* The McNulty Memorandum creates two categories of information regarding waivers of privileged information. *Id.* at 9-10. Category I includes factual information relating to the underlying misconduct. *Id.* at 9. This could include copies of key documents, witness statements, or purely factual interview memoranda regarding the underlying misconduct. *Id.* Prosecutors may consider a corporation's response to the government's request for waiver of privilege for Category I information in determining whether a corporation has cooperated in the government's investigation and thus if the corporation should be indicted. *Id.* Prosecutors must obtain written authorization from the United States Attorney before requesting that a corporation waive the attorney-client or work product protections for Category I information. *Id.* Category II includes attorney-client communications and non-factual attorney work product, including legal advice given to the corporation before, during, and after the underlying misconduct occurred. *Id.* at 10. The McNulty Memorandum states that this information should only be requested if the purely factual information provides an incomplete basis to conduct a thorough investigation. *Id.* In order to obtain a waiver for Category II information, the prosecutor must obtain written authorization from the Deputy Attorney General, and in the U.S. Attorney's request for approval to request a waiver of privileged information, the U.S. Attorney must set forth a legitimate need for the information and identify the scope of the waiver sought. *Id.*

on: (1) the probability that “the privileged information will benefit the government’s investigation;” (2) whether there are alternative means of obtaining the same information in a timely manner; (3) the “completeness of the voluntary disclosure already provided;” and (4) the effect of the waiver on the corporation.<sup>85</sup>

Although the McNulty Memorandum changed the DOJ standard to no longer require the corporation to waive its attorney-client privilege in order for the government to find that the corporation cooperated,<sup>86</sup> the culture of waiver created under the Thompson Memorandum resulted in the current trend of corporate waiver of attorney-client privilege even without a DOJ request to do so.<sup>87</sup> This culture of waiver persisted in the wake of the McNulty Memorandum as the corporation still perceived undue pressure to waive the attorney-client privilege in order to show cooperation with the DOJ and thus avoid indictment.<sup>88</sup>

For Category I information,<sup>89</sup> which includes only factual information,<sup>90</sup> the McNulty Memorandum provided that the DOJ may consider the corporation’s response to a DOJ request for waiver of privilege in determining whether the corporation cooperated in the

<sup>85</sup> *Id.* at 9.

<sup>86</sup> *Id.* at 8 (“Waiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government’s investigation.”).

<sup>87</sup> At a Congressional hearing on September 18, 2007 regarding Arlen Specter’s Attorney-Client Privilege Protection Act of 2007, the DOJ reported that since DOJ policy was modified through the McNulty Memorandum, the DOJ had only demanded a corporation waive its attorney-client privilege four times for factual information and requested no waivers of privilege for attorney-client communications. *McNulty Hearings*, *supra* note 38, at 5 (statement of Karin Immergut, U.S. Attorney, District of Oregon). However, as a result of the “culture of waiver,” and as evidenced by more than forty recent cases, companies often waive their attorney-client privilege even without a DOJ request to do so, “for fear that the alternative [i]s indictment.” *Abuse of Privilege*, *supra* note 77, at A12. This is because companies “read between the lines” and waive their privileges in accordance with what prosecutors want “for fear that the alternative [i]s indictment.” *Id.* Furthermore, “Norman Veasey, former Chief Judge of the Delaware Supreme Court, submitted to the committee a roster of cases in which prosecutors have continued to run roughshod over attorney-client privilege and defendants’ rights” even after implementation of the McNulty Memorandum. *Id.*; see also John Diedrich, *Coupon Case Could Expand: Indictment Alleging Intimidation, Obstruction to be Sought in Scam*, MILWAUKEE J. SENTINEL, Sept. 29, 2007, at A1 (reporting that prosecutors dropped International Outsourcing Services from its investigation for defrauding manufacturers and stores of at least \$250 million over a decade, after the company agreed “to fire several of the defendants and waive attorney-client privilege on thousands of pages of documents.”).

<sup>88</sup> See *United States v. Stein (Stein II)*, 440 F. Supp. 2d 315, 337 (S.D.N.Y. 2006) (Corporations that face indictment “must do whatever [they] can to avoid indictment” or face consequences such as that of Arthur Anderson & Co.). Corporate indictment also “threatens to destroy the business regardless of whether the firm ultimately is convicted or acquitted.” *Id.* A common example of this phenomenon is the collapse of Arthur Anderson & Co. almost immediately after it was indicted. *Id.* The Supreme Court’s reversal of the corporation’s conviction did not reverse the damage done by the indictment. *Id.*

<sup>89</sup> See *supra* note 84.

<sup>90</sup> Factual information in Category I “could include, without limitation, copies of key documents, witness statements, or purely factual interview memoranda regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel.” McNulty Memorandum, *supra* note 17, at 9.

government investigation.<sup>91</sup> Furthermore, the McNulty Memorandum stated that prosecutors must not consider a refusal by the corporation to waive protection to privileged information against the corporation for Category II information, which includes attorney-client communications and non-factual attorney work product.<sup>92</sup> However, the McNulty Memorandum also provided that prosecutors may still “favorably consider” a corporation’s waiver of attorney-client privilege in response to the government’s request, in determining whether the corporation has cooperated in the DOJ’s investigation.<sup>93</sup> This Note argues that if prosecutors can favorably consider a corporation’s waiver of privilege, then it follows that failure to provide a requested waiver may negatively affect the corporation’s likelihood of avoiding indictment.<sup>94</sup> Thus, the language in the McNulty Memorandum was not strong enough to protect the corporation from negative consideration by prosecutors if it refused to waive protection to privileged information. As prosecutors were allowed to use refusal to waive the attorney-client privilege as a factor in determining whether the corporation cooperated, and thus whether the corporation should be indicted, the waiver was not truly voluntary.<sup>95</sup>

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<sup>91</sup> *Id.* (“A corporation’s response to the government’s request for waiver of privilege for Category I information may be considered in determining whether a corporation has cooperated in the government’s investigation.”).

<sup>92</sup> *Id.* at 10 (“If a corporation declines to provide waiver for Category II information after a written request from the United States Attorney, prosecutors must not consider this declination against the corporation in making a charging decision.”); *see also supra* note 84.

<sup>93</sup> McNulty Memorandum, *supra* note 17, at 10. (“Prosecutors may always favorably consider a corporation’s acquiescence to the government’s waiver request in determining whether a corporation has cooperated in the government’s investigation.”); *see also* Tancabel, *supra* note 32, at 2 (“As long as the DOJ continues to grant cooperation points to companies that voluntarily waive the privilege in the absence of a written request to do so, companies are likely to continue to waive the privilege at the beginning of a criminal investigation.”).

<sup>94</sup> In addition, there have been complaints that the DOJ has not done enough to prevent prosecutors from demanding waiver of attorney-client privilege by corporations. Pamela A. MacLean, *The Year of Living Dangerously For CGS*, NAT’L L.J., Oct. 1, 2007, at 5 (“Defense lawyers have complained that the Justice Department has not sufficiently discouraged prosecutors from demanding—as a sign of cooperation—the waiver of attorney-client privilege information and access to results of internal company investigations.”). Furthermore, there are allegations that prosecutors ignore the provisions of the McNulty Memorandum and instead continue to pressure corporations to waive important privileges. Marcia Coyle, *Efforts to Protect Privilege Falling Short*, NAT’L L.J., Sept. 24, 2007, at 6 (“The behaviors ingrained in pre-McNulty remain ingrained post-McNulty and the memo hasn’t removed those practices.” (quoting Susan Hackett, Senior Vice President and General Counsel of the Association of Corporate Counsel)). For example, allegedly when an East Coast corporation was being investigated for fraud after the implementation of the McNulty Memorandum and the company counsel raised the McNulty Memorandum procedures in a discussion with the prosecutor, the prosecutor’s response was “I don’t give a flying - -” about the policy and said the burden was on the company to ‘appeal’ the waiver request up the Justice Dept. chain of command.” *Id.* Furthermore, “[b]usiness groups say McNulty’s revisions have not stopped prosecutorial abuses.” Bill McConnell, *Spector Bill Would Curb Prosecutors*, DAILY DEAL, Sept. 19, 2007. Thus, “although the theory of the McNulty Memorandum is a good one, in practice, individual prosecutors interpret its factors markedly differently” because there has been little training of prosecutors to act according to the provisions of the McNulty Memorandum. *McNulty Hearings*, *supra* note 38, at 17 (statement of Andrew Weissmann, Partner, Jenner & Block).

<sup>95</sup> *See* United States v. Stein (*Stein I*), 435 F. Supp. 2d 330, 364 (S.D.N.Y. 2006), *aff’d*, 541 F.3d 130 (2d Cir. 2008) (“Few if any competent defense lawyers would advise a corporate client at risk of indictment that it should feel free to advance legal fees to individuals in the face of the



Thus, this Note argues that the language used in the McNulty Memorandum allowed prosecutors to consider the corporation's waiver of privileges in its indictment decision, which consequently perpetuated the culture of waiver.

### 3. August 2008 Filip Guidelines

On August 28, 2008 the DOJ announced the implementation of new guidelines for prosecution of corporate crimes.<sup>96</sup> The DOJ revised its guidelines as provided in the McNulty Memorandum due to criticism from the American legal community and criminal justice system.<sup>97</sup> The newly announced policy provides further protection of the attorney-client privilege as compared to the Thompson and McNulty Memoranda. The new guidelines clearly state that cooperation credit should be given to corporations for disclosing relevant facts to prosecutors regardless of whether those facts are protected by the attorney-client privilege.<sup>98</sup> Thus, unlike the McNulty Memorandum, no positive credit is given to corporations specifically for waiver of their attorney-client privilege.<sup>99</sup> Furthermore, unlike the Thompson and McNulty Memoranda, the guidelines are implemented in the DOJ manual instead of merely in a Memorandum supplementing the DOJ's policy.<sup>100</sup>

Although the newly announced Filip Guidelines attempt to alleviate some of the problems created under the Thompson and

language of the Thompson Memorandum itself. It would be irresponsible to take the chance that prosecutors might view it as 'protecting . . . culpable employees and agents.'").

<sup>96</sup> Filip Guidelines, *supra* note 16.

<sup>97</sup> *Id.* ch. 9-28.710 (prefacing its change of policy with the comment that "the contention, from a broad array of voices, is that the Department's position on attorney-client privilege and work product protection waivers has promoted an environment in which those protections are being unfairly eroded to the detriment of all").

<sup>98</sup> *Id.* ch. 9-28.720 ("[T]he sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant facts concerning such misconduct."). This policy is based partially on the Report of the House Judiciary Committee that was submitted in connection with H.R. 3013, the attorney-client privilege bill passed by the House of Representatives. *Id.* ch. 9-28.720(a). The portion of the Report adopted by the Filip Guidelines states that

an entity that voluntarily discloses should receive the same amount of cooperation credit for disclosing facts that happen to be contained in materials not protected by attorney-client privilege or attorney work product as it would receive for disclosing identical facts that are contained in materials protected by attorney-client privilege or attorney work product. There should be no differentials in an assessment of cooperation (i.e., neither a credit nor a penalty) based upon whether or not the materials disclosed are protected by attorney-client privilege or attorney work product.

*Id.* (quoting H.R. Rep. No. 110-445, at 4 (2007) (quotation marks omitted).

<sup>99</sup> *Id.* ch. 9-28.720 ("Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege . . .").

<sup>100</sup> DOJ, *supra* note 37 (explaining that instead of merely being included in a memo, "[t]he revisions and policy changes announced today will be committed for the first time to the United States Attorneys Manual, which is binding on all federal prosecutors within the Department of Justice").

McNulty Memoranda, the revised guidelines will not be enough to remedy the problems existing under the current culture of waiver. Since the DOJ has had five different policies in the past ten years for prosecution of corporate criminals and the current policy can easily be changed again by the next Deputy Attorney General who takes office,<sup>101</sup> corporations and corporate employees will be unable to rely on the new policy. The culture of waiver will persist and employees will consequently refrain from speaking with corporate counsel<sup>102</sup> because there is a good chance that the DOJ policy for prosecution of corporate crimes will be revised again in the future. This future change could allow prosecutors to once more request information protected by the corporate attorney-client privilege and to consider corporate disclosure of this privileged information in determining the amount of cooperation credit to give the corporation. Furthermore, even if corporations believe the DOJ will not change its policy for prosecution of corporate criminals in the future, there have been allegations that prosecutors ignored provisions of the McNulty Memorandum and instead continued to pressure corporations to waive their attorney-client privilege.<sup>103</sup> Thus, a change in DOJ policy might not be enough to prevent prosecutors from continuing to pressure corporations to waive their privileges.<sup>104</sup> Moreover, there is evidence that because of the culture of waiver that has been established through past DOJ policy and practices, corporations feel obligated to waive their privileges even without DOJ demand to do so.<sup>105</sup> Therefore this Note argues that the recent implementation of the Filip Guidelines for prosecution of corporate criminals will not remedy the current culture of waiver.

### III. DOJ POLICY OF PRESSURING CORPORATIONS TO WAIVE THEIR ATTORNEY-CLIENT PRIVILEGE SHOULD BE REJECTED

The DOJ policy and practice for prosecuting corporations or individual employees for corporate crimes must protect those victimized

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<sup>101</sup> *Companies Get Protected from DOJ Pressure*, CFO MAG., (Aug. 28, 2008), at 7 (quoting the Coalition to Preserve Attorney Client Privilege as stating that “[t]he Justice Department’s track record of five different policies in ten years cries out for a permanent legislative solution that cannot be revised at the whim of each new Deputy Attorney General” (quotation marks omitted)); ABA President Wells Statement, *supra* note 23 (noting that the ABA President stated that “[t]he Department’s new guidelines are its fifth such policy in ten years and can be changed again at any time”).

<sup>102</sup> See *supra* Part II.B.

<sup>103</sup> Coyle, *supra* note 94.

<sup>104</sup> See, e.g., Coyle, *supra* note 94 (“The behaviors ingrained pre-McNulty remain ingrained post-McNulty and the memo hasn’t removed those practices.” (quoting Susan Hackett, Senior Vice President and General Counsel of the Association of Corporate Counsel)); McConnell, *supra* note 94 (“Business groups say McNulty’s revisions have not stopped prosecutorial abuses.”); *McNulty Hearings*, *supra* note 38, at 17 (statement of Andrew Weissmann, Partner, Jenner & Block) (stating that while the McNulty Memorandum is effective in theory, “individual prosecutors interpret its factors markedly differently”).

<sup>105</sup> See *supra* note 87 and accompanying text.

by corporate fraud and maintain investor confidence, while at the same time protect individual and corporate rights. This Note argues that courts should find pressured waiver of corporate attorney-client privilege by the DOJ to be unconstitutional, as it fails strict scrutiny analysis and violates the constitutional rights of both the corporation and the corporate employees. Furthermore, even if courts do not find the DOJ policy and practice of pressured corporate waiver to be unconstitutional, the policy should be rejected because waiver of attorney-client privilege is harmful to corporations, corporate employees, and shareholders, and it is unnecessary as there are equally effective alternatives to obtain the relevant information. Although the DOJ recently changed its policy in an attempt to alleviate concerns of pressured waiver of corporate attorney-client privilege, this Note argues that the culture of waiver will persist and the DOJ's prior practice of pressured waiver of attorney-client privilege could also continue under the new policy.<sup>106</sup>

#### A. *Pressured Waiver of Attorney-Client Privilege Should Be Held Unconstitutional*

There is no current precedent concerning the constitutionality of the DOJ's policy regarding corporate waiver of attorney-client privilege as established in the McNulty Memorandum<sup>107</sup> or the recently announced Filip Guidelines.<sup>108</sup> This Note argues that courts should hold the DOJ's policy and practice of impliedly pressuring corporations to grant waivers of attorney-client privilege to be unconstitutional, as it violates the substantive due process rights of corporations and corporate employees.<sup>109</sup> The court's decision in *Stein I*, which used strict scrutiny analysis to hold the legal fees provision of the Thompson Memorandum to be unconstitutional,<sup>110</sup> supports this Note's argument that courts should hold the DOJ's policy and practice of pressuring corporations to waive their attorney-client privilege to be unconstitutional.

##### 1. Pressured Waiver of Attorney-Client Privilege Violates Substantive Due Process Rights

The McNulty Memorandum established a system whereby prosecutors were only permitted to request a waiver of corporate

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<sup>106</sup> See *supra* notes 86-88, 94 and accompanying text.

<sup>107</sup> McNulty Memorandum, *supra* note 17, at 8-11.

<sup>108</sup> Filip Guidelines, *supra* note 16, ch. 9-28.710.

<sup>109</sup> Although the McNulty Memorandum was recently replaced by the Filip Guidelines, which prohibit forced waiver of corporate privileges, the pressure on corporations to waive their attorney-client privilege arguably might continue due to the culture of waiver, despite the revised DOJ guidelines. See *supra* notes 87, 94.

<sup>110</sup> 435 F. Supp. 2d 330, 366 (S.D.N.Y. 2006), *aff'd*, 541 F.3d 130 (2d Cir. 2008).

attorney-client privilege for specific and rare purposes.<sup>111</sup> Despite this system, due to the culture of waiver and pressure by the government, corporations often feel obligated either to waive their attorney-client privilege or to face indictment.<sup>112</sup> This Note argues that courts should apply strict scrutiny analysis to determine the constitutionality of the DOJ's policy and practice of impliedly pressuring corporations to waive their attorney-client privilege. Courts should apply strict scrutiny because pressured waiver deprives the corporation and its employees of the right to defend themselves and to a fair trial.<sup>113</sup> If strict scrutiny analysis is applied, courts should find this DOJ policy to be unconstitutional.<sup>114</sup>

Strict scrutiny analysis should be applied to the DOJ policy and practice of impliedly pressuring corporations to waive their attorney-client privilege because pressured corporate waiver of attorney-client privilege violates the constitutional rights of the corporation and its employees.<sup>115</sup> The Constitution protects individual defendants against undue pressure to waive Fifth Amendment rights.<sup>116</sup> Although a corporation is not protected by the Fifth Amendment, it is a legal individual and must be protected against undue pressure to waive its

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<sup>111</sup> McNulty Memorandum, *supra* note 17, at 8-11. However, the McNulty Memorandum does not specifically state that a waiver may only be used in determining the level of cooperation of the corporation when the refusal to waive obstructs the investigation. *Id.*

<sup>112</sup> See *supra* note 87 and accompanying text.

<sup>113</sup> U.S. CONST. amend. VI.

<sup>114</sup> An additional reason for holding pressured waiver of attorney-client privilege to be unconstitutional is that justice is not served by undue government pressure to waive the attorney-client privilege. One might argue that the corporation is defended by a team of high-powered lawyers, so it is highly unlikely that they will be unduly pressured into doing anything. However, the fact that the defendant here is a corporation, instead of an individual, does not mean that the government can treat it unfairly. The justice system provides the same protections regardless of the perceived high level of counsel retained by the defendant. Another rationale for holding pressured waiver of attorney-client privilege to be unconstitutional is that the *Stein I* court found that prosecutors abuse their power when they impose punishment before the defendant has been found guilty. 435 F. Supp. 2d at 363 ("The imposition of economic punishment by prosecutors, before anyone has been found guilty of anything, is not a legitimate governmental interest—it is an abuse of power."). Similarly, the court would likely find prosecutors are abusing their power by forcing corporations to waive the attorney-client privilege to avoid indictment, before any finding of wrongdoing by the corporation or its employees. See *id.* at 364 ("It would be irresponsible to take the chance that prosecutors might view [advancing legal fees to individual employees] as protecting . . . culpable employees and agents.") (internal quotation marks omitted). In *Stein I*, the court found:

[j]ustice is not done when the government uses the threat of indictment—a matter of life and death to many companies and therefore a matter that threatens the jobs and security of blameless employees—to coerce companies into depriving their present and even former employees of the means of defending themselves against criminal charges in a court of law . . . the determination of guilt or innocence must be made fairly—not in a proceeding in which the government has obtained an unfair advantage long before the trial even has begun.

*Id.* at 381-83.

<sup>115</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (The government may not infringe on a fundamental liberty interest "unless the infringement is narrowly tailored to serve a compelling state interest." (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993))).

<sup>116</sup> See U.S. CONST. amend. V.

rights.<sup>117</sup> In addition, corporations and employees have a right to effective counsel.<sup>118</sup> Pressured waiver of attorney-client privilege is comparable to forced waiver of the corporation's right to effective counsel because counsel cannot be fully effective in the creation of trial strategies and arguments without all relevant information.<sup>119</sup> Although waiver of attorney-client privilege will expedite DOJ investigations and might make the prosecutor's job easier, these benefits do not justify placing undue pressure on corporations and employees to relinquish their rights,<sup>120</sup> even if there is a "legitimate need for the privileged information."<sup>121</sup> The government expends extensive time and resources for any large criminal investigation. Making an investigation easier for the government does not justify violating the rights of an individual or a corporation.

Government pressure on a corporation to waive its attorney-client privilege also interferes with the individual employee's constitutional rights to effective counsel and a fair trial.<sup>122</sup> The corporate counsel represents the corporation and consequently owes a duty only to the corporation, not the individual employee.<sup>123</sup> Thus, when an employee speaks to corporate counsel, the employee's communications will be revealed to the prosecution when the corporation waives its attorney-client privilege unless the employee can prove that his discussions with corporate counsel were in an individual capacity.<sup>124</sup> Proving that the employee's discussions with corporate counsel were in an individual

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<sup>117</sup> See *id.*; EPSTEIN, *supra* note 41, at 141 ("Unlike the Fifth Amendment privilege against self-incrimination, which is not extended to a corporate entity, the attorney-client privilege now may be asserted by a corporation . . .").

<sup>118</sup> See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.").

<sup>119</sup> The *Upjohn* court found that "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected" and "[a]n uncertain privilege . . . is little better than no privilege at all." 449 U.S. at 393. Thus, "if the purpose of the attorney-client privilege is to be served," there cannot be a likely chance that the conversations between employee and corporate counsel will not be protected. *Id.*; see also *ABA Report on Attorney-Client Privilege*, *supra* note 51, at 1037 ("If a client fears that information revealed to his attorney will be made known to others, then the client will withhold information and the attorney will be left with less than all of the information needed to provide competent legal advice.").

<sup>120</sup> See U.S. CONST. amend. VI.

<sup>121</sup> McNulty Memorandum, *supra* note 17, at 8; McConnell, *supra* note 94 (reporting that "[b]usinesses, along with civil liberties groups, complain that federal prosecutors have abused their authority to file criminal charges as leverage to bully companies into waiving their Fifth Amendment right to confidential communications with their lawyers").

<sup>122</sup> U.S. CONST. amend. VI.

<sup>123</sup> The default rule is that corporate counsel is representing the corporation, not the individual. EPSTEIN, *supra* note 41, at 164.

<sup>124</sup> *Supra* notes 49-50 and accompanying text. Therefore, even if the corporation does not refuse to provide funds for the defense of the employee or otherwise pressure the corporation to interfere in the individual employee's defense, as prohibited in *United States v. Stein (Stein I)*, 435 F. Supp. 2d 330, 357 (S.D.N.Y. 2006), *affd*, 541 F.3d 130 (2d Cir. 2008), DOJ pressure on the corporation to waive its attorney-client privilege can still interfere with the individual employee's defense.

capacity is a very difficult burden to meet.<sup>125</sup> As a result, if the corporation waives its privilege and the employee cannot prove he communicated with the corporate counsel in an individual capacity, the employee's right to a fair trial will be infringed upon because his right to an effective defense will essentially be waived for him by the corporation.<sup>126</sup> The corporation's waiver of its attorney-client privilege provides the government with confidential information and communications regarding the individual, which the government would not have obtained but for the waiver. Hence, the corporate waiver gives prosecutors an unfair advantage over the employee-defendants and at the same time deprives these employees of their constitutional rights to a fair trial<sup>127</sup> and a defense free from government interference.<sup>128</sup>

To be valid, waiver of an individual's rights must be made "voluntarily, knowingly, and intelligently" by the individual.<sup>129</sup> In waiving its attorney-client privilege, the corporation is essentially waiving the attorney-client privilege for each individual employee who cannot prove that his discussions with corporate counsel were in an individual capacity.<sup>130</sup> Because the employee is not given a choice in the corporation's waiver, the waiver of the employee's communications with corporate counsel cannot be said to have been made "voluntarily, knowingly, and intelligently."<sup>131</sup> Therefore, courts should find that undue pressure on a corporation to waive its privileges violates the rights and protections afforded to employees by the Constitution, as it forces waiver of attorney-client privilege by individual employees, without their consent, for some communications between the employee and corporate counsel.

Thus, this Note demonstrates that the DOJ policy and practice of putting pressure on the corporation to waive its attorney-client privilege

<sup>125</sup> *Supra* notes 49-50 and accompanying text.

<sup>126</sup> In *Stein I*, the court found that

[j]ustice is not done when the government uses the threat of indictment—a matter of life and death to many companies and therefore a matter that threatens the jobs and security of blameless employees—to coerce companies into depriving their present and even former employees of the means of defending themselves against criminal charges in a court of law . . . the determination of guilt or innocence must be made fairly—not in a proceeding in which the government has obtained an unfair advantage long before the trial even has begun.

*Stein I*, 435 F. Supp. 2d at 381-82.

<sup>127</sup> U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.").

<sup>128</sup> *Stein I*, 435 F. Supp. 2d at 381-83.

<sup>129</sup> *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (waiver of right to remain silent).

<sup>130</sup> EPSTEIN, *supra* note 41, at 155.

<sup>131</sup> *Miranda*, 384 U.S. at 444.

interferes with the corporation's and corporate employees' right to a defense free from government interference.<sup>132</sup> This interference by the DOJ deprives the corporation and its employees of their constitutional rights to defend themselves and to a fair trial.<sup>133</sup> As this is a violation of the constitutional right of due process to fair proceedings,<sup>134</sup> courts should apply strict scrutiny analysis.<sup>135</sup> To survive strict scrutiny, the government must show that it had a compelling interest in the successful prosecution of corporate crime and that government pressure to waive the corporation's attorney-client privilege is narrowly tailored to achieve this compelling interest.<sup>136</sup>

The court in *Stein I* found that the government has a compelling interest in "investigating and fairly prosecuting crime."<sup>137</sup> However, this Note argues that even if the DOJ has a compelling interest in the successful prosecution of corporations and corporate employees guilty of wrongdoing, the government policy and practice of placing pressure on corporations to waive their attorney-client privilege does not survive strict scrutiny because it is not narrowly tailored to achieve this interest.

Pressured corporate waiver is not narrowly tailored to achieve the government's interest in prosecuting corporate crimes because it will have a chilling effect on the willingness of employees to speak to corporate counsel about wrongdoing within the corporation and thus will

<sup>132</sup> *Stein I*, 435 F. Supp. 2d at 357 (stating that government pressure on a corporation is unconstitutional where it interferes with "the manner in which [the defendant] defends the case"). Furthermore, the employees' reluctance to speak with counsel would harm the corporation's ability to determine wrongdoing of its employees and to fix, internally, the problems caused by the illegal conduct.

<sup>133</sup> U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.").

<sup>134</sup> *Id.*

<sup>135</sup> *Stein I*, 435 F. Supp. 2d at 361-62 ("The right to fairness in criminal proceedings is a fundamental liberty interest subject to substantive due process protection."). The *Stein I* court held that the "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" is a "right [that] is basic to our concepts of justice and fair play. It is fundamental." *Id.* The *Stein I* court further held that

[by putting] pressure on KPMG to deny or cut off defendants' attorneys' fees . . . [,] the government has interfered with the ability of the KPMG Defendants to obtain resources they otherwise would have had. Unless remedied, this interference almost certainly will affect what these defendants can afford to permit their counsel to do. This would impact the defendants' ability to present the defense they wish to present by limiting the means lawfully available to them.

*Id.* at 362. Therefore the court held "the Thompson Memorandum and the USAO's actions . . . are subject to strict scrutiny." *Id.*

<sup>136</sup> *Id.* at 362. To survive strict scrutiny, the government must show it has a compelling interest in acting as it did and that its act was narrowly tailored to achieve this compelling interest. See *Washington v. Davis*, 426 U.S. 229, 248 (1976); see also *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (The government may not infringe on a fundamental liberty interest "unless the infringement is narrowly tailored to serve a compelling state interest." (internal quotation marks omitted) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993))).

<sup>137</sup> *Stein I*, 435 F. Supp. 2d at 363.

actually impede the government's compelling interest. When a corporation waives its attorney-client privilege, all communications between individual employees and corporate counsel will be provided to the prosecutors unless the officer or employee can show he consulted with corporate counsel in an individual capacity.<sup>138</sup> If the culture of waiver continues, employees and officers within the corporation will refuse to speak with corporate counsel about wrongdoing within the corporation because they will know that their conversations will likely be turned over to prosecutors when the corporation waives its privilege. Corporations will thereby have less information to provide to prosecutors and will not be able to provide the facts underlying the confidential communications nor direct prosecutors to certain witnesses.<sup>139</sup> Thus, by pressuring corporations to waive their attorney-client privilege, the government is actually impeding its ability to obtain relevant information to meet its compelling interest in "investigating and fairly prosecuting crime."<sup>140</sup> Therefore the DOJ policy of pressured waiver of corporate attorney-client privilege is not narrowly tailored to meet the government's compelling interest.

In sum, courts should find government pressure on corporations to waive their attorney-client privilege to be unconstitutional, as it does not survive strict scrutiny analysis. Courts should apply strict scrutiny analysis because the DOJ policy and practice of pressuring corporations to waive their attorney-client privilege interferes with the corporation's and corporate employees' rights to a fair trial and a defense free from government interference.<sup>141</sup> Although the government has a compelling interest in "investigating and fairly prosecuting crime,"<sup>142</sup> pressured corporate waiver is not narrowly tailored to achieve this interest because it creates a chilling effect on the willingness of employees to speak to corporate counsel about corporate wrongdoing. Thus, pressured corporate waiver has the effect of impeding the government's compelling interest and, consequently, does not survive strict scrutiny analysis.

<sup>138</sup> *Supra* notes 49-50 and accompanying text.

<sup>139</sup> Attorney-client privilege applies "only to *communications* and not to facts." *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) (internal quotations and citations omitted) ("The [attorney-client] privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."). Thus, even if the corporation does not waive its attorney-client privilege, it can still provide the prosecutors with the facts underlying the protected communications. *See id.*

<sup>140</sup> *Stein I*, 435 F. Supp. 2d at 363 (The government has a compelling interest in "investigating and fairly prosecuting crime."). If the employees stop speaking with corporate counsel for fear of corporate waiver of the attorney-client privilege, then the corporations will not even be able to share these underlying facts with prosecutors. Consequently, prosecutors will be unable to have the necessary information to investigate and fairly prosecute crime.

<sup>141</sup> *Id.* at 357 (noting that government pressure on a corporation is unconstitutional where it interferes with "the manner in which [the defendant] defends the case"). Furthermore, the employees' reluctance to speak with counsel would harm the corporation's ability to determine wrongdoing of its employees and to fix, internally, the problems caused by the illegal conduct.

<sup>142</sup> *Id.* at 363.



## 2. *U.S. v. Stein* Opens the Door to Legal Challenges to DOJ Policy and Practices

The courts have already begun to find aspects of the DOJ policy regarding prosecution of corporations to be unconstitutional.<sup>143</sup> The court's ruling in *Stein I*<sup>144</sup> was the first judicial strike against the Thompson Memorandum.<sup>145</sup> In 2006, the court held part of the Thompson Memorandum to be unconstitutional because it violated the defendant's right to effective counsel under the Sixth Amendment<sup>146</sup> and the defendant's due process rights under the Fifth Amendment.<sup>147</sup> In finding as such, the court maintained that "due process requires fair proceedings."<sup>148</sup> Although *Stein I* focused on the legal fees provision of the Thompson Memorandum, it opened the door for legal challenges to the DOJ's policy and practice of pressuring corporations to waive their attorney-client privilege to avoid indictment.<sup>149</sup>

The *U.S. v. Stein* case began in 2002 when the IRS issued nine summonses to the KPMG corporation as part of an IRS examination of KPMG's potential involvement in tax shelters.<sup>150</sup> The IRS claimed KPMG did not fully comply with the summonses and consequently brought suit to enforce them.<sup>151</sup> Prior to this matter, it was KPMG's policy to advance and pay, without limitation, all legal fees for KPMG partners and employees in any matter relating to "activities arising within the scope of the individual's duties and responsibilities as a KPMG partner, principal, or employee."<sup>152</sup> As a result of the Thompson Memorandum and United States Attorney's Office ("USAO") pressure in this matter,<sup>153</sup> KPMG changed its policy to implement a \$400,000 cap on

<sup>143</sup> *Id.* at 382.

<sup>144</sup> *See id.* at 362.

<sup>145</sup> Taigue, *supra* note 76, at 374.

<sup>146</sup> *See* U.S. CONST. amend. VI. The court in *Stein I* found that the Thompson Memorandum and the actions of the United States Attorney's Office "were parts of an effort to limit defendants' access to funds for their defense." *Stein I*, 435 F. Supp. 2d at 366. The court also found that "[e]ven if this was not among the conscious motives [of the DOJ], the Memorandum was adopted and the USAO acted in circumstances in which that result was known to be exceptionally likely." *Id.*

<sup>147</sup> *See* U.S. CONST. amend. V; *Stein I*, 435 F. Supp. 2d at 367-73. Although the court in *Stein* found the violation under the Thompson Memorandum, the McNulty Memorandum still advocates prosecutors placing undue pressure on the corporation to waive its privilege. *See supra* Part II.C.2. Thus the policy and principles behind the holding in *Stein* would still likely apply to the McNulty Memorandum.

<sup>148</sup> *Stein I*, 435 F. Supp. 2d at 357.

<sup>149</sup> Taigue, *supra* note 76, at 390 (finding the court's decision in *Stein I* "pushed the door open for future legal challenges to the most objectionable portion of the Memorandum: its heavy emphasis on pressuring corporations under investigation to waive their attorney-client and work product privileges").

<sup>150</sup> *Stein I*, 435 F. Supp. 2d at 338.

<sup>151</sup> *United States v. KPMG LLP*, 316 F. Supp. 2d 30, 31-32 (D.D.C. 2004).

<sup>152</sup> *Stein I*, 435 F. Supp. 2d at 340.

<sup>153</sup> A prosecutor's comments to KPMG counsel in this matter "[were] understood by both KPMG and government representatives as a reminder that payment of legal fees by KPMG, beyond

the amount of legal fees it would pay for any individual, and to pay these fees only as long as the individual cooperated fully with the government.<sup>154</sup> Furthermore, KPMG revised its policy to state clearly that it would stop payment of all legal fees and expenses if the government charged the recipient with criminal wrongdoing.<sup>155</sup>

In *Stein I*, the court held that the government violated the defendant's due process rights by pressuring the KPMG corporation to refuse payment of attorneys' fees of potential employee defendants, thus interfering with the defendants' choice of how to defend their case.<sup>156</sup> As a defense, the government claimed that it did not force or even suggest that KPMG create and implement a plan to refuse to pay attorney fees for individuals who did not cooperate in the DOJ's investigation.<sup>157</sup> However, based on the Thompson Memorandum and the DOJ's comments and behavior during its investigation, KPMG believed that full and prompt cooperation mandated that it not pay legal fees for its employees in order to avoid indictment.<sup>158</sup> The court agreed and found that the USAO purposefully facilitated KPMG's thinking in this regard.<sup>159</sup> In addition, the court found this pressure from the government to be unconstitutional,<sup>160</sup> even though there was no official request from the DOJ for the corporation to refuse payment of attorneys' fees for its employees.<sup>161</sup>

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any that it might legally be obligated to pay, could well count against KPMG in the government's decision whether to indict the firm." *Id.* at 344.

<sup>154</sup> *Id.* at 345.

<sup>155</sup> *Id.* at 345-46.

<sup>156</sup> *Id.* at 357 (finding the government interfered in "the manner in which [the defendant] defends the case"). The court in *Stein* found that the possibility of obtaining different counsel without the assistance of the corporation was not sufficient to allow the government to put undue pressure on the corporation to refuse to pay the attorney fees for the accused employee, and was not sufficient for the corporation to refuse such payment. *Id.* at 369.

<sup>157</sup> *Id.* at 351.

<sup>158</sup> *Id.* at 353 (finding KPMG's decision to stop all payments of legal fees and expenses of employees indicted by the government and to provide payments only to those who cooperate with the government was "the direct consequence of the pressure applied by the Thompson Memorandum and the USAO"). Furthermore, the court found that KPMG stood "to avoid a criminal conviction if it live[d] up to its part of the bargain" which included "cooperat[ing] extensively with the government, both in general and in the government's prosecution of this indictment." *Id.* at 349.

<sup>159</sup> *Id.* at 352 (finding the USAO "deliberately, and consistent with DOJ policy, reinforced the threat inherent in the Thompson Memorandum").

<sup>160</sup> *Id.* at 365 (The actions of the individual prosecutors in the USAO "cannot withstand strict scrutiny under the Due Process Clause because they too were narrowly tailored to serve compelling governmental interests.").

<sup>161</sup> *Id.* at 353. The court found KPMG's decision "to cut off all payments of legal fees and expenses to anyone who was indicted and to limit and to condition such payments prior to indictment upon cooperation with the government was the direct consequence of the pressure applied by the Thompson Memorandum and the USAO," even though the DOJ never explicitly requested that KPMG change its policy in that way. *Id.* The court found that "KPMG refused to pay because the government held the proverbial gun to its head. Had that pressure not been brought to bear, KPMG would have paid these defendants' legal expenses." *Id.* at 336. Furthermore, the court stated that the government "let its zeal get in the way of its judgment" and consequently "violated the Constitution it is sworn to defend." *Id.*

Soon after the court in *Stein I* partially dismissed the individual employees' indictments due to the DOJ pressure on KPMG, the employees moved for suppression of statements proffered to the government during the investigation.<sup>162</sup> The court found some of the employees' statements to be coerced and suppressed only those statements.<sup>163</sup> The Second Circuit Court of Appeals affirmed the district court's decision, which dismissed the indictment for all thirteen defendants.<sup>164</sup> The court held that the government violated the Sixth Amendment by unjustifiably interfering with defendants' ability to defend themselves.<sup>165</sup>

Similar to this Note's analysis of government pressure on corporations to waive their attorney-client privilege, the court in *Stein I* applied strict scrutiny in reaching its decision.<sup>166</sup> The court applied this analysis because the Thompson Memorandum and the government's behavior allegedly violated the defendant's substantive due process rights to fairness in the criminal process by interfering with the ability of the KPMG defendants "to obtain resources they otherwise would have had" for their defense.<sup>167</sup> Under strict scrutiny analysis, the court held that neither the guidelines established in the Thompson Memorandum, which advised prosecutors to consider negatively a corporation's advancement of legal fees to indicted employees, nor the government's exploitation of KPMG's fear of indictment by pressuring KPMG to refuse payment of legal fees for its employees, were narrowly tailored to the government's goal of prosecuting corporations for criminal acts.<sup>168</sup> Thus, the court held that it is unconstitutional for the government to pressure corporations to stop payment of legal fees of their employees.<sup>169</sup> The court's rationale for this decision was that individual employees have a right to choose their counsel without government interference and that the government's policy was not narrowly tailored to its goal of prosecuting corporations for criminal acts.<sup>170</sup>

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<sup>162</sup> United States v. Stein (*Stein II*), 440 F. Supp. 2d 315, 319 (S.D.N.Y. 2006).

<sup>163</sup> *Id.* at 330-33.

<sup>164</sup> United States v. Stein (*Stein III*), 541 F.3d 130, 136 (2d Cir. 2008) (affirming the dismissal of the indictment for the defendants "[b]ecause no other remedy will return defendants to the status quo ante").

<sup>165</sup> *Id.* As a result of the court's finding that the Sixth Amendment was violated by the government's actions and "[b]ecause no other remedy will return defendants to the status quo ante," the court did not "reach the district court's Fifth Amendment ruling." *Id.*

<sup>166</sup> See *supra* note 136 and accompanying text.

<sup>167</sup> United States v. Stein (*Stein I*), 435 F. Supp. 2d 330, 362 (S.D.N.Y. 2006), *aff'd*, 541 F.3d 130 (2d Cir. 2008) ("To survive strict scrutiny, government action must be narrowly tailored to achieve a compelling government interest.").

<sup>168</sup> *Id.* at 364-65. The court partially based its holding that the DOJ guidelines were not narrowly tailored on the fact that "the Thompson Memorandum does not say that payment of legal fees may cut in favor of indictment *only* if it is used as a means to obstruct an investigation." *Id.* at 363.

<sup>169</sup> *Id.* at 362.

<sup>170</sup> *Id.*; see also *supra* note 167. The court further held that "the government may not both prosecute a defendant and then seek to influence the manner in which he or she defends the case."

The pressure felt by corporations to either waive their attorney-client privilege or face indictment is similar to what happened in *Stein I*, where the corporation felt pressure from the government to stop all payments of legal fees and expenses of indicted employees or face indictment of the corporation.<sup>171</sup> The court in *Stein I* found government pressure on a corporation to be unconstitutional where it interfered with “the manner in which [the defendant] defends the case.”<sup>172</sup> This reasoning supports this Note’s contention that courts should find forced waiver of attorney-client privilege to be unconstitutional because it interferes with the corporation’s and corporate employees’ right to a defense free from government interference. The DOJ’s pressure upon the corporation to waive its attorney-client privilege negatively affects the corporation’s defense because it will result in employees’ refusal to speak fully and frankly with corporate counsel.<sup>173</sup> This silence by corporate employees will eventually result in the corporation’s inability to provide any information to the DOJ to assist in its investigation, as it will have no information to provide.<sup>174</sup> Consequently, the corporation will not have “cooperated” fully with the DOJ and will likely face indictment. In addition, government pressure on corporations to waive their attorney-client privilege will interfere in the defense of individual corporate employees because the waiver will result in prosecutors obtaining confidential information about the employee that can be used against him if he is indicted.<sup>175</sup>

The court in *Stein I* held that the possibility that the corporation’s payment of a defendant-employee’s legal fees would obstruct the DOJ’s investigation or signify a lack of full cooperation by the corporation is

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*Stein I*, 435 F. Supp. 2d at 357. “Nor may the government interfere at will with a defendant’s choice of counsel, as the Constitution ‘protect[s] . . . the defendant’s free choice independent of concern for the objective fairness of the proceedings.’” *Id.* (quoting *United States v. Panzardi Alvarez*, 816 F.2d 813, 818 (1st Cir. 1987) (internal citation and quotation marks omitted)).

<sup>171</sup> In *Stein I*, the government did not “instruct or request KPMG to change its decision about paying fees, capping the payment of fees, or conditioning the payment of fees on an employee’s or a partner’s cooperation.” 435 F. Supp. 2d at 351 (emphasis omitted). Thus, there is even more clear pressure from the government in the cases of attorney-client privilege waiver, where there is generally an actual request of waiver from the DOJ. In contrast, in the KPMG case, the corporation simply felt pressure to stop payments, without any official request by the DOJ. *Id.* Furthermore, even if the DOJ does not request waiver of privileges but the corporation merely feels pressure to waive the attorney-client privilege, the rationale behind the court’s findings in *Stein I* would still apply. After all, KPMG felt pressure to refrain from paying attorney fees for indicted employees, without any official request to do so by the DOJ. *Id.*

<sup>172</sup> *Stein I*, 435 F. Supp. 2d at 357.

<sup>173</sup> See *infra* notes 184-187 and accompanying text.

<sup>174</sup> If the employees stop speaking with corporate counsel for fear of corporate waiver of the attorney-client privilege, then there will be no communications or underlying facts in existence for corporations to share with prosecutors. In contrast, if the attorney-client privilege remains intact and employees thus continue sharing information with the corporation, the corporation can still provide the prosecutors with the facts underlying the protected communications. *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) (internal citations and quotations omitted) (“The [attorney-client] privilege . . . does not protect disclosure of the underlying facts by those who communicated with the attorney.”).

<sup>175</sup> See *supra* notes 122-128 and accompanying text.

not sufficient to justify government interference with the corporation's policy of payment of legal fees for an indicted employee.<sup>176</sup> Using this reasoning, courts should find the DOJ's justification of protecting shareholders through quick and efficient prosecution<sup>177</sup> similarly insufficient to justify the government's pressure upon corporations to give up the important and long-recognized attorney-client privilege.

Accordingly, courts should apply strict scrutiny analysis to determine the constitutionality of pressured corporate waiver of attorney-client privilege by the DOJ. Using strict scrutiny analysis, courts should find the DOJ practice of pressured waiver of corporate attorney-client privilege to be unconstitutional, as it interferes with the substantive due process rights of both the corporation and the individual employees. Furthermore, this Note demonstrates that the court's decision in *Stein I* supports the argument that an individual or corporation could successfully challenge the DOJ's policy and practice of pressuring corporations to waive their attorney-client privilege.

### *B. Pressured Waiver of Attorney-Client Privilege is Harmful*

Even if courts do not find the DOJ's pressure on corporations to waive their attorney-client privilege to be unconstitutional, the DOJ's practice of pressured waiver should still be rejected as harmful and unnecessary. This Note argues that the DOJ's pressure on corporations to waive their attorney-client privilege is harmful to the corporation, its employees, and its shareholders.

#### 1. Effect of Waiver of Attorney-Client Privilege on the Corporation

There are strong arguments in support of allowing the DOJ to pressure corporations to waive their attorney-client privilege. However, these potential benefits are outweighed by the negative effects pressured waivers have on corporations. One argument in support of pressured corporate waivers of attorney-client privilege is that fraud conducted within corporations harms the average investor, and prosecutorial tactics that pressure corporations to waive their privileges protect those

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<sup>176</sup> *Stein I*, 435 F. Supp. 2d at 369; see also *United States v. Stein (Stein II)*, 440 F. Supp. 2d at 338 ("It is no answer for the government to say that [the disputed] aspects of the Thompson Memorandum are needed to fight corporate crime. Those responsible should be prosecuted and, if convicted, punished. But the end does not justify the means."). Furthermore,

the fact that advancement of legal fees occasionally might be part of an obstruction scheme or indicate a lack of full cooperation by a prospective defendant is insufficient to justify the government's interference with the right of individual criminal defendants to obtain resources lawfully available to them in order to defend themselves . . . .

*Stein I*, 435 F. Supp. 2d at 369.

<sup>177</sup> McNulty Memorandum, *supra* note 17, at 1.

victimized by corporate fraud by facilitating the timely and cost-effective punishment of those guilty of corporate wrongdoing.<sup>178</sup> Also, the DOJ has credited the recent increase in prosecution of corporate crimes to corporate cooperation with DOJ investigations.<sup>179</sup> This cooperation includes waiver of corporate attorney-client privilege.<sup>180</sup> Moreover, corporate criminal convictions have caused a “return of investor confidence in the market”<sup>181</sup> and have deterred further corporate crimes.<sup>182</sup>

At the same time, there are strong arguments against the waiver policy, including the violation of the corporation’s constitutional rights.<sup>183</sup> Even if the benefits from pressured waivers are valid, if employees believe the corporation’s attorney-client privilege will likely be waived, employees will refrain from including corporate counsel in decisions that could be crucial for the corporation.<sup>184</sup> In addition, employees will be less inclined to speak with corporate counsel about anything even remotely related to the criminal wrongdoing for fear that the conversation will not constitute a personal privilege and will consequently be revealed to the prosecution when the corporation waives its attorney-client privilege.<sup>185</sup> This could harm the investigation even more than if privileges are not waived because it will encourage a culture of silence among employees.<sup>186</sup> As a result of employees’ silence, corporations will eventually have little, if any, valuable information to

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<sup>178</sup> See Taigue, *supra* note 76, at 395 (addressing the argument that the DOJ policy of requesting waivers of privileges is in place because “corporate fraud victimizes the average, unsophisticated investor”); Tancabel, *supra* note 32, at 220; *McNulty Hearings*, *supra* note 38, at 14-15 (statement of Michael L. Seigel, Professor, University of Florida Fredric G. Levin College of Law) (arguing that “sometimes waiver is the only means by which [f]ederal investigators and prosecutors can cut to the heart of the alleged corporate criminality in an efficient and timely manner” and that public good is gained when, “[w]ith corporate cooperation, the successful completion of a complex case can be reduced from a matter of years to a matter of months”).

<sup>179</sup> Tancabel, *supra* note 32, at 220.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 222.

<sup>182</sup> *Sen. Leahy Issues Statement on “Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum,”* U.S. FED. NEWS, Sept. 18, 2007 [hereinafter *Leahy Issues Statement*] (“Aggressive prosecution of corporate fraud has helped to reduce the culture of greed that devastated so many Americans [sic] financial security.”).

<sup>183</sup> See *supra* notes 115-121 and accompanying text.

<sup>184</sup> Tancabel, *supra* note 32, at 220. The *Upjohn* court found that “if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected” and “[a]n uncertain privilege . . . is little better than no privilege at all.” *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). Thus if the “purpose of the attorney-client privilege is to be served,” there cannot be a likely chance that the conversations between employee and corporate counsel will not be protected. *Id.*

<sup>185</sup> Tancabel, *supra* note 32, at 220; see also *ABA Report on Attorney-Client Privilege*, *supra* note 51, at 110 (“If a client fears that information revealed to his attorney will be made known to others, then the client will withhold information . . .”).

<sup>186</sup> See *supra* note 184.

assist prosecutors in their investigation.<sup>187</sup> Thus, while protection of the privilege will still allow valuable information, such as the facts underlying the privileged communication, to be provided to prosecutors,<sup>188</sup> forced waiver will prevent prosecutors from obtaining any information from employees because the employees will remain silent for fear of future personal harm. Moreover, without openness and frankness from corporate employees, it will be more difficult, if not impossible, for corporations to fully investigate and prevent future wrongdoing by corporate officers or employees because the corporation will lack the information necessary to do so.<sup>189</sup> By impeding the corporation's ability to learn about and rectify illegal conduct by its employees, the corporation, including its employees and ultimately its shareholders,<sup>190</sup> will be harmed.<sup>191</sup>

## 2. Effect of Waiver of Attorney-Client Privilege on Employees

In addition to harming the corporation, pressured corporate waiver of attorney-client privilege negatively affects corporate employees. Employees could lose their jobs when corporate employers fire employees under suspicion of wrongdoing in order to appease prosecutors.<sup>192</sup> In addition, placing undue pressure on corporations to waive their attorney-client privilege can result in waiver of individual employees' confidential communications with corporate counsel.<sup>193</sup>

Assuming the waiver of attorney-client privilege is voluntary,<sup>194</sup> some argue that corporations should be allowed to waive their attorney-client privilege because individuals are permitted to waive their

<sup>187</sup> See Tancabel, *supra* note 32, at 221 (“[E]rosion of the [attorney-client] privilege inhibits frank communications between employees and company counsel and therefore deters corporate compliance with the law.”).

<sup>188</sup> *Upjohn*, 449 U.S. at 395 (“The [attorney-client] privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.”).

<sup>189</sup> *Id.* at 393.

<sup>190</sup> Increased indictments of corporations will likely lead to a decrease in investor confidence in corporations and also cause more corporations to shut down, which will consequently have a negative effect on shareholders.

<sup>191</sup> The crimes committed by employees in companies like Enron and Worldcom deprived employees of their jobs and savings. *McNulty Hearings*, *supra* note 38, at 2 (statement of Hon. Patrick J. Leahy, U.S. Senator, State of Vermont) (crimes committed by employees in these corporations “left a lot of employees without jobs but also bereft of their life savings, and it devastated the shareholders . . . to whom [those executives] owe a fiduciary responsibility”); see also *supra* notes 2-3.

<sup>192</sup> Sarah Helene Duggin, *The McNulty Memorandum, the KPMG Decision and Corporate Cooperation: Individual Rights and Legal Ethics*, 21 GEO. J. LEGAL ETHICS 341, 346 (2008).

<sup>193</sup> See *supra* notes 49-50 and accompanying text.

<sup>194</sup> One might argue that the corporation makes a conscious choice to waive the attorney-client privilege in exchange for the DOJ's decision not to indict the corporation.

privileges when they are indicted for crimes.<sup>195</sup> Prosecutors often allow individuals indicted for crimes to waive their attorney-client privilege in exchange for leniency in charging or punishment.<sup>196</sup> However, in contrast to the corporate context, waiver by an individual is done voluntarily by the indicted individual after weighing the costs and benefits of waiver. In the corporate context, if a corporation waives its attorney-client privilege, it simultaneously waives all privileged communications between an employee and corporate counsel, unless the employee can prove his communications with corporate counsel were in an individual capacity.<sup>197</sup> In order for the employee or officer to prove his conversation with corporate counsel was conducted in an individual capacity, he must show that the substance of his conversations with corporate counsel “did not concern matters within the company or the general affairs of the company.”<sup>198</sup>

The burden of proof held by a corporate officer or employee to show he was represented in an individual capacity instead of as an officer of the corporate client is difficult to meet.<sup>199</sup> This difficulty arises because an individual employee or officer of the corporation will generally speak to corporate counsel about topics within the scope of the employee’s duties.<sup>200</sup> The individual will consequently be prone to personal liability because these communications will be revealed to the prosecution if the corporation waives its attorney-client privilege.<sup>201</sup>

### 3. What about the Shareholders?

Pressured waiver of a corporation’s attorney-client privilege can harm shareholders as well. Shareholders put their faith, and often their financial future, in the hands of the corporation. Corporations have a

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<sup>195</sup> *McNulty Hearings*, *supra* note 38, at 5-8 (statement of Karin Immergut, U.S. Attorney, District of Oregon).

<sup>196</sup> Steve Lash, *Panel Weighs Law to Counter Privilege Policy*, CHI. DAILY L. BULL., Sept. 18, 2007 (quoting U.S. Attorney Karin Immergut, who argued that “[t]he notion that prosecutors extend leniency in charging or punishment in exchange for cooperation is a concept fundamental to our criminal justice system,” and Sen. Jeff Sessions (R-Ala.), who argued that “[c]orporate defendants should not be treated different from other suspected criminals, who often waive their attorney-client privilege to help investigators in return for reduced charges or a lighter sentence”). Karin Immergut, U.S. Attorney for the District of Oregon, argued that “efforts to further restrict corporate waivers, such as Senate Bill 186” will not only diminish the prosecutor’s ability to protect victims and punish those guilty of corporate criminal acts, but they will also “establish rules for the investigation of corporate suspects which are different from those applicable to every other type of suspect.” *McNulty Hearings*, *supra* note 38, at 6 (statement of Karin Immergut, U.S. Attorney, District of Oregon).

<sup>197</sup> See *supra* notes 49-50 and accompanying text.

<sup>198</sup> EPSTEIN, *supra* note 41, at 157.

<sup>199</sup> *Id.* at 158; see also *supra* note 50 and accompanying text.

<sup>200</sup> EPSTEIN, *supra* note 41, at 158.

<sup>201</sup> *Id.*



duty to act in the best interest of their shareholders at all times.<sup>202</sup> Thus, one could argue that a corporation owes its shareholders full cooperation with the government, including waiver of attorney-client privilege, to ensure that those employees who have jeopardized the savings of the shareholders will be punished and prevented from committing any future harm against the shareholders' interests. However, while it is crucial to prosecute those guilty of corporate crimes in order to protect the shareholders and ensure the proper functioning of the market,<sup>203</sup> protection of attorney-client privilege between attorneys and employees of the corporation is necessary to protect shareholders' interests as well.

As argued above,<sup>204</sup> if the employees know that the corporation will likely waive its attorney-client privilege upon DOJ investigation, they will be less likely to disclose to the corporation any potential wrongdoing within the corporation. This lack of disclosure will impede the corporation's ability to provide all relevant information to the DOJ so that the DOJ can properly address the alleged wrongdoing. Therefore, the current "culture of waiver"<sup>205</sup> might eventually result in less successful prosecution of individuals guilty of wrongdoing because the corporations will not have information from employees that is sufficient to direct prosecutors to relevant facts or witnesses.<sup>206</sup> Failure to speak with corporate counsel will also harm the corporation's ability to conduct internal investigations and to change compliance programs to prevent further criminal wrongdoing within the corporation in the future because the corporation will not have the information necessary to do so.<sup>207</sup> In addition, the culture of waiver might result in more indictments of corporations because the corporation will not have sufficient information to provide to prosecutors in order to "cooperate" and avoid indictment.<sup>208</sup>

<sup>202</sup> See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.").

<sup>203</sup> McNulty Memorandum, *supra* note 17, at 1; see also *The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 2 (2007) (statement of Hon. Robert Scott, Chairman, Subcomm. on Crime, Terrorism, and Homeland Security) ("[I]t is vital that prosecutors . . . hold accountable wrongdoers who profit at the expense of ordinary working Americans.").

<sup>204</sup> See *Upjohn*, 449 U.S. at 393 (holding that "if the purpose of the attorney-client privilege is to be served," it cannot be probable that the conversations between employee and corporate counsel will be unprotected).

<sup>205</sup> Many argue the culture of waiver exists throughout the federal criminal justice system and not just with corporations because individual defendants regularly waive privileges to obtain leniency in prosecution or sentencing. See, e.g., *McNulty Hearings*, *supra* note 38, at 12-14 (statement of Daniel Richman, Professor, Columbia Law School).

<sup>206</sup> *Supra* notes 139-140 and accompanying text.

<sup>207</sup> The corporation's lack of ability to improve compliance programs would result from lack of information from employees from which to investigate or act upon to prevent corporate wrongdoing in the future.

<sup>208</sup> See Tancabel, *supra* note 32, at 221 ("[E]rosion of the [attorney-client] privilege inhibits frank communications between employees and company counsel and therefore deters corporate compliance with the law."). Although there is a current increase in prosecutions, it is likely

Increased indictments will likely lead to a decrease in investor confidence in corporations and may also cause more corporations to shut down, which will consequently have a negative effect on shareholders.<sup>209</sup>

Pressured corporate waiver of attorney-client privilege might initially result in quick prosecution of individuals and thus be beneficial to shareholders. However, this Note demonstrates that pressure on corporations to waive their attorney-client privilege will, in the long run, result in employees' refusals to provide important information to the corporation.<sup>210</sup> As a result of the employees' silence, investigators will not have as much information even if corporations do waive their attorney-client privilege, and there will be fewer successful prosecutions of individuals guilty of corporate fraud. Accordingly, pressured waiver of corporate attorney-client privilege is not in the best interest of shareholders.

Thus, this Note argues that the culture of silence that will result among corporate employees due to pressured waiver of attorney-client privilege will harm the corporation's ability to internally investigate and remedy problems caused by the illegal conduct. The employees' silence will also impede the ability of prosecutors to learn vital information to successfully prosecute corporate officers and employees guilty of wrongdoing. Therefore, this Note demonstrates that the DOJ policy of pressuring corporations to waive their attorney-client privilege should be rejected because it is harmful to the corporation, its employees, and its shareholders.

### C. *Pressured Waiver of Attorney-Client Privilege is Unnecessary*

It is not necessary for the DOJ to pressure corporations to waive their attorney-client privilege in order to meet its goals of obtaining fraud convictions and restoring investor confidence. Rather, as the DOJ acknowledges in its recently revised guidelines,<sup>211</sup> the DOJ can obtain the information necessary to reach its goals without corporate waiver of attorney-client privilege by ascertaining the facts underlying the protected communications, speaking with witnesses, and exercising its

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that these prosecutions will decrease as employees stop speaking with corporations in anticipation of the corporation's waiver of the attorney-client privilege. See *supra* notes 139-140 and accompanying text.

<sup>209</sup> GRAY ET AL., *supra* note 1, at 2 (observing that as a result of corporate crimes since the Enron scandal, there has been "an unprecedented assault on the integrity of U.S. corporations [and] . . . [n]ot surprisingly, the U.S. is suffering the effects of a considerable loss in investor confidence and an even greater loss of trust in corporations and their executives").

<sup>210</sup> See *ABA Report on Attorney-Client Privilege*, *supra* note 51, at 110 ("If a client fears that information revealed to his attorney will be made known to others, then the client will withhold information and the attorney will be left with less than all of the information needed to provide competent legal advice.").

<sup>211</sup> Filip Guidelines, *supra* note 16, ch. 9-28.720 ("[T]he sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant facts concerning such misconduct.").

rights under Federal Rule of Civil Procedure 26.<sup>212</sup> The protection of attorney-client privilege is interpreted narrowly<sup>213</sup> and applies “only to *communications* and not to facts.”<sup>214</sup> Thus, even if the attorney-client privilege is not waived, the DOJ will still have access to all non-privileged communications and all facts underlying all privileged and non-privileged communications.<sup>215</sup> In addition, the corporation “can direct the Government to documents and witnesses who will further its investigation” without providing prosecutors with the privileged documents themselves.<sup>216</sup> The DOJ can also interview relevant parties to the case to determine the material facts, instead of pressuring corporations to disclose the actual documents protected by attorney-client privilege.<sup>217</sup> Furthermore, Federal Rule of Civil Procedure 26 allows disclosure of all non-privileged information, including documents and tangible materials, where there is a showing of substantial need and an inability to obtain the information without undue hardship.<sup>218</sup>

As a result of these alternatives to waiver of corporate attorney-client privilege, the context and purpose of the communication, as well as the events surrounding the communication, are not protected from disclosure.<sup>219</sup> Accordingly, corporate waiver of attorney-client privilege is not necessary because the DOJ has effective alternative means to obtain sufficient information to successfully prosecute corporations and individuals accused of corporate crimes. Although without corporate

<sup>212</sup> FED. R. CIV. P. 26.

<sup>213</sup> EPSTEIN, *supra* note 41, at 11; *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 504 (2d Cir. 1991) (finding the attorney-client privilege “should be strictly confined within the narrowest possible limits underlying its purpose”); *National Labor Relations Bd. v. Harvey*, 349 F.2d 900, 907 (4th Cir. 1965) (finding attorney-client privilege “ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle”).

<sup>214</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) (“The [attorney-client] privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.”) (internal quotations and citations omitted). Indeed, the Supreme Court has explained that

the protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, “What did you say or write to the attorney?” but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

*Id.* at 395-96 (quoting *Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 2d 830, 831 (Pa. D. & C. 1962)).

<sup>215</sup> *Id.*; see also *supra* note 214 and accompanying text.

<sup>216</sup> *McNulty Hearings*, *supra* note 38, at 18 (statement of Andrew Weissmann, Partner, Jenner & Block, New York, New York) (also testifying that although there were waivers in connection with his prosecution of thirty individuals in the Enron case, the results would have likely been the same even without the waivers).

<sup>217</sup> *Id.* at 18. Although this will undoubtedly be more time consuming than having the corporation simply provide all necessary information regardless of privileges, it is not so inconvenient as to force the corporation to waive its attorney-client privilege.

<sup>218</sup> FED. R. CIV. P. 26. Thus, the context and purpose of the communication, and the events surrounding the communication, are not protected from disclosure. EPSTEIN, *supra* note 41, at 13.

<sup>219</sup> See EPSTEIN, *supra* note 41, at 13.

waiver of attorney-client privilege the prosecutors will have to interview the relevant parties to obtain the material facts, this extra effort is minimal in comparison to the rights that would otherwise be violated by undue pressure on corporations to waive their attorney-client privilege.<sup>220</sup>

This Note concludes that courts should find undue pressure by the DOJ on corporations to waive their attorney-client privilege to be unconstitutional as it fails strict scrutiny analysis and violates the rights held by the corporation and the corporate employee. The DOJ policy of pressured waiver should also be rejected because it is harmful to corporations, corporate employees, and shareholders. Furthermore, this Note demonstrates that pressured waiver of corporate attorney-client privilege is unnecessary as there are alternative means to waiver of corporate attorney-client privilege for prosecutors to obtain the information necessary to prosecute individuals guilty of wrongdoing within the corporation.

#### IV. POSSIBLE SOLUTIONS TO PROTECT PRIVILEGES AND ALSO MEET DOJ OBJECTIVES

There is no simple resolution to the issues discussed in this Note regarding the pressured waiver by the DOJ of a corporation's attorney-client privilege. A proper solution must balance the interests of the DOJ in prosecuting corporations and corporate employees guilty of criminal wrongdoing against the interests in protecting attorney-client privilege and ensuring fairness to corporations and individual employees accused of wrongdoing.<sup>221</sup> This section will evaluate three potential means by which to reach this balance. This Note proposes that the best solution is legislation that expressly prohibits the government from requesting corporate waiver of attorney-client privilege or from considering a corporation's waiver of attorney-client privilege in deciding whether to indict the corporation.

##### A. *Legislation: The Attorney-Client Privilege Protection Act of 2008*

Legislation addressing the issue of pressured waiver of the attorney-client privilege would be an effective solution to the issues discussed in this Note. Legislation would allow the court to regulate waivers of privileges, which would be more effective in preventing any

<sup>220</sup> See *supra* Parts III.A.1, III.C.

<sup>221</sup> *McNulty Hearings*, *supra* note 38, at 1-3 (statement of Hon. Patrick J. Leahy, U.S. Senator, State of Vermont). Although it is important to protect attorney-client privileges, the court and legislature must be careful not to go too far. *Id.* Misconduct by corporations and its employees "should not be given a safe haven or immunized from accountability." *Id.* at 2 (also arguing that "[w]e do not want to go back to the dark days before Sarbanes-Oxley when we were subject to corporate greed and actions taken in the dark").

further infringement on the rights of corporations and their employees than would be a change in DOJ policy.<sup>222</sup> Furthermore, unlike a change in DOJ policy, legislation would provide the necessary security to corporations and their employees because it would establish more permanent rules that prosecutors would be required to follow and that would apply to all federal regulatory entities.<sup>223</sup> This would ensure that corporations and their employees would know what to expect if the corporation is faced with potential corporate criminal liability, instead of being subject to the changing policy of the DOJ.<sup>224</sup> This Note will demonstrate that The Attorney-Client Privilege Protection Act of 2008,<sup>225</sup> which prohibits prosecutors from demanding, requesting, or conditioning treatment of a charging decision on the disclosure of any communication protected by the attorney-client privilege, would be effective in remedying the persisting culture of waiver.

Senator Arlen Specter introduced to Congress The Attorney-Client Privilege Protection Act of 2008,<sup>226</sup> which passed unanimously in the House committee.<sup>227</sup> The Act responds to the McNulty Memorandum

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<sup>222</sup> Legislation would be instead of the DOJ revising its own policy to protect the corporations from forced waiver who, as evidenced by the changes in the McNulty Memorandum, have not been very effective in preventing these forced waivers.

<sup>223</sup> See ABA President Wells Statement, *supra* note 23 (stating that the Filip Guidelines apply only to the Justice Department and “do[] nothing to change the similar policies adopted by the Securities and Exchange Commission, the Environmental Protection Agency and the Department of Housing and Urban Development, or the informal waiver practices of many other agencies”).

<sup>224</sup> *Id.* (ABA President H. Thomas Wells, Jr., stated that “the rights of American employees and the businesses they work for are too important to be subject to constantly shifting administrative policies. The Department’s new guidelines are its fifth such policy in ten years and can be changed again at any time.”).

<sup>225</sup> The legislation was introduced to the Senate on June 26, 2008. S. 3217, 110th Congress (2d Sess. 2008). It was read twice and referred to the Committee on the Judiciary. *Id.* The Bill was passed by the House of Representatives on November 15, 2007. H.R. 3013, 110th Congress (1st Sess. 2007). The act was originally introduced by Senator Specter in 2006. Tague, *supra* note 76, at 407. If passed, the bill “would have overturned portions of the Thompson Memorandum and its policies.” *Id.*

<sup>226</sup> See *supra* note 225.

<sup>227</sup> *Abuse of Privilege*, WALL ST. J., Sept. 20, 2007, at A12. The Bill is supported by several organizations and ex-DOJ employees, including the American Bar Association (“ABA”), the American Civil Liberties Union (“ACLU”), and Former Attorney General Richard L. Thornburgh. In endorsing the bill, the ABA said the Attorney-Client Privilege Protection Act of 2007 “is necessary to protect the communications between lawyer and client from potentially overzealous prosecutors.” Jerry Crimmins, *U.S. Harms Attorney-Client Privilege: Survey*, CHI. DAILY L. BULL., July 17, 2007. In supporting the Bill in 2006, the ACLU stated the “right of Americans to speak freely and without hesitation to their attorneys is fundamental and vital to the court system.” *American Civil Liberties Union Welcomes Attorney-Client Privilege Protection Act*, *supra* note 39. Thornburgh supports the Bill to protect privileged communications and argues that although the DOJ, in deciding whether or not to indict a corporation, should take into account the corporation’s willingness to provide the prosecution with all possible relevant information, the corporation should not have to reveal privileged communications for the DOJ to deem them cooperative in the investigation. Lash, *supra* note 196. Thornburgh argues that the bill would address the flaws in the McNulty Memorandum that threaten attorney-client privilege and would in no way impair federal prosecutors from prosecuting individuals or corporations. *McNulty Hearings*, *supra* note 38, at 10 (statement of Dick Thornburgh, former U.S. Attorney General and Of Counsel, K&L Gates, Washington, D.C.). Former Attorney General Thornburgh testified regarding the effect of the new bill on the ability of a prosecutor to obtain sufficient information for a conviction as someone who

by clearly prohibiting a prosecutor from demanding, requesting, or conditioning treatment of a civil or criminal charging decision on the disclosure by the corporation, or employee of the corporation, of any communication protected by the attorney-client privilege.<sup>228</sup> The Act also includes a provision, however, that states that the government is not prohibited from accepting a “voluntary and unsolicited offer” to share confidential or protected materials.<sup>229</sup>

This proposed legislation differs from the McNulty Memorandum, which allows prosecutors to take a corporation’s grant of waiver into consideration as an indication of corporate cooperation in the investigation.<sup>230</sup> Thus, if passed and followed by the DOJ, this new legislation would balance the interests of the DOJ while still protecting the attorney-client privilege, better than what was done by the McNulty Memorandum. The Act would prevent prosecutors from putting any undue pressure—explicit or implied—on corporations to waive their attorney-client privilege. This type of legislation would undoubtedly make it more difficult for prosecutors to build their case,<sup>231</sup> but it would also ensure full protection of the attorney-client privilege. In addition, in building their case, prosecutors would retain access to materials held by the corporation that were not protected by attorney-client privilege, and they would have access to the underlying facts of privileged documents.<sup>232</sup> Furthermore, as the government would not be prohibited from accepting a “voluntary and unsolicited offer” to share confidential

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“either served as a Federal prosecutor [himself] or supervised other Federal prosecutors” for a “large part of [his] professional career.” *Id.* at 11. Thornburg further argued that a prosecutor must balance the gathering of all relevant information from corporations while not forcing the corporation to reveal privileged communications. *Id.* at 12.

<sup>228</sup> H.R. 3013, 110th Cong. § 3(a) (1st Sess. 2007); S. 3217, 110th Cong. § 3(a) (2d Sess. 2008). The stated purpose of the Act is “to place on each agency clear and practical limits designed to preserve the attorney-client privilege and work product protections available to an organization and preserve the constitutional rights and other legal protections available to employees of such an organization.” H.R. 3013, 110th Cong. § 2(b) (1st Sess. 2007); S. 3217, 110th Cong. § 2(b) (2d Sess. 2008).

<sup>229</sup> H.R. 3013, § 3(a) (“Nothing in this Act is intended to prohibit an organization from making, or an agent or attorney of the United States from accepting, a voluntary and unsolicited offer to share the internal investigation materials of such organization.”); S. 3217, § 3(a) (“Nothing in this section may be construed to prohibit an organization from making, or an agent or attorney of the United States from accepting, a voluntary and unsolicited offer to waive the protections of the attorney-client privilege or attorney work product doctrine.”).

<sup>230</sup> The McNulty Memorandum prohibits prosecutors from considering negatively a refusal by the corporation to waive protection to privileged information, but the McNulty Memorandum also states “[p]rosecutors may always favorably consider a corporation’s acquiescence to the government’s waiver request in determining whether a corporation has cooperated in the government’s investigation.” McNulty Memorandum, *supra* note 17, at 10.

<sup>231</sup> McConnell, *supra* note 94 (reporting that Karin Immergut, a U.S. Attorney in Portland, Oregon, “warned that stripping prosecutors of the right to consider confidentiality waivers when deciding to bring charges or not could cause investigations to drag on for years”).

<sup>232</sup> The attorney client privilege is very narrow and does not protect the facts underlying the protected communication. *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981); *see also supra* notes 213-214 and accompanying text.

or protected materials,<sup>233</sup> the corporation could provide specific confidential materials to the prosecution if it deems them necessary for the DOJ's investigation. As opposed to the pressured waiver under the McNulty Memorandum, this provision would allow corporations to make their own decision about what, if any, privileged materials should be provided to prosecutors. The provision would also allow corporations to obtain the input and consent of corporate employees that might be affected by the corporation's decision to share protected materials with the DOJ before the corporation waives its attorney-client privilege.

One might argue that if waiver of privilege never counts toward the cooperation of the corporation, then corporations will have no incentive to waive their privileges and thus will never do so. This is not necessarily true, however, because corporations still have a fiduciary duty to their shareholders to act in their best interest at all times.<sup>234</sup> Accordingly, if the corporation believes that waiving part of its attorney-client privilege will facilitate the investigation and punishment of those involved in wrongdoing within the corporation, then the corporation should waive its privilege even though it is not technically getting "credit" from the DOJ for this waiver. Also, it is in the corporation's best interest to provide all relevant information possible to prosecutors because if their shareholders or members of the public, who are potential shareholders, think that the corporation is being uncooperative, then they will be less likely to invest in the corporation. Even if such a change in legislation resulted in a corporation never waiving its attorney-client privilege, the prosecution could still obtain the information necessary for its investigation through other means.<sup>235</sup>

Although The Attorney-Client Privilege Protection Act of 2008 provides provisions similar to those in the newly announced Filip Guidelines for prosecution of corporate crimes, the Act will provide certainty to the corporations and corporate employees that the Filip Guidelines cannot provide. The legislation will "ensure that the rights of corporate defendants are respected," as opposed to the DOJ's guidelines which could change at any moment.<sup>236</sup> This Note argues that if the

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<sup>233</sup> H.R. 3013, § 3(a); S. 3217, § 3(a).

<sup>234</sup> See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.").

<sup>235</sup> See *supra* Part III.C. It might not necessarily be a bad thing if corporations never waived the attorney-client privilege. As only a limited set of information is protected by the attorney-client privilege, *United States v. Goldberger & Dubin*, P.C., 935 F.2d 501, 504 (2d Cir. 1991), and the prosecutors can obtain the relevant facts underlying the protected communications, *Upjohn*, 449 U.S. at 395-96, it might not be necessary for the attorney-client privilege to be waived to facilitate the investigation. See also Parts III.A.1, III.C.

<sup>236</sup> Debra Cassens Weiss, *DOJ Announces New Corporate Guidelines that Ease Pressure for Privilege Waivers*, ABA J. LAW NEWS NOW, Aug. 28, 2008, available at [http://www.abajournal.com/news/doj\\_to\\_announce\\_new\\_corporate\\_fraud\\_guidelines\\_today/](http://www.abajournal.com/news/doj_to_announce_new_corporate_fraud_guidelines_today/) (referring to ABA President H. Thomas Wells Jr.'s statement in a press release regarding the new DOJ guidelines announced Aug. 28, 2008, by Deputy Attorney General Mark R. Filip).

corporation and its employees know the unreliable nature of the DOJ guidelines, then the culture of waiver will persist since corporations will never know when the guidelines for prosecution of corporate crimes will change. Also, even if the culture of waiver does not persist, its negative effects of causing corporate employees to stop speaking to corporate counsel about wrongdoing within the corporation will continue since the corporate employees will never know when the policy will change back to allow pressured waiver of the corporate attorney-client privilege.<sup>237</sup>

Accordingly, this Note demonstrates that legislation should be enacted to prohibit prosecutors from requesting waiver of corporate attorney-client privilege or from considering any grant or refusal by a corporation to waive its attorney-client privilege. Without such a prohibition, the culture of waiver will persist and continue to be detrimental to corporations, shareholders, and employees.<sup>238</sup> Although revisions to the DOJ guidelines improve the current culture of waiver, no DOJ guidelines that are implemented will provide the necessary security to corporations because they can be changed at any moment, and they do not apply to all federal regulatory entities.<sup>239</sup> This Note argues that The Attorney-Client Privilege Protection Act of 2008 would be an effective remedy to the current culture of waiver as it would facilitate the prosecution of those guilty of corporate wrongdoing while protecting the attorney-client privilege. In addition, unlike any DOJ guidelines that might be implemented, legislation will provide security to corporations because it will make certain that the rights of those accused of corporate crimes will be protected regardless of the guidelines used by the DOJ in the prosecution of corporate defendants.

### B. *Revision of DOJ Guidelines*

Another potential solution to the culture of waiver is the newly announced DOJ guidelines for prosecuting corporate criminals.<sup>240</sup> The new guidelines adopt a portion of The Attorney-Client Privilege Protection Act, passed in the House of Representatives, which states that an organization that voluntarily discloses relevant facts to the government to assist in its investigation should receive the same amount of cooperation credit regardless of whether or not the facts disclosed are protected by attorney-client privilege.<sup>241</sup> Although these guidelines are an

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<sup>237</sup> See *supra* Part II.B.

<sup>238</sup> See *supra* Part III.B. Prosecutors could obtain evidence for the prosecution of individuals guilty of corporate criminal acts without waiver of the attorney-client privilege. See *supra* Part III.C.

<sup>239</sup> ABA President Wells Statement, *supra* note 23.

<sup>240</sup> See generally Filip Guidelines, *supra* note 16.

<sup>241</sup> *Id.* ch. 9-28.720(a) (“[A] corporation should receive the same credit for disclosing facts contained in materials that are not protected by the attorney-client privilege or attorney work product as it would for disclosing identical facts contained in materials that are so protected.”).



improvement from those provided in the McNulty Memorandum, which allowed prosecutors to positively take into account waiver of attorney-client privilege by the corporation, this Note argues that the new guidelines will not be enough to cure the negative effects of the culture of waiver created by the Thompson and McNulty Memoranda. Since the DOJ guidelines have been changed various times in the past and can be changed again at any time in the future with little or no warning,<sup>242</sup> the implementation of new guidelines will not provide the security necessary to remedy the negative effects of the culture of waiver. Furthermore, unlike the Attorney-Client Privilege Protection Act of 2008, which would apply to all federal entities, the Filip Guidelines only apply to the Department of Justice and not to other regulatory agencies, such as the Securities and Exchange Commission or the Internal Revenue Service.<sup>243</sup> This Note argues that corporate employees will still refrain from speaking to corporate counsel about potential wrongdoing within the corporation for fear that the corporation will feel pressure in the future from the DOJ or other federal regulatory entities to waive the corporation's attorney-client privilege and thus likely disclose the employees' conversations with corporate counsel.<sup>244</sup> This will consequently harm the corporation's ability to prevent future wrongdoing within the corporation and to provide prosecutors with important facts underlying the communications between corporate employees and corporate counsel.<sup>245</sup>

Furthermore, the potential ineffectiveness of the revised guidelines in remedying the culture of waiver is evident from the persisting culture of waiver under the McNulty Memorandum, which was implemented in 2007.<sup>246</sup> There have been allegations not only that prosecutors have blatantly ignored the provisions of the McNulty Memorandum and demanded corporate waiver of privilege, but that the DOJ has refrained from enforcing the rule in the McNulty Memorandum that prosecutors may not demand waiver of attorney-client privilege as a sign of cooperation.<sup>247</sup> Therefore, as a result of the culture of waiver created by the Thompson Memorandum and persisting under the McNulty Memorandum, corporations could still feel pressure from

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<sup>242</sup> See *supra* note 101 and accompanying text.

<sup>243</sup> Bill McConnell *DOJ Stiffens Client Protections*, DAILY DEAL, Aug. 29, 2008 (quoting David Weiner, former member of the ABA's standing committee on the federal judiciary as saying it is problematic that only federal prosecutors are covered by the new DOJ guidelines, and that "[o]ver the last 10 years we've seen the culture of waiver permeate throughout the federal government. We need federal legislation that will make sure DOJ's new policies are comprehensive" (internal citations omitted)); Filip Guidelines, *supra* note 16, at 21 (The principles in the Filip Guidelines "provide only internal Department of Justice guidance" and "are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.").

<sup>244</sup> See *supra* Part II.B.

<sup>245</sup> See *supra* Part II.B.

<sup>246</sup> See *supra* note 87.

<sup>247</sup> See *supra* note 94.

prosecutors to waive their attorney-client privilege or face indictment. Simply because the DOJ announced a new policy does not mean the prevalent culture of waiver will disappear.

### C. *No Prosecution of Corporations*

Some have suggested reforming corporate criminal liability to prevent the government from ever prosecuting corporations and instead allowing the DOJ to charge only individual employees who committed the crimes.<sup>248</sup> This would alleviate the pressure corporations feel to grant requests to waive the attorney-client privilege in order to avoid indictment.<sup>249</sup> However, changing the law such that corporations could always avoid criminal liability would send the wrong message. The reasoning behind corporate criminal liability is to hold corporations liable for a more serious crime instead of having them face only civil liability.<sup>250</sup>

Accordingly, this Note recommends that the most effective resolution of the conflict between prosecuting those guilty of corporate crimes and protecting the corporate attorney-client privilege is legislation, such as The Attorney-Client Privilege Protection Act of 2008, which prohibits the government from requesting corporate waiver of attorney-client privilege and from considering a corporation's waiver of attorney-client privilege in making its indictment decision. Although the recent changes in the DOJ guidelines for prosecution of corporate crimes are a step in the right direction, they will not be enough to remedy the persisting culture of waiver or its negative effects. Merely telling prosecutors what not to do regarding prosecution of corporations did not work in the past,<sup>251</sup> so there is no guarantee that it will be effective now. Legislation will be more effective in remedying the culture of waiver as it will provide assurance to corporations and corporate employees that the DOJ policy will not be changed again in the future to allow requests to or pressure on corporations to waive their attorney-client privilege. Furthermore, legislation such as The Attorney-Client Privilege Protection Act of 2008 will apply to all federal entities, as compared to the Filip Guidelines, which only apply to the DOJ.<sup>252</sup>

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<sup>248</sup> Taigue, *supra* note 76, at 407.

<sup>249</sup> See *supra* Part II.C.

<sup>250</sup> *New York Cent. R. R. v. United States*, 212 U.S. 481, 495 (1909) (holding that a corporation can be held liable for the crimes of its agents and officers when the corporation profits by such transactions). “[T]o give [corporations] immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.” *Id.* at 495-96.

<sup>251</sup> See *supra* notes 87, 94 and accompanying text.

<sup>252</sup> *Companies Get Protected from DOJ Pressure*, CFO MAG., Aug. 28, 2008, at 7 (stating that although the new guidelines announced by Deputy Attorney General Mark Filip “are binding on the DOJ, other federal entities, including the Securities and Exchange Commission, aren’t required to follow the new rule”); ABA President Wells Statement, *supra* note 23 (“Comprehensive

## V. CONCLUSION

The corporate crimes committed within Enron alone caused employees and shareholders to lose billions of dollars.<sup>253</sup> Successful prosecution of corporate criminals is necessary to protect the public and to restore confidence in the market. Since 2001, the DOJ's policy for prosecution of corporate crimes has facilitated over 1200 corporate criminal convictions.<sup>254</sup> These convictions have deterred others from committing corporate crimes<sup>255</sup> and restored investor confidence in the market.<sup>256</sup> Although successful identification and punishment of those guilty of criminal wrongdoing is vital, it should not be achieved at the expense of the rights and privileges guaranteed by the Constitution.

The McNulty Memorandum was not sufficient to remedy the culture of waiver, as it did not prevent the DOJ from placing undue pressure on a corporation to waive its attorney-client privilege. Although the recently announced Filip Guidelines are an improvement of the DOJ policy for prosecution of corporate crimes since the Thompson and McNulty Memoranda, they will not be enough to remedy the persisting culture of waiver or its negative effects. Pressured waiver of attorney-client privilege forces the corporation to reveal communications between corporate counsel and the corporation's employees, and thus impedes the corporation's ability to gain valuable information from employees to conduct internal investigations and prevent further incidents.<sup>257</sup> The corporation's waiver of its attorney-client privilege will simultaneously include waiver of confidential conversations between employees and corporate counsel, without the consent of the employee, unless the employee can prove her communications with corporate counsel were in an individual capacity.<sup>258</sup> Therefore, this Note demonstrates that the culture of waiver will eventually result in employees refusing to speak fully and openly with corporate counsel because the employees will know that their communications will likely be revealed to prosecutors when the corporation waives its attorney-client privilege. Thus, if the attorney-client privilege is not protected, corporate counsel will be unable to learn all relevant information regarding an alleged crime. This will inhibit the corporation's ability to both assist the DOJ in its

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legislation is the only way to make the Department's reforms permanent, give them the force of law, and apply them to all federal agencies.").

<sup>253</sup> Alexei Barrionuevo, *The Enron Verdict: The Overview; 2 Enron Chiefs are Convicted in Fraud and Conspiracy Trial*, N.Y. TIMES, May 26, 2006, at A1.

<sup>254</sup> *McNulty Hearings*, *supra* note 38, at 5 (statement of Karin Immergut, U.S. Attorney, District of Oregon).

<sup>255</sup> *Leahy Issues Statement*, *supra* note 182 ("Aggressive prosecution of corporate fraud has helped to reduce the culture of greed that devastated so many Americans [sic] financial security.").

<sup>256</sup> Tancabel, *supra* note 32, at 222.

<sup>257</sup> *See supra* Part III.B.1.

<sup>258</sup> *See supra* notes 49-50 and accompanying text.

investigation and increase effectiveness of corporate compliance programs to prevent further misconduct within the corporation.

This Note argues that courts should use strict scrutiny analysis in determining the constitutionality of pressured corporate waivers of attorney-client privilege.<sup>259</sup> Using this analysis, and supported by the court's reasoning in *Stein I*,<sup>260</sup> courts should find the DOJ's policy of pressuring corporations to waive their attorney-client privilege to be unconstitutional.<sup>261</sup> Furthermore, this Note demonstrates that the DOJ policy of pressured waiver should be rejected because it is harmful to corporations, employees, and shareholders,<sup>262</sup> and it is unnecessary, as prosecutors have sufficient alternative means to obtain the information relevant to their investigation.<sup>263</sup>

Legislation is the most effective way to strike a proper balance between protecting the corporation's attorney-client privilege and meeting the DOJ's goal of finding and prosecuting criminal conduct by corporations and their employees. While the recent change in DOJ policy on August 28, 2008 provides greater protection to the corporate attorney-client privilege, it will not remedy the current culture of waiver. This Note argues that corporations will still feel pressure to waive their attorney-client privilege or face indictment of the corporation. This distrust of the DOJ and corporate counsel that is being developed by corporate employees could remain despite the recent improvement in DOJ policy.<sup>264</sup> Even if corporations no longer feel pressure to waive their attorney-client privilege, the negative effects of the culture of waiver will persist because there is no guarantee that the DOJ will not change its policy for the prosecution of corporate crimes again tomorrow to allow pressured waiver of corporate attorney-client privilege. This Note argues that this uncertainty will result in corporate employees' refusal to speak with corporate counsel about any potential wrongdoing within the company because they will know their communications will likely be revealed to prosecutors when the corporation waives its attorney-client privilege.<sup>265</sup> This result will consequently inhibit the corporation from preventing future misconduct within the corporation and from providing prosecutors with important information for their investigation.<sup>266</sup>

Legislation would provide certainty to corporations and their employees that the corporate attorney-client privilege will be protected in the future and that the rights of the corporation and its employees will

<sup>259</sup> See *supra* Part III.A.1.

<sup>260</sup> 435 F. Supp. 2d 330 (S.D.N.Y. 2006), *aff'd*, 541 F.3d 130 (2d Cir. 2008); see also *supra* Part III.A.2.

<sup>261</sup> See *supra* Part III.A.

<sup>262</sup> See *supra* Part III.B.

<sup>263</sup> See *supra* Part III.C.

<sup>264</sup> See generally Filip Guidelines, *supra* note 16.

<sup>265</sup> See *supra* Part II.B.

<sup>266</sup> See *supra* Part III.B.1.

not be violated. Unlike the DOJ policy, legislation would also allow for regulation by the courts and would apply to all federal entities. In providing greater protection to corporations, legislation would thus allow employees to speak at ease with corporate counsel. This would ensure the protection of employee rights as well as allow corporations to gain the necessary information from employees to conduct internal investigations of corporate wrongdoing within the corporation. This Note proposes that The Attorney-Client Protection Act of 2008 is a viable option to both remedy the culture of waiver prevalent in DOJ corporate investigations and protect corporate attorney-client privilege from DOJ pressure to waive. Prosecution of corporate crimes is undoubtedly crucial to protecting the public and maintaining investor confidence. However, this need must be balanced with the right, protected by the attorney-client privilege, of corporate employees to fully and frankly communicate with corporate counsel.

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