

Written Testimony
United States Senate Committee on the Judiciary
“The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations”
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Good morning Chairman Specter, Ranking Member Leahy and members of the Committee and staff. I am Andrew Weissmann, a partner at the law firm of Jenner & Block in New York. I served for 15 years as an Assistant United States Attorney in the Eastern District of New York and had the privilege to represent the United States as the Director of the Department of Justice’s Enron Task Force and Special Counsel to the Director of the FBI.

I will make three main points regarding the Thompson Memorandum’s effect on the right to counsel in corporate investigations.

A. A Lack of Uniform Standards Regarding Requests for Waivers of the Attorney-Client Privilege

First, there have been and still are wide differences across the country regarding when and how to seek a waiver of the attorney-client privilege in white collar investigations. The Thompson Memorandum gives federal prosecutors a green light to seek waivers of the attorney-client privilege. It offers no guidance, however, about when it is appropriate to do so and when the government should consider a corporation’s failure to waive as a sign of non-cooperation.¹ The considerable variances in implementation of the Thompson Memorandum often subject corporations, many of which are national and even international in scope, to the vagaries and unreviewed decisions of an individual prosecutor. This problem can be exacerbated by the tradition of independence of each of the 93 United States Attorneys across the country, whose offices in practice often run quite autonomously of Main Justice here in Washington, D.C. Indeed, even though then-Acting Deputy Attorney General Robert McCallum, in a memorandum issued eleven months ago called for each Office to implement a written review process governing the request for waivers of the attorney-client privilege by individual federal prosecutors, I understand this process is not yet complete. But more to the point, even if the McCallum directive reaches successful completion, its positive effects will be limited. Individual written policies within a particular U.S. Attorney’s Office may alleviate variations of interpretation within that same prosecutor’s office, but do nothing to advance a national policy on the issue. Thus, although the theory of the Thompson Memorandum is a good one -- setting forth the criteria that should guide all federal prosecutors in deciding when to seek to charge

¹ “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 and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel.” Memorandum from Deputy Attorney Gen. Larry D. Thompson, to Heads of Dept. Components, U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) [hereinafter Thompson Memorandum], *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (last visited September 9, 2006), § VI cmt.

corporations -- in practice the interpretation and implementation of its “factors” is left to the determination of individual prosecutors. Even assuming good faith and dedication to public service by all federal prosecutors, they are not receiving the necessary guidance to diminish the wide variations that currently exist.

It is important to discuss specifics in order to understand the scope of the problem. There are two areas that I think are not of particular controversy in practice. First, it is quite common for prosecutors to request and corporations to agree to a waiver of attorney-client communications made at the time of the transaction that is under investigation. So, for instance, a prosecutor may examine, such as I did, a transaction at Enron that appears to be undertaken to manipulate earnings by transferring losses from a failing business segment to a profitable one. What Enron employees were saying to internal and outside counsel at the time regarding the legality of such a transaction would be particularly important in determining the intent of the employees who were responsible for the transaction. If the lawyers blessed the transaction, with full knowledge of the transaction and its purpose, the requisite criminal intent would likely not exist. On the other hand, if the lawyers were given less than the full factual picture, then the evidence from those attorneys becomes powerful proof that the employees were hiding facts precisely because they were conscious of the wrongfulness of the transaction. Corporations will generally waive the privilege in those situations both because the government’s need for such information can be particularly strong and because the company itself may seek to rely on an advice of counsel defense, and thus a waiver would occur anyway.

Conversely, the Thompson Memorandum makes clear that it is generally inappropriate to seek a waiver with respect to communications between the corporation and its counsel regarding the company’s defense of a current criminal investigation.² Such communications are rarely if ever necessary to determine the legality of the underlying transactions, even though they may in fact be quite relevant to the government’s investigation.

There is, however, a wide area in the middle where the practices of federal prosecutors vary considerably. Prosecutors have interpreted -- and unless someone intervenes will continue to interpret -- the Thompson Memorandum to mean that it is appropriate at the very outset of a criminal investigation involving a corporation to seek a blanket waiver of all attorney-client communications, other than current communications regarding how to defend the case. That waiver can include the disclosure of all reports prepared by counsel of its interviews of employees as part of a company’s internal investigation as well as production of counsel’s notes taken at any interviews (whether of a company employee or a third party) -- even when the government attorneys and agents can interview the witnesses themselves or were present at the interviews. In other words, disclosure is sought even though the government could replicate the information by rolling up its sleeves and interviewing the witnesses.³

² Thompson Memorandum, § VI n.3 (“This waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government’s criminal investigation.”).

³ For example, the Thompson Memorandum acknowledges that waivers “permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements.” Thompson Memorandum, § VI cmt.

On the other hand, other prosecutors take a more surgical approach and proceed incrementally—only seeking a full waiver where it is truly important to the investigation and other interim steps have failed. This latter approach is of course far more responsible. Indeed, the Thompson Memorandum itself, insofar as it generally places off limits current communications with counsel regarding the company’s defense, suggests such an approach. Those communications could be highly relevant to the investigation -- but disclosure would cut to the core of the attorney-client privilege, and they are rarely if ever necessary to an investigation. In my opinion, DOJ in Washington should promulgate guidance strictly cabining prosecutors’ discretion to seek immediate blanket waivers and curtailing the solicitation of waivers that are simply a shortcut where the government can obtain the information directly.

B. Penalizing Assertions of a Constitutional Right

The second point I would like to make concerns the credit given under the Thompson Memorandum to companies that fire or do not pay legal fees for employees who refuse to speak with the government based on the Fifth Amendment.⁴ These aspects of the Thompson Memorandum have garnered significant attention recently by virtue of two decisions by Judge Lewis Kaplan of the Southern District of New York, in the so-called KPMG tax shelter case.⁵ Judge Kaplan addressed two of the Thompson Memorandum factors that govern whether to indict a company -- whether a company elects to pay the legal fees of its employees and whether it retains personnel who assert the Fifth Amendment privilege against self-incrimination during a criminal investigation.

Judge Kaplan’s opinions highlight that the Thompson Memorandum -- and the way it is wielded by federal prosecutors -- is causing companies to fire employees for merely asserting their constitutional right to remain silent, and is interfering with the ability of employees to mount a defense by essentially restricting the employee’s access to counsel that the corporation would otherwise have funded.

In the first *Stein* decision, Judge Kaplan found that prosecutors had invoked the Thompson Memorandum at the very outset of its investigation to pressure KPMG to break its long-standing tradition of paying its employees’ legal fees. KPMG’s payment of legal fees was at the top of the prosecutors’ agenda from their very first discussions with KPMG, and the court found that the prosecutors had indicated that the government would not look favorably on the voluntary advancement of legal fees. Judge Kaplan concluded that by causing KPMG to cut off legal fees

⁴ Thompson Memorandum, § VI (“In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection.”); *id.* § VI cmt. (“Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus . . . a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees [or] through retaining the employees without sanction for their misconduct, . . . may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.”).

⁵ *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006); *United States v. Stein*, No. S1 05 Crim. 0888 LAK, 2006 WL 2060430 (S.D.N.Y. July 25, 2006).

to employees, the Thompson Memorandum violated the Fifth Amendment's due process clause and the Sixth Amendment right to counsel.

In the second *Stein* decision, issued one month later, Judge Kaplan concluded that certain statements made to the government by KPMG employees had been coerced and thus obtained in violation of the Fifth Amendment. KPMG had threatened certain employees that if they did not cooperate with the government's investigation they would be fired or their legal fees would not be paid. The court concluded that KPMG took those steps at the behest of the government and that the Thompson Memorandum precipitated KPMG's use of economic threats to coerce statements from its employees. Under these circumstances, the court found that such an identity existed between the government and KPMG that KPMG's conduct could be legally attributed to the government. Because he found that the government had coerced the pre-trial proffer statements of two defendants, Judge Kaplan suppressed them.⁶

The factual situation in KPMG is not unique. Across the country corporations have instituted strict policies that call for firing employees or refusing to advance legal fees to employees who do not "cooperate" with the government. The motivation behind these policies is often to enable the company to be in full compliance with the Thompson Memorandum factors so that it can avoid being indicted. Employees at these companies who refuse to speak with the government based on their Fifth Amendment rights against self-incrimination risk losing their jobs or having payment of their defense fees cut off.

Regardless of the legal firmness of the *Stein* decisions and of Judge Kaplan's attribution of state action to KPMG, the case underscores the need to reevaluate the Thompson Memorandum as a policy matter. It should be revised so that it no longer encourages an environment where employees risk losing their jobs or legal defense merely for exercising their constitutional right

⁶ The constitutional problem with a corporation's dismissing an employee as a result of the government's Thompson Memorandum arises because of a Supreme Court case governing the appropriateness of state actors' firing employees for refusing to cooperate. In *Garrity v. New Jersey*, 385 U.S. 493 (1967), the Supreme Court considered whether an incriminating statement can be voluntary if the alternative to self-incrimination is losing one's job. The defendants were New Jersey police officers under investigation for "fixing" traffic tickets. A New Jersey statute provided for the dismissal of any public official who refused, on the basis of self-incrimination, to answer questions relating to his employment. The defendants cooperated and made incriminating statements, which the state attempted to introduce against them at their subsequent trial. The trial court concluded that the statements were voluntary and admitted them over the defendants' objections. The defendants were subsequently convicted of conspiring to obstruct the administration of the state's traffic laws.

In affirming the trial court's determination that the statements had not been coerced, the New Jersey Supreme Court placed great weight on the absence of coercive tactics during the officers' questioning. It noted that the interrogation lacked physical as well as psychological compulsion.

The United States Supreme Court reversed. That coercive interrogation tactics had not been used to elicit the officers' statements was of no consequence. Instead, the Court focused on the choice the officers faced. Although they may have chosen to cooperate rather than lose their jobs, the mere fact of election did not render their statements free of duress. The choice between self-incrimination or job loss was, in short, no choice at all, and was in fact "the antithesis of free choice to speak out or to remain silent." The Court held that the state could not condition the right to remain silent on the threat of removal from office.

not to speak to the government. In determining whether to indict a company, the DOJ should not permit consideration of the company's treatment of an employee who has asserted her Fifth Amendment right. This factor should simply not come into play in the analysis of whether a corporation has or has not cooperated. Although a company itself can properly fire an employee or cut off legal fees based on whether she cooperates with an investigation, the DOJ should not weigh in on this determination -- and not because a court may ultimately deem the company's actions as government conduct. Rather, for policy reasons, the DOJ should simply not base its decision to prosecute a company on whether a person has been punished by her employer for asserting a constitutionally guaranteed right.⁷

Moreover, with respect to a corporation's advancement of employees' legal fees, the Thompson Memorandum should be revised to make mandatory the current approach employed by cautious prosecutors. The wary prosecutor, for instance, will raise the issue of whether a company is paying for its employees legal fees only *after* the government has determined it has a prosecutable case against the company and only if that factor could make a difference in the calculus of whether to charge the company. And even then, the advancement of legal fees should only count against a company if the payment is part of a scheme to obstruct the government's investigation.

C. Rethinking Criminal Corporate Liability

The issues being addressed today by this Committee are symptoms of a larger problem with the current state of the law of criminal corporate liability. To understand what is wrong with the Thompson Memorandum and how the guidelines for prosecutorial decision-making can be improved, we need first to consider the context in which the Thompson Memorandum operates. There are two principal forces at work.

The first is the prevailing understanding that a corporate indictment could be the equivalent of a death sentence. One of the lessons corporate America took away from Arthur Andersen's demise in 2002 is to avoid an indictment at all costs. A criminal indictment carries potentially devastating consequences, including the risk that the market will impose a swift death sentence -- even before the company can go to trial and have its day in court. In the post-Enron world, a corporation will thus rarely risk being indicted by a grand jury at the behest of the Department of Justice. The financial risks are simply too great.

⁷ Andrew Weissmann & Ana R. Bugan, *No Choice: It's Time to Rethink the DOJ's "Principles of Federal Prosecution of Business Organizations"*, *The Deal*, Aug. 7, 2006, at 24.

The second principle at work is the current standard of criminal corporate liability under federal common law. A corporation can be held criminally liable as a result of the criminal actions of a single, low-level employee if only two conditions are met: the employee acted within the scope of her employment, and the employee was motivated at least in part to benefit the corporation. No matter how large the company and no matter how many policies a company has instituted in an attempt to thwart the criminal conduct at issue, if a low-level employee nevertheless commits such a crime, the entire company can be prosecuted.⁸

In light of the Draconian consequences of an indictment and the fact that the federal common law criminal standard can be so easily triggered -- despite a company's best efforts to thwart criminal conduct -- the Thompson Memorandum offers prosecutors enormous leverage. To avoid indictment, corporations will go to great lengths to be deemed "cooperative" with a government investigation. KPMG is a prime example, and one that has been spotlighted in the two decisions by Judge Kaplan in the *United States v. Stein* case.

Although the Thompson Memorandum has recently received significant negative attention, and is in some ways an easy target, it is not the real source of the problem. The root cause that renders the Thompson Memorandum such a sharp weapon is the standard for criminal corporate liability and the absence of systemic checks to restrict the government's power to charge corporations whenever an employee strays. The current standard for corporate criminal responsibility affords prosecutors enormous -- and unduly disproportionate -- leverage and power. In this climate, a corporation has little choice but to conform its conduct to the Thompson Memorandum factors, even in the absence of a prosecutor's overt threats.

A rethinking of criminal corporate liability is in order. The standard for criminal liability should take into account a company's attempts to deter the criminal conduct of its employees.⁹ Holding the government to the additional burden of establishing that a company did not implement reasonably effective policies and procedures to prevent misconduct would both dull the threat inherent in the Thompson Memorandum as well as help correct the imbalance in power between the government and the corporation facing possible prosecution for the acts of an errant employee. A more stringent criminal standard, one that ties criminal liability to a company's lack of an effective compliance program, would have the added benefit of maximizing the chances that criminality will not take root in the first place -- since corporations will be greatly

⁸ *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481 (1909) (holding that illegal rebates granted by agents and officers of a common carrier could be imputed to create criminal liability for the carrier itself); *Dollar S.S. Co. v. United States*, 101 F.2d 638 (9th Cir. 1939) (affirming steamship corporation's conviction for dumping refuse in navigable waters despite the company's extensive efforts to prevent its employees from engaging in that very conduct); *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656 (2d Cir. 1989) (affirming conviction despite the fact that bona fide compliance program was in effect at company); *United States v. George F. Fish, Inc.*, 154 F.2d 798 (2d Cir. 1946) (affirming corporation's conviction based on criminal acts of a salesman); *Riss & Co. v. United States*, 262 F.2d 245 (8th Cir. 1958) (clerical worker); *Texas-Oklahoma Express, Inc. v. United States*, 429 F.2d 100 (10th Cir. 1970) (truck driver); *United States v. Dye Constr. Co.*, 510 F.2d 78 (10th Cir. 1975).

⁹ Notably, in the civil corporate liability context the Supreme Court has restricted agency principles along these lines. *See e.g.*, *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

incentivized to create and monitor a strong and effective compliance program. The objectives of law-abiding society, the criminal law, and even of the DOJ Thompson Memorandum itself, would then be well served.

Thank you for this opportunity to testify today.