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PROSECUTORIAL ETHICS AND THE MCNULTY MEMO: SHOULD THE GOVERNMENT SCRUTINIZE AN ORGANIZATION’S PAYMENT OF ITS EMPLOYEES’ ATTORNEYS’ FEES?

Noah D. Stein*

INTRODUCTION

"Those who commit crimes—regardless of whether they wear white or blue collars—must be brought to justice. The government, however, has let its zeal get in the way of its judgment. It has violated the Constitution it is sworn to defend."

With that statement, Judge Lewis Kaplan of the U.S. District Court for the Southern District of New York rebuked federal prosecutors for pressuring the accounting firm KPMG not to pay attorneys’ fees for several executives embroiled in a government investigation. Judge Kaplan’s opinion in United States v. Stein was a milestone in the debate over the U.S. Department of Justice’s policy that allows federal prosecutors to scrutinize an organization’s advancement of attorneys’ fees to its employees, which may have the effect of impeding or limiting that advancement. The practice of advancing fees to attorneys is widespread, and in many cases

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2. Id.


4. See infra notes 209-14 and accompanying text. In this Note, the term “employee” may also mean “executive” or “partner” or any other worker employed by an organization, except where otherwise noted. “Advancement” refers to an organization’s payment of an employee’s attorneys’ fees before it knows whether the employee is entitled to indemnification. See infra notes 18-19 and accompanying text. Generally, if an organization eventually determines that an employee does not qualify for indemnification, then the employee must repay any money advanced. See infra notes 31-33 and accompanying text.

5. See infra note 29 and accompanying text.
the practice is authorized or required by state law or by contract. Because of the possibility of organizations using advancement as part of a criminal conspiracy, however, the government's policy allows prosecutors to take advancement into account, along with a range of other factors, in deciding whether to lodge a criminal charge against an organization. Given the legitimate need for advancement in many cases, a public debate over the government's scrutiny of such payments began with the decision in *Stein* and afterwards soon came to a head.

Although Judge Kaplan based his order in *Stein* on a constitutional law analysis, the two sides in the larger debate have raised several public policy concerns. Two distinct, alternative policy visions have emerged out of this debate: The Senate Judiciary Committee proposed a bill that would ban prosecutors from scrutinizing advancement, and the Justice Department developed a new version of its policy that limits its ability to scrutinize advancement while reserving discretion to do so in limited circumstances.

To date, considerations of prosecutorial ethics have not been directly addressed in the debate over scrutinizing advancement. This Note seeks to remedy that omission, reviewing the policy arguments and assessing their intersection with ethical considerations, to contribute to the debate and to inform any future attempts to change the Justice Department's policy. Prosecutors' ethical responsibilities may impact the arguments about scrutinizing advancement, which matters for two reasons. First, prosecutors act within the context of ethical duties, and those duties may support or contradict policy concerns. Thus, a review of prosecutorial ethics can provide fresh insights regarding the relative value of changing or maintaining the Justice Department's current policy. Second, where prosecutors are not constrained by the constitutional requirements noted in *Stein*, the Justice Department's current policy gives prosecutors discretion

6. See infra notes 20-21 and accompanying text.
7. See infra note 34 and accompanying text.
8. See infra Part I.B.
10. See infra notes 103, 108 and accompanying text.
11. See infra notes 109-19 and accompanying text.
12. See Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. Ill. L. Rev. 1573, 1576 (noting that prosecutors are subject to unique ethical duties, an obligation which reflects the well-accepted understanding that they should "conduct themselves differently from other lawyers"); infra Part I.C.1-2.
13. At least one court so far has disagreed with the analysis in *Stein*. See United States v. Stodder, No. 2:05-CR-00027, 2006 WL 3066196, at *2-3 (C.D. Cal. Oct. 4, 2006) (dictum) (declining to adopt the *Stein* court's analysis that the government's policy violated individuals' constitutional rights, finding the analysis unsupported and unpersuasive). Moreover, in *Stein*, the court based its holding in part on findings of fact specific to the KPMG case. See infra notes 86-87 and accompanying text.
to take advancement into account in some cases. In such cases, ethical considerations may indicate how they should use that discretion.

Accordingly, Part I of this Note introduces the topic of advancement and describes how organizations pay employees' attorneys' fees, often to attract and retain talented employees but sometimes to impede criminal investigations. This part then traces the evolution of the government's policy on scrutinizing advancement to ensure that organizations do not use it to shield illegal conduct, starting with the Holder Memorandum and continuing to the Thompson Memorandum. This part also describes the Stein case, where the court found that the government's policy and prosecutors' implementation of that policy violated the constitutional rights of several former KPMG employees. Then, Part I explains how the debate over advancement in the wake of Stein led to proposed legislation that would ban outright any government scrutiny of advancement, which in turn led the Justice Department to amend its policy—this part describes both the legislation and the policy amendment. Next, this part explains that while ethics rules do not subject prosecutors to disciplinary action for scrutinizing advancement, the norms of ethical conduct nonetheless create certain responsibilities to ensure procedural fairness and individuals' access to counsel. Finally, Part I explains that, while those ethical obligations are limited in scope, where prosecutors do retain discretion they sometimes impose on themselves standards that promote effective self-regulation.

Part II of this Note describes the opposing views on government scrutiny of advancement and draws out the ethical implications inherent in that debate. First, Part II examines claims by critics of the Justice Department who argue that the government's policy denies individuals access to competent counsel and undermines both the presumption of innocence and the adversarial system. Then, it describes various ethical concerns that intersect with those public policy critiques. Next, this part describes arguments that scrutinizing advancement is vital to preventing obstruction of investigations and that prosecutors use their discretion to scrutinize advancement only in rare cases where doing so is warranted. Part II then identifies certain ethical obligations inherent in those claims.

Finally, Part III of this Note assesses the debate over the Justice Department's policy on advancement in light of prosecutors' ethical obligations. It argues that weighing the ethical considerations in light of the overall prosecutorial ethics framework reveals that prosecutors should retain discretion to consider advancement, which in turn suggests that the government should not adopt the proposed legislation containing an absolute ban on scrutinizing fee payments. Instead, this part argues that the current Justice Department policy is generally consistent with norms of prosecutorial ethics, although it lacks specificity in one regard. Lastly, this

15. See, e.g., Rory K. Little, Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role, 68 Fordham L. Rev. 723, 751 (1999) (suggesting that ethical precepts can help guide prosecutors in the wise use of their discretion).
part proposes an amendment to the current policy that would fix the existing ambiguity and give clear guidance on when prosecutors should scrutinize advancement, limiting scrutiny to those situations where the advancement is being used improperly.


A. Advancement of Attorneys' Fees

Organizations, in an attempt to attract talented individuals, may indemnify their employees against legal liability when that liability arises in the course of the individuals' service to the organization. An important corollary to indemnification is advancement, an organization's payment of an employee's expenses as the employee incurs them. Advancement provides employees with "immediate interim relief from the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with investigations and legal proceedings." This assistance supports an employee while the organization determines whether the employee is entitled to indemnification, "a decision that must necessarily await the outcome of the investigation or litigation."

Many states have passed laws that require corporations to pay legal expenses through indemnification or advancement or that authorize them to provide such payments by adopting provisions within their bylaws, articles, or employment agreements. The statutes allow the organizations


17. See id. at 261 (noting that the benefit of advancement is "separate and distinct" from indemnification (quoting Homestore, 888 A.2d at 212) and likening it to "an extension of credit" (quoting Fasciana v. Elec. Data Sys. Corp., 829 A.2d 160, 182-83 (Del. Ch. 2003))).

18. Homestore, 888 A.2d at 211. Advancement may be even more important to employees than indemnification, since "the costs of defending a lawsuit often are more daunting and immediate than the threat of ultimate[ly] liability." John F. Olson, Jonathan C. Dickey & Aric H. Wu, Litigation and the Director, 1569 Practicing L. Inst. 179, 188 (2006), available at WL 1569 PLI/Corp 179.


20. Dale A. Oesterle, Limits on a Corporation's Protection of Its Directors and Officers from Personal Liability, 1983 Wis. L. Rev. 513, 546 (noting that in most states, either a statute or the common law requires an organization to pay an employee's legal expenses where the employee's defense succeeds); see Steven J. Schleicher, Comment, Director Liability Dilemma: Providing Relief for Executive Anxiety, 56 UMKC L. Rev. 367, 379-80 (1988) (citing a Delaware law requiring indemnification in certain situations).

to pay for expenses related to proceedings whether those proceedings are civil or criminal, investigative or administrative, or threatened, pending, or completed. Many states also have adopted statutes authorizing indemnification and advancement for members and employees of partnerships and other business organizations, such as limited partnerships and limited liability companies. Some also have authorized the payment of legal fees for public officials. However, a state’s laws may treat corporations and partnerships differently from each other. For example, Delaware mandates indemnification for corporate officers and directors who prevail in their defenses, but it merely authorizes indemnity for partnership employees.

The main purpose of indemnification and advancement is to allow organizations to attract talented employees by providing an assurance that the organization will cover their expenses if they are sued or incur liability in connection with their employment. Further, organizations may believe that paying legal expenses boosts employee morale and “that it is unfair to require an employee whose corporate conduct is under investigation to pay for [his or her] own defense before any adjudication of guilt, much less before any determination of guilt or responsibility on the part of the individual could even be made.” Because of its benefits, the practice is widespread. Indeed, the Justice Department even has adopted internal regulations providing advancement for prosecutors who become the subjects of federal criminal investigations.

To balance the need to attract and retain competent employees with the desire not to sanction illicit conduct, indemnification and advancement statutes generally stipulate that organizations cannot cover an employee’s costs where the individual’s actions were improper or criminal. However,
if the organization has promised to advance expenses to employees, then it
must make the advances even if it appears likely that an employee’s
wrongful conduct will make indemnification unavailable to the employee at
the end of the case. In other words, if an organization has “contracted” to
advance expenses in its bylaws or charter or in an employment agreement,
it “bear[s] the risk of later non-payment . . . in the event that the underlying
conduct . . . and/or the outcome of the matter ultimately disentitles [the
employee] to indemnification.”

While the payment of attorneys’ fees serves legitimate governance and
retention purposes, some organizations have used the practice to further
criminal ends. For example, drug rings and organized crime syndicates
have provided “‘house counsel’ to subordinates . . . in the hopes that the
lawyers will deter, or at least mitigate the effects of, cooperation by their
clients.” In some cases, corporations can have similar incentives to try to
prevent employees from cooperating by retaining or referring lawyers to
represent employees.

C.F.R. § 50.15(a)(7) (conditioning reimbursement on, among other things, whether the
government declined to indict or file an information against the employee).

32. See Radin, supra note 16, at 268-69. A long line of cases establishes this rule in
Delaware, and the limited case law on this subject outside of Delaware establishes the same
rule. See id. at 269-80.

scholars have expressed doubt that organizations actually recoup money advanced to
employees who end up being convicted. See Pamela H. Bucy, Indemnification of Corporate
Executives Who Have Been Convicted of Crimes: An Assessment and Proposal, 24 Ind. L.
Rev. 279, 316 (1991). But see William M. Bulkeley, CA Sues Ex-CEO to Recoup Legal Fee,
Wall St. J., Nov. 17, 2006, at B2 (reporting that after the former CEO of CA Inc. was
convicted, a court attached his home and other property pending a suit by the company to
recoup fees it had advanced).

34. Daniel C. Richman, Cooperating Clients, 56 Ohio St. L.J. 69, 122 (1995) (footnote
omitted); see Peter Margulies, Legal Hazard: Corporate Crime, Advancement of
research paper), available at http://ssrn.com/abstract=927783 (citing an organized crime
example to illustrate a potential danger of advancement in the corporate context).

35. Richman, supra note 34, at 122-23, 123 n.188 (citing James B. Stewart, Den of
Thieves 314-15 (1991)). In his book, Stewart describes how lawyers defending the infamous
financier Michael Milken and his company, Drexel Burnham Lambert, Inc., decided which
lawyers to recommend for Drexel employees who would be called as witnesses in the
government’s case against Milken and Drexel. Stewart, supra, at 311-15. With Drexel
paying the employee-witnesses’ attorneys’ fees, the attorneys representing Drexel and
Milken chose “friendly” attorneys who had an established preference for fighting the
government or who had received significant business referrals from Milken and Drexel’s
attorneys and, thus, might feel obliged to (or dependent on) the attorneys for Milken and
Drexel. Id. at 311, 314-15.
B. *The History of the Justice Department’s Scrutiny of Advancement*

1. The Initial Policy on Scrutinizing Advancement: The Holder and Thompson Memoranda

The federal government first formalized its policy on advancement in June 1999, when Eric Holder, Jr., then Deputy Attorney General of the U.S. Department of Justice, issued a policy memorandum that provided guidelines for federal prosecutors in deciding whether to file criminal charges against an organization.36 The policy, titled “Federal Prosecution of Corporations,”37 also called the “Holder Memo,”38 listed eight factors that prosecutors should consider in reaching a determination.39 One of those factors was the extent of the organization’s “willingness to cooperate in the investigation of its agents,”40 and to help prosecutors evaluate the cooperation, the Holder Memo listed several considerations that prosecutors could weigh.41 One consideration was the organization’s willingness to waive its attorney-client privilege and work product protections.42 Another consideration, which concerned advancement, was spelled out in the following provision:

[A] factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation’s promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government’s investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation’s cooperation.43

The Holder Memo expressly limited the consideration of advancement in some contexts. Specifically, it said, “[s]ome states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a corporation’s compliance with governing law should not be considered a failure to cooperate.”44

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38. Wray & Hur, supra note 36, at 1099.
39. See Holder Memo, supra note 37, at II.A.
40. Id. at II.A.4.
41. See id. at VI.B.
42. Id. at II.A.4, VI.B.
43. Id. at VI.B.
44. Id. at VI.B n.3. For a description of the Holder Memo and its other provisions, see Carmen Couden, Note, *The Thompson Memorandum: A Revised Solution or Just a Problem?*, 30 J. Corp. L. 405, 407-13 (2005).
In early 2003, in the wake of Enron and other major corporate scandals, Larry Thompson, Holder’s successor, issued a memorandum updating the Holder Memo. Thompson’s policy, titled “Principles of Federal Prosecution of Business Organizations,” also called the “Thompson Memo,” adopted the Holder Memo’s general principal on assessing an organization’s cooperation. The Thompson Memo’s advancement provision, in the comment to the general principal on assessing cooperation, exactly tracked the one in the Holder Memo, and it also retained verbatim the Holder Memo’s ban on scrutinizing fee payments mandated by state law. While in this regard the Thompson Memo’s language was consistent with its predecessor’s, the new policy stressed that an organization’s cooperation with an investigation was the key driver of the government’s decision whether to seek charges, thus emphasizing the factor for which advancement was a consideration. The Thompson Memo also included new language indicating another consideration that counted in assessing an organization’s cooperation, besides advancement and related examples of protection of culpable employees: whether the organization had acted to impede the investigation.

To a large extent, the Thompson Memo, and thus the Holder Memo before it, merely codified long-standing Justice Department practices, “commit[ting] to paper what good prosecutors [had] been doing for


46. Wray & Hur, supra note 36, at 1101.

47. The Thompson Memo stated, “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.” Thompson Memo, supra note 45, at VI.A. This provision was nearly identical to the one in the Holder Memo. Compare id., with Holder Memo, supra note 37, at VI.A.

48. Compare text accompanying note 43, with Thompson Memo, supra note 45, at VI.B. In addition to privilege waivers and advancement, the Thompson Memo listed considerations that may indicate noncooperation, including an organization’s retaining culpable employees without sanction and its formation of a joint defense agreement with culpable employees. Thompson Memo, supra note 45, at VI.B.

49. Compare text accompanying note 44, with Thompson Memo, supra note 45, at VI.B n.4.

50. Thompson Memo, supra note 45, at preface (“The main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation’s cooperation.”).

51. See id. at VI.B. The provision provided the following examples of conduct indicating obstruction of the investigation:
   [1] overly broad assertions of corporate representation of employees or former employees; [2] inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed; [3] making presentations or submissions that contain misleading assertions or omissions; [4] incomplete or delayed production of records; and [5] failure to promptly disclose illegal conduct known to the corporation.

Id.
Nonetheless, these formal policy documents drew fire from commentators. The initial criticism focused on the use of privilege waivers in determining the authenticity and extent of an organization’s cooperation and ignored the policy on advancement.

2. United States v. Stein Brought Concerns About Scrutinizing Advancement into the Limelight

The Justice Department’s policy of scrutinizing advancement moved into the spotlight in United States v. Stein, which involved the largest tax fraud in U.S. history, a scheme that defrauded the public out of $2.5 billion in tax revenue. The events at issue in Stein began in early 2002, when the Internal Revenue Service (IRS) issued several summonses to KPMG as part of an investigation into the organization’s marketing of improper tax shelters. Rather than turn over materials, KPMG took “steps . . . designed to hide its tax shelter activities.” In one such step, KPMG invoked 26 U.S.C. § 7525, a confidentiality privilege relating to taxpayer documents, to protect documents that did not justify the privilege and that contained damning evidence. Frustrated by the lack of compliance, IRS officials referred the matter to the U.S. District Court for the District of Columbia for enforcement. Meanwhile, a Senate subcommittee running a concurrent investigation into illegal tax shelters began holding public hearings, and in November 2003, the committee heard testimony from


53. See, e.g., Sarah Helene Duggin, Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview, 2003 Colum. Bus. L. Rev. 859, 904 (“The defense bar has repeatedly raised concerns about these policies . . . .”); Peter J. Henning, Targeting Legal Advice, 54 Am. U. L. Rev. 669, 695-701 (2005) (arguing that the Thompson Memo is symptomatic of the Justice Department’s overcriminalization of legal advice); Wray & Hur, supra note 36, at 1170-84 (citing various criticisms of the Thompson Memo, particularly regarding its emphasis on cooperation).


58. Id. at 38.

several KPMG executives. During those hearings, some committee members expressed displeasure with KPMG and its executives.

Concerned about the tone of the Senate hearings and the ongoing IRS investigation, KPMG’s chairman, Eugene O’Kelly, hired renowned lawyer Robert Bennett “to come up with a new cooperative approach” toward the government. As part of that strategy, KPMG dismissed eighteen executives involved with the suspect tax shelters, including the firm’s deputy chair and chief operating officer, Jeffrey Stein. By virtue of Stein’s senior position and close friendship with O’Kelly, KPMG offered him retirement with a “very generous” consulting contract—negotiated in “very friendly” discussions with O’Kelly—which paid Stein $100,000 per month for three years and which promised to reimburse his attorneys’ fees in any legal proceedings against him.

Despite the dismissal of employees, the IRS made a criminal referral to the Justice Department in early 2004, and in February 2004, prosecutors from the U.S. Attorney’s Office for the Southern District of New York (USAO) met with KPMG’s lawyers. Bennett began the meeting by saying that KPMG’s “object was to save KPMG, not to protect any individuals.” Later, Bennett noted that the firm had no obligation to provide advancement, but it had a common “practice of paying its employees’ legal expenses” and asked if KPMG could continue that practice in this investigation. Prosecutors responded that they would “take into account KPMG’s legal obligations, if any, to advance legal expenses,” but then referred KPMG to the Thompson Memo. During that same conversation, prosecutors warned KPMG that they would scrutinize fee advancement arrangements.

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60. Id.
61. Id. at 338-39 (noting one senator’s comments suggesting general wrongdoing and another’s belief that a KPMG executive was testifying dishonestly).
62. Id. at 339 (internal quotation marks omitted).
63. Id.
64. Id. at 339 & n.23 (internal quotation marks omitted).
65. Id. at 339.
66. Id. at 341.
67. Id.
68. Id. at 342 (noting “that Delaware law gave the company the right to do whatever it wished”). KPMG is a Delaware LLP. Id. at 355 n.117. Delaware partnership law authorizes but does not require partnerships to offer advancement to employees. See supra note 26 and accompanying text.
70. Id.
71. See id. at 341-44. Prosecutors told KPMG that “misconduct should not or cannot be rewarded and referred to federal guidelines.” Id. at 342 (internal quotation marks omitted). Shortly thereafter, prosecutors noted that if KPMG had discretion in its advancement decision, then the government would “look at [its decision whether to advance fees] under a microscope.” Id. at 344 & n.52 (emphasis and internal quotation marks omitted). The court found that “while the USAO did not say in so many words that it did not want KPMG to pay legal fees, no one at the meeting could have failed to draw that conclusion.” Id. at 344.
Following the meeting, KPMG informed the government that it would cap fee advancement at $400,000 and condition payment on the employees’ full cooperation with the government.\textsuperscript{72} Beginning in March 2004, the USAO notified KPMG’s lawyers whenever an employee refused to be interviewed or invoked the Fifth Amendment in refusing to respond to questions.\textsuperscript{73} Upon such notice, KPMG contacted the employee’s lawyer and threatened to cease paying attorneys’ fees unless the employee began to cooperate with the government.\textsuperscript{74} Some employees relented; others refused to cooperate and were promptly fired by KPMG and denied payment for legal fees.\textsuperscript{75} During this time, KPMG reimbursed Stein for nearly $650,000 in attorneys’ fees.\textsuperscript{76} KPMG kept from the government the existence and terms of its agreement with Stein, as well as its advancement of $650,000 to him.\textsuperscript{77} Ultimately, the government indicted the employees.\textsuperscript{78}

On August 29, 2005, KPMG entered into a deferred prosecution agreement (DPA) with the government,\textsuperscript{79} in which the firm admitted that it broke the law in marketing illegal tax shelters and in making misrepresentations to the IRS.\textsuperscript{80} Furthermore, the firm admitted that criminal conduct was “deliberately approved and perpetrated at the highest levels of KPMG’s tax management, and involved dozens of KPMG partners and personnel.”\textsuperscript{81} As part of the DPA, KPMG agreed to pay the government $456 million in fines.\textsuperscript{82}

On January 19, 2006, the indicted employees moved to dismiss their indictments or for other relief on the ground that the government’s interference with KPMG’s advancement of attorneys’ fees was improper.\textsuperscript{83} On June 26, 2006, Judge Kaplan issued his opinion, holding that the Thompson Memo and the government’s implementation of it violated the KPMG employees’ constitutional rights to substantive due process and fairness in criminal proceedings\textsuperscript{84} and their constitutional right to counsel.\textsuperscript{85} The holding rested in part on the court’s findings that KPMG had an

\textsuperscript{72} Id. at 345.
\textsuperscript{73} Id. at 347.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 348 n.74.
\textsuperscript{77} See Margulies, \textit{supra} note 34, at 42 (citing \textit{Stein}, 435 F. Supp. 2d at 339). It is unclear when the government learned of the exact economic terms of Stein’s severance agreement, but by August 2004, the USAO knew that the package was “sizeable.” \textit{Stein}, 435 F. Supp. 2d at 348 n.75.
\textsuperscript{78} See \textit{Stein}, 435 F. Supp. 2d at 338 (referring to employees as “subjects of the indictment in this case”).
\textsuperscript{79} Id. at 349.
\textsuperscript{80} Margulies, \textit{supra} note 34, at 41.
\textsuperscript{81} Government’s Post-Hearing Memorandum on Issues Concerning the Defendants’ Right to Counsel at 14 n.10, \textit{Stein}, 435 F. Supp. 2d 330 [hereinafter Government’s Memorandum] (quoting the KPMG deferred prosecution agreement (DPA)).
\textsuperscript{82} \textit{Stein}, 435 F. Supp. 2d at 349.
\textsuperscript{83} Id. at 350.
\textsuperscript{84} Id. at 362-65.
\textsuperscript{85} Id. at 367-69.
“unbroken track record” of advancing attorneys’ fees prior to the events at issue in the Stein case, which gave the defendants an expectation that the firm would pay their legal expenses.

3. After Stein, the Debate over Advancement Intensified

Stein was not the first case in which prosecutors scrutinized the advancement of attorneys’ fees to employees. In other cases, federal prosecutors have pressured companies not to advance attorneys’ fees to employees, or have indicated that advancement would be considered a sign of noncooperation. Nonetheless, Stein was the first case to address the government’s advancement policy directly, and it brought the controversy over the government’s policy on advancement to the fore.

Emboldened by Judge Kaplan’s opinion, critics of the Thompson Memo stepped up their assault. In August 2006, the American Bar Association (ABA) House of Delegates unanimously adopted a resolution opposing the practice of scrutinizing advancement of attorneys’ fees. On September 12, 2006, the Senate Judiciary Committee held hearings on the Thompson Memo and included the advancement provision in its focus. The ABA’s president and two former U.S. Attorneys General were among those who testified, and all three of these witnesses criticized the Thompson Memo’s advancement provision. Paul McNulty, the Justice Department’s Deputy

86. Id. at 356.
87. Id.
88. See Nathan Koppel, U.S. Pressures Firms Not to Pay Staff Legal Fees, Wall St. J., Mar. 28, 2006, at B1 (noting three cases where prosecutors reportedly scrutinized payments of attorneys’ fees); see also Am. Coll. of Trial Lawyers, supra note 21, at 335 (“Today, it is common for defense counsel to be confronted by a federal prosecutor who believes that a corporation is not fully cooperating with the government in a federal criminal investigation solely because the corporation is paying the legal fees for an officer, director or employee.”).
89. Koppel, supra note 88. Counsel for Symbol Technologies, Inc., claimed that federal prosecutors urged the company not to pay attorneys’ fees for executives accused of accounting fraud. Id. There, prosecutors ultimately allowed the advancement after the company convinced them that its bylaws required the payments. Id. Similarly, in an accounting fraud trial of five former executives of Enterasys Networks, Inc., prosecutors pressured the company to deny advancement to the executives. Id. In the case against Enterasys, the presiding U.S. district court judge expressed concern that federal prosecutors had acted improperly, although he did not sanction the prosecutors. Id.
90. Id. (reporting that lawyers involved in the prosecution of HealthSouth Corp. said that prosecutors informed the company that the government would count advancement of attorneys’ fees to indicted executives as a sign of noncooperation).
92. See Thompson Memo Hearings, supra note 52, at 93-95 (statement of Karin J. Mathis, President, ABA) (listing several problems with the advancement provision and related considerations on protecting culpable employees); id. at 130 (statement of Edwin Meese III, Chairman, Center for Legal and Judicial Studies, Heritage Foundation) (recommending removal of the advancement provision); id. at 142 (statement of Dick Thornburgh, former Att’y Gen. of the United States) (calling the advancement provision “problematic”).
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Attorney General, also testified, defending the government's policy on advancement. On November 30, 2006, a committee of business and legal practitioners and academics that had formed with the U.S. Treasury Secretary's blessing to recommend ways to improve the competitiveness of the U.S. capital markets issued a report critical of the Thompson Memo. In part, the criticism focused on the policy on scrutinizing advancement. As these events were unfolding, several other commentators, practitioners, and scholars weighed in on the debate.

4. Two Competing Solutions Emerged: The McNulty Memorandum and the Specter Bill

Out of the controversy over the Thompson Memo, two solutions emerged. First, critics took the position that prosecutors should never consider advancement as a factor in determining an organization's cooperation. For example, the resolution that the ABA House of Delegates adopted states the following:

RESOLVED, that the American Bar Association opposes government policies, practices and procedures that... require, encourage or permit prosecutors or other enforcement authorities to take into consideration... in making a determination of whether an organization has been cooperative in the context of a government investigation... that the organization... advanced, reimbursed or indemnified the legal fees and expenses of an employee...

Similarly, the interim report of the Committee on Capital Markets Regulation recommended "that the Justice Department revise its prosecutorial guidelines to prohibit federal prosecutors from seeking... the denial of attorneys' fees to employees, officers, or directors." These recommendations express categorical opposition, containing no exceptions.

93. See id. at 120-21 (statement of Paul J. McNulty, Deputy Att'y Gen. of the United States).
94. See David Reilly, Booming Audit Firms Seek Shield from Suits, Wall St. J., Nov. 1, 2006, at C1; see also Greg Ip, Is a U.S. Listing Worth the Effort?, Wall St. J., Nov. 28, 2006, at C1 (claiming that the committee had the Treasury secretary's support for its research).
96. See id. at 85.
97. See, e.g., Lattman, supra note 3.
98. See, e.g., Has the Government Gone Too Far in Its War on Corporate Crime?, WSJ.com, Nov. 1, 2006, http://online.wsj.com/article/SB116224475563608109.html (hereinafter Has the Government Gone Too Far?) (discussing the debate between current and former prosecutors, including one who helped draft the Thompson Memo).
99. See generally Margulies, supra note 34 (describing the risks of advancement—including agency costs, moral hazard, race to the bottom, and cognitive biases—and criticizing the Stein court's analysis).
100. Recommendation 302B, supra note 91, at Recommendation.
101. Comm. on Capital Mkts. Regulation, supra note 95, at 86.
that would allow prosecutors to take advancement into account in certain circumstances.102

This view took concrete form on December 8, 2006, when Senator Arlen Specter, then Chairman of the Senate Judiciary Committee, proposed a bill that would take a hard line approach to curbing prosecutors’ discretion in determining an organization’s cooperation for charging purposes.103 Although the bill’s explicit focus is on the attorney-client privilege portion of the Thompson Memo,104 it notes among its findings that prosecutors can “conduct their work while respecting . . . the rights of individuals”105 and that an indictment can have “devastating consequences” on an organization.106 Moreover, it contains language that prohibits prosecutors from considering advancement under any circumstances when determining an organization’s level of cooperation.107 Specifically, the bill provides that prosecutors “shall not . . . condition a civil or criminal charging decision relating to a[n] organization . . . or use as a factor in determining whether an organization . . . is cooperating with the [g]overnment . . . the provision of counsel to, or contribution to the legal defense fees or expenses of, an employee of that organization.”108 The bill does not contain any provisions creating exceptions, indicating that its prohibition is absolute in forbidding prosecutors from considering advancement under any circumstances when determining an organization’s level of cooperation.

An alternative solution emerged less than a week after Senator Specter first announced his proposal, when Deputy Attorney General McNulty issued a memorandum that superseded the Thompson Memo and provided an updated policy on assessing an organization’s cooperation for charging purposes.109 The new policy, known as the “McNulty Memo,”110 makes

102. See supra notes 100-01 and accompanying text.
104. See S. 30 (referring in the title and in the majority of the provisions to privileges or work product protections and waivers).
105. Id. § 2(a)(5).
106. Id. § 2(a)(7).
107. Id. § 3(a).
108. Id. The bill also prohibits prosecutors making charging decisions from considering whether an organization waived the attorney-client or work product privileges; shared information with employees, informally or through a formal agreement, such as a joint-defense agreement; or failed to terminate or otherwise sanction employees for exercising constitutional or other legal protections in response to government requests. See id. Moreover, in addition to ruling out this conduct and advancement as bases for a charging decision, the bill also prohibits prosecutors from requesting or demanding that a company engage in such conduct. See id.
significant changes to the previous policy, including placing substantive and procedural constraints on prosecutors’ use of discretion in choosing whether to treat an organization’s payment of attorneys’ fees to its employees as a sign of noncooperation. Specifically, the new policy states that prosecutors “generally should not take into account” advancement as a sign of noncooperation except in “extremely rare cases.” Additionally, the McNulty Memo expounds on the rare case exception, saying that prosecutors may only take advancement into account where “the totality of the circumstances show[s] that it was intended to impede a criminal investigation. In these cases, fee advancement is considered with many other telling facts to make a determination that the corporation is acting improperly to shield itself and its culpable employees from government scrutiny.” The policy references the discussion in the government’s brief, which makes the point that prosecutors are permitted to look at advancement as a sign of noncooperation “only” in the context of a “panoply of factors that made it appear a company was circling the wagons,” but which does not list any specific factors.

Furthermore, the McNulty Memo retains the Thompson Memo’s absolute prohibition on scrutinizing advancement when organizations are obligated to advance fees under state law and expands the rule to bar scrutiny where organizations are obligated to pay attorneys’ fees under contractual agreements with employees, such as those contained in “corporate charters, bylaws or employment agreements.” In addition to these substantive limits on scrutinizing advancement, the McNulty Memo adds a procedural requirement: Where prosecutors wish to invoke the rare case exception and take advancement into account, they must first obtain approval from the Deputy Attorney General using the same process required for requesting privilege waivers. Thus, the new policy places new procedural as well as substantive limits on prosecutors’ ability to scrutinize advancement.

Although the McNulty Memo adds restrictions, another change stipulates that the policy “is not meant to prevent a prosecutor from asking questions

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112. Id. at VII.B.3 n.3.
113. Id.
114. See id. (citing Brief for the United States of America at 1, United States v. Smith, No. 06-3999-cr (2d Cir. Nov. 6, 2006)). The appeal is of an order in Stein, dated July 26, 2006, which incorporated in part the June 27, 2006 order (discussed in detail in Part I.B.2 of this Note) and which suppressed the statements of two defendants in the case. Brief for the Appellant, supra, at 1.
115. Brief for the United States of America, supra note 114, at 51-52, 52 n.*.
116. See id.
117. McNulty Memo, supra note 111, at VII.B.3.
118. Id. at VII.B.3 n.3.
about an attorney’s representation of a corporation or its employees" and that questions about “how and by whom attorneys’ fees are paid” are “appropriate.”

C. Prosecutors’ Ethical Responsibilities Related to Advancement

Part I.A of this Note explained organizations’ practice of advancing attorneys’ fees to their employees. Part I.B then described how the government’s policy of scrutinizing advancement evolved, with the Justice Department offering its most recent iteration after receiving criticism from the court in Stein and from a host of other critics. Part I.C examines prosecutorial ethics and shows that, although the ethics rules are silent on scrutinizing advancement, norms of ethical conduct create some responsibility for prosecutors to protect procedural fairness and individuals’ access to counsel. Next, this part explains that those ethical obligations are limited in scope and describes how the government sometimes develops standards of self-regulation to help prosecutors exercise their discretion.

1. Specific and General Provisions of the Disciplinary Rules Regarding Prosecutors

The various codes of professional conduct subject prosecutors to disciplinary action for failure to comply with ethics rules, but no rule squarely addresses whether prosecutors may interfere with an organization’s advancement of attorneys’ fees to its employees. Rule 3.8 of the Model Rules of Professional Conduct lists the duties specific to the prosecutor function, but none of its provisions are directly relevant to

119. Id. at VII.B.3.
120. Id. at VII.B.3 n.4. The McNulty Memo also retains language that appeared in the Thompson Memo indicating that another consideration in determining the organization’s cooperation, besides shielding culpable employees, is whether the organization intentionally impeded the investigation. In the McNulty Memo, this language appears in the subsection entitled “Obstructing the Investigation.” See id. at VII.B.4. That provision immediately follows, but is separate from, the subsection on “Shielding Culpable Employees and Agents,” which in turn contains the advancement provision. See id. at VII.B.3. The “Obstructing the Investigation” subsection lists six examples of conduct indicating obstruction:

[1] overly broad assertions of corporate representation of employees or former employees; [2] overly broad or frivolous assertions of privilege to withhold the disclosure of relevant, non-privileged documents; [3] inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed; [4] making presentations or submissions that contain misleading assertions or omissions; [5] incomplete or delayed production of records; and [6] failure to promptly disclose illegal conduct known to the corporation.

Id. at VII.B.4. Except for the second example, all of those listed appeared in the Thompson Memo. Compare id., with supra note 51.

121. See, e.g., Model Rules of Prof’l Conduct R. 8.4(a) (2003) (“It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct.”).

122. See id. R. 3.8.
advancement. Other disciplinary rules that impose broad obligations seem, by their terms, capable of implying a duty not to interfere with advancement. For example, Model Rule 8.4(d) states that “[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.” Additionally, ethics rules direct prosecutors to “seek justice.” However, courts generally find violations of Model Rule 8.4(d) only in combination with other violations. Moreover, scholars note that the duty to do justice is vague and allows for different interpretations of prosecutors’ responsibilities. On the one hand, it could mean that prosecutors should strictly apply the letter of the law and avoid mercy. On the other hand, it could mean that prosecutors should ensure “that convicted defendants do not suffer unduly harsh treatment.” Moreover, the duty to seek justice does not indicate particular requirements prosecutors should follow, and courts have declined to fill in the duty with specific obligations. Furthermore,

123. For example, Model Rule 3.8(b) requires a prosecutor to “make reasonable efforts to assure that the accused has been . . . given reasonable opportunity to obtain counsel.” See id. Despite that rule’s seemingly broad language about access to counsel, however, it imposes on a prosecutor only the narrow duty to let a judge inform an unrepresented defendant of the right to counsel and to remind any judge who may forget to raise the issue. See Green, supra note 12, at 1591.


125. Model Code of Prof’l Responsibility EC 7-13 (1981) (“The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”); see also Model Rules of Prof’l Conduct R. 3.8 cmt. 1 (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”). Although the duty to do justice appears as a comment, and not a binding rule, in the Model Rules, the comments “provide guidance for practicing in compliance with the Rules.” Model Rules of Prof’l Conduct Preamble ¶ 14. Moreover, most prosecutors accept that the duty to seek justice imposes responsibilities like those identified in the rules. See Bruce A. Green, Why Should Prosecutors “Seek Justice”?, 26 Fordham Urb. L.J. 607, 616 (1999).

126. See, e.g., In re Zawada, 92 P.3d 862, 866 (Ariz. 2004) (en banc). In Zawada, the court found violations of the Arizona versions of Model Rule 3.1 (“assertions made without good faith basis in law or fact”), Model Rule 3.4(e) (“trial tactics unsupported by admissible evidence”), and Model Rule 8.4(d) (“misconduct prejudicial to the administration of justice”). Id. at 866. There the prosecutorial misconduct “included (a) appeals to fear by the jury if [the defendant] was not convicted, (b) disrespect for and prejudice against mental health experts that led to harassment and insults during cross-examination, and (c) improper argument to the jury.” Id. at 864.


128. See Green, supra note 125, at 622-23; Ramsey, supra note 127, at 1312 (noting that in the late nineteenth century “justice” was “equated with high conviction rates”).

129. Green, supra note 125, at 623.


131. See Fisher, supra note 127, at 218 (noting that case law does not contradict the view that the duty to do justice has no independent content and merely suggests prosecutors should not violate other rules); Green, supra note 125, at 623.
scholars note that when courts do invoke the requirement, they do so as a general admonishment when they deem prosecutors to have acted overzealously. Accordingly, courts likely will not discipline prosecutors for conduct that limits advancement.

2. Norms of Ethical Conduct Create Responsibilities for Prosecutors Regarding Procedural Fairness and Access to Counsel

Even if no ethics rule subjects prosecutors to disciplinary action for interfering with advancement, prosecutors may still have a responsibility to avoid the practice if it is at odds with general ethical concerns and norms concerning the use of prosecutorial discretion. Indeed, many prosecutors consider it their responsibility to go further than the rules require. In two areas related to scrutinizing advancement in particular—protecting procedural fairness and respecting access to counsel—the norms of ethical conduct create responsibilities for prosecutors.

First, scholars note that the duty to do justice that appears in the ethics codes reflects an expectation that prosecutors should seek to protect fairness in criminal proceedings. One reason for this is that prosecutors wield tremendous power because they control considerable resources and have ―tremendous‖ discretion. Left unchecked, that prosecutorial power

132. See Fisher, supra note 127, at 218-19; Green, supra note 125, at 623.
133. See Robert H. Jackson, The Federal Prosecutor, 31 Am. Inst. Crim. L. & Criminology 3, 4 (1940) (―[T]he spirit of fair play and decency... should animate the federal prosecutor.‖); Laurie L. Levenson, Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors, 26 Fordham Urb. L.J. 553, 558 (1999) (noting that prosecutors’ ―most important work occurs in the area where the rules [governing prosecutor conduct] are silent‖ and that prosecutors must apply a ―practical sense of what is right and a moral standard‖ to fill gaps in the rules); cf. Green, supra note 125, at 618-19 (noting the difference between ―ethics rules,‖ which subject prosecutors to disciplinary action for misconduct, and ―ethics in the broader sense of involving what a prosecutor should do in situations where the law offers a choice‖); W. Bradley Wendel, Legal Ethics and the Separation of Law and Morals, 91 Cornell L. Rev. 67, 72 (2005) (―Compliance with the law means more than seeking to avoid sanctions—it entails an attitude of respect toward legal norms.‖).
134. See, e.g., Kenneth J. Melilli, Prosecutorial Discretion in an Adversary System, 1992 B.Y.U. L. Rev. 669, 684 (noting that ―[m]any prosecutors impose a higher standard of probability upon their charging decisions‖ than the ethics rules require).
135. See Model Rules of Prof'l Conduct R. 3.8 cmt. 1 (2003) (stipulating that the responsibility of a minister of justice ―carries with it [a] specific obligation[] to see that the defendant is accorded procedural justice,‖ but noting that the extent of this obligation is ―a matter of debate and varies in different jurisdictions‖).
136. See John S. Edwards, Professional Responsibilities of the Federal Prosecutor, 17 U. Rich. L. Rev. 511, 511 (1983); Jackson, supra note 133, at 3 (―The prosecutor has more control over life, liberty, and reputation than any other person in America.‖).
137. See Zacharias, supra note 130, at 59 (―[T]he prosecutor] benefits from the state’s hefty investigative and litigation resources. Through the police and grand jury, [the prosecutor] monopolizes the ability to coerce testimony and obtain cooperation in the investigation of crimes.‖ (footnote omitted)).
138. See Jackson, supra note 133, at 3; Zacharias, supra note 130, at 58.
could lead to abuses.\textsuperscript{139} Indeed, since the adversarial nature of the legal system underlies the professional codes,\textsuperscript{140} some claim that prosecutors should check their power on their own to ensure that proceedings remain adversarial, without one side overwhelming the other.\textsuperscript{141} In other words, prosecutors have a responsibility to pursue "adversarially valid results."\textsuperscript{142} This power-based view of the duty to do justice creates specific prosecutorial responsibilities, such as the requirement to intervene where the defense counsel’s performance is substandard.\textsuperscript{143}

Additionally, scholars suggest that since prosecutors represent the sovereign,\textsuperscript{144} the duty to seek justice requires them to preserve fairness in criminal proceedings.\textsuperscript{145} According to these scholars, the public demands fair governance from the state, so prosecutors representing the sovereign should not only punish wrongdoers but also should ensure that they do not

\textsuperscript{139} See Ralph K. Winter, Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America, 42 Duke L.J. 945, 963 (1993) (noting that some abuses are inevitable where enormous power is unchecked); Zacharias, supra note 130, at 58 ("[T]he fear of unfettered prosecutorial power is the impetus for the special ethical obligation.").

\textsuperscript{140} See Roberta K. Flowers, A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors, 37 B.C. L. Rev. 923, 926 (1996).

\textsuperscript{141} See United States v. Cronic, 466 U.S. 648, 657 (1984) ("While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." (quoting United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975))); Melilli, supra note 134, at 691-97 (discussing the effect of the adversary system and the relevance of prosecutorial ethics); Zacharias, supra note 130, at 59.

\textsuperscript{142} Zacharias, supra note 130, at 60 (emphasis omitted); see also Flowers, supra note 140, at 962-74 (discussing the need for ethics standards to restrain prosecutors in the investigation of a case and proposing areas for regulation); Little, supra note 15, at 751-56 (suggesting that prosecutors should be required or encouraged to consider which steps to pursue in an investigation and how aggressively to pursue them to avoid disproportionate burden to targets and third parties); Melilli, supra note 134, at 702 (suggesting that for prosecutors merely to trust in the adversary system to protect the innocent, without using self-restraint, is "too great a concession").

\textsuperscript{143} See Zacharias, supra note 130, at 66 (noting that "[a]dversarial justice breaks down most clearly when a criminal defense attorney does not even roughly match the prosecutor’s talents or fails to represent his client’s interests," for example when defense counsel is (1) "bad or indolent"; (2) incapacitated by "illness, alcohol, or distractedness"; (3) "lack[ing]... time or resources to prepare"; or (4) constrained by the government or court, e.g., where the government times an indictment to limit counsel’s opportunity to defend).

\textsuperscript{144} See Berger v. United States, 295 U.S. 78, 88 (1935) ("[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all... ."); United States v. Singleton, 165 F.3d 1297, 1300 (10th Cir. 1999) (en banc) ("[T]he government of the United States is not capable of exercising its powers on its own; the government functions only through its officers and agents. We thus infer in criminal cases that an Assistant United States Attorney, acting within the scope of authority conferred upon that office, is the alter ego of the United States exercising its sovereign power of prosecution."); Green, supra note 125, at 633.

\textsuperscript{145} See Green, supra note 125, at 636; see also Zacharias, supra note 130, at 57 (suggesting that prosecutors serve the goals of several “constituencies,” including “the community’s [interest in] protection, victims’ desire for vengeance, defendants’ entitlement to a fair opportunity for vindication, and the state’s need for a criminal justice system that is efficient and appears fair” (footnotes omitted)).
punish the innocent. Moreover, prosecutors should treat similarly situated criminals equally and impose punishments that are proportional to the crimes committed. Furthermore, under this role-based view, prosecutors should not only ensure that they obtain criminal convictions through a fair process but also should avoid any public perception that the process is unfair. Scholars note that the public also expects that the government will fight corporate crime, and the courts have sanctioned that expectation, so prosecutors are responsible for carrying it out. Nonetheless, even in the corporate crime context, prosecutors' specific responsibilities regarding the preservation of fair procedure still exist. To the extent that these responsibilities are in tension, prosecutors acting for the sovereign must balance the competing interests. Thus, in light of prosecutors' role as the sovereign's representatives and their superior power, the duty to seek justice creates some responsibilities for prosecutors to ensure procedural fairness.

Second, in addition to indicating that prosecutors should ensure procedural fairness, commentators claim that the ethics provisions express an overarching concern that individuals have access to competent representation. For example, these scholars point out that prosecutors have a duty to ensure that a court notifies a defendant of the right to representation, and they have an affirmative duty to notify the court of a

146. See Green, supra note 125, at 634 (noting that the goal of avoiding punishment of the innocent, "as reflected in the 'presumption of innocence,' is paramount in importance"); see also Melilli, supra note 134, at 671-72 (suggesting that all prosecutors should regard the possibility of even charging innocent people, let alone convicting them, as the greatest concern).

147. See Green, supra note 125, at 634.

148. See id. at 636. The McNulty Memo's executive summary echoes this concern. See McNulty Memo, supra note 111, at 1 (noting that federal prosecutors "must maintain public confidence in the way in which they exercise their charging discretion").

149. See John Hasnas, Ethics and the Problem of White Collar Crime, 54 Am. U. L. Rev. 579, 602-30 (2005) (discussing how Congress created new offenses and the Organizational Sentencing Guidelines to help overcome pro-defendant biases inherent in the law and allow for more effective prosecution of corporate crime); Robert G. Morvillo & Barry A. Bohrer, Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation, 32 Am. Crim. L. Rev. 137, 139-52 (1995) (arguing that Congress's passage of federal laws initially aimed at organized crime, such as the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Criminal Forfeitures Act, gave prosecutors wide latitude to pursue corporate crime and that Congress sanctioned the development by refusing to narrow the scope of those laws and by passing new laws with similarly broad language).

150. See Hasnas, supra note 149, at 595-630 (noting that the courts played a crucial role in easing prosecution of white collar crime by (1) creating corporate vicarious liability, (2) broadly interpreting new federal offenses criminalizing corporate conduct, and (3) allowing an implementation of the Organizational Sentencing Guidelines that favors prosecutors).

151. Green, supra note 125, at 636.

152. See id. at 634; see also Melilli, supra note 134, at 698 ("[T]he prosecutor must define the public interest in specific cases."); Zacharias, supra note 130, at 57-58 ("Prosecutors . . . face conflicts among their constituents' interests as well as between constituent and personal interests.").

153. See supra note 123.
defense lawyer's incompetence. Moreover, the Standards Relating to the Administration of Criminal Justice, which are not binding on prosecutors but which represent guidelines for conduct, indicate that ethical norms recognize "the critical importance of" competent representation in criminal proceedings. Accordingly, prosecutors have an ethical responsibility to ensure that defendants receive a certain level of representation.

3. Scope of Prosecutors' Ethical Responsibilities: Limits on Responsibility, Context of Prosecutorial Discretion, and Self-Imposed Regulation for Sensitive Issues

Although prosecutors have ethical responsibilities to protect procedural fairness and respect the right to counsel, their responsibilities in this area are not unlimited. For example, the ethics rules impose only minimal obligations on prosecutors to ensure a defendant's access to competent counsel. Model Rule 3.8(b) creates a duty, but only a narrow one. Model Rule 1.1 requires lawyers to provide clients with "competent representation," which requires "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." However, commentators have noted that the "rule permits even neophyte lawyers to handle criminal cases even when the cases are a 'wholly novel field' to the lawyer, so long as counsel studies hard using universal lawyering skills." Moreover, while ethical norms may suggest that prosecutors have a responsibility to notify the court if defense counsel is incompetent, it is not clear that they need do more.

Courts have set a similarly low standard. Although the constitutional right to counsel includes the right to effective counsel, the courts have not precisely defined effectiveness and have set a high bar for determining ineffective assistance. Indeed, "some courts have upheld

154. See generally Vanessa Merton, What Do You Do When You Meet a "Walking Violation of the Sixth Amendment" If You're Trying to Put That Lawyer's Client in Jail?, 69 Fordham L. Rev. 997 (2000) (discussing scholars views on the subject); supra note 143 and accompanying text. The duty may also extend to notifying the court if defense counsel has conflicts of interest. See Bruce A. Green, Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest, 16 Am. J. Crim. L. 323, 352-53 (1989).
155. See Recommendation 302B, supra note 91, at I & nn.9-10.
156. See supra note 123.
159. See supra note 154 and accompanying text.
161. See, e.g., State v. Allen, 638 P.2d 338, 343 n.6 (Haw. Ct. App. 1981) ("Effective counsel" is defined not as errorless counsel but as counsel whose assistance is within [a] range of competence demanded of attorneys in criminal cases.").
162. See, e.g., Strickland v. Washington, 466 U.S. 668, 689 (1984) (holding that "[t]here are countless ways to provide effective assistance in any given case," so courts "must
convictions in which defense counsel slept through much of the trial or was intoxicated during it; or where counsel conducted little, if any, serious investigation and could not recall a single relevant case."\textsuperscript{163} Besides setting a low standard for effectiveness, courts usually have held that the right to counsel attaches only after indictment, not during investigations.\textsuperscript{164} Moreover, although defendants have the right to counsel of their choice, they have no right to counsel that they cannot afford.\textsuperscript{165} In the same vein, the Supreme Court has allowed prosecutors to seek forfeiture of money that a defendant paid or needed to pay to an attorney for defense in criminal proceedings if the money belonged to another or came from criminal conduct.\textsuperscript{166} Such forfeiture does not violate defendants’ Sixth Amendment right to counsel, according to the Court’s holdings in \textit{United States v. Monsanto}\textsuperscript{167} and \textit{Caplin & Drysdale, Chartered v. United States}.\textsuperscript{168} Thus, the ethics rules and the courts impose only limited obligations regarding access to competent counsel.

Not only are prosecutors’ affirmative obligations limited in scope, but prosecutors generally have broad discretion to enforce the law,\textsuperscript{169} and ethics rules place few limits on the exercise of that discretion.\textsuperscript{170} Model Rule 3.8 “deals with only one aspect of prosecutorial discretion—the core decision

\begin{itemize}
  \item \textsuperscript{163} Raeder, Taslitz & Giannelli, supra note 158, at 18.
  \item \textsuperscript{164} Kirby v. Illinois, 406 U.S. 682, 688 (1972) (plurality decision) (“In a line of constitutional cases in this Court . . . it has been firmly established that a person’s Sixth . . . Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him.”). \textit{But see} United States v. Stein, 435 F. Supp. 2d 330, 366-67 (S.D.N.Y. 2006) (finding that the government could not limit defendants’ access to funds for their defense where such limitation would likely have an unconstitutional effect post-indictment).
  \item \textsuperscript{165} Wheat v. United States, 486 U.S. 153, 159 (1988).
  \item \textsuperscript{166} United States v. Monsanto, 491 U.S. 600 (1989); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989).
  \item \textsuperscript{167} Monsanto, 491 U.S. at 614 (“[N]either the Fifth nor the Sixth Amendment to the Constitution requires Congress to permit a defendant to use assets adjudged to be forfeitable to pay that defendant’s legal fees.”).
  \item \textsuperscript{168} Caplin & Drysdale, 491 U.S. at 626 (“A defendant has no Sixth Amendment right to spend another person’s money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice . . . . [T]he government does not violate the Sixth Amendment if it seizes the . . . proceeds [of a crime] and refuses to permit the defendant to use them to pay for his defense.”).
  \item \textsuperscript{169} See Green, supra note 12, at 1587-88 (“The most distinctive and significant aspect of prosecutorial conduct is the exercise of discretion concerning such questions as whom to investigate, whom to charge and what charges to bring, whether to negotiate the terms of a guilty plea, whether to grant immunity from prosecution, whether to drop charges or continue a case to trial, what sentence to seek, and whether to move to vacate a conviction or sentence.”); Ellen S. Podgor, \textit{Department of Justice Guidelines: Balancing “Discretionary Justice,”} 13 Cornell J. L. & Pub. Pol’y 167, 168 (2004).
  \item \textsuperscript{170} See Green, supra note 12, at 1587; Bruce A. Green & Fred C. Zacharias, \textit{Regulating Federal Prosecutors’ Ethics}, 55 Vand. L. Rev. 381, 397 (2002) (“[T]he codes place no meaningful restriction on prosecutors’ conduct in the areas that are the most momentous and contentious—that is, with regard to the exercise of discretion regarding charging, plea bargaining, and sentencing.”).
\end{itemize}
whether to prosecute a criminal charge—and incorporates a standard that is . . . low and incomplete.”

Moreover, the discretion afforded prosecutors under the ethics rules is especially pronounced in the investigatory context. There, prosecutors are exempted even from some limits placed on other lawyers, such as the constraints on gathering evidence for litigation. Additionally, although prosecutors must ensure procedural fairness, scholars note that they have discretion to put pressure on the targets of an investigation to gain their cooperation. For example, the government regularly flips witnesses to uncover facts in an investigation, using the threat of prosecution to secure cooperation by parties whom they believe to be criminally culpable. Furthermore, prosecutors “ask cooperating drug dealers, bank robbers and gun-toting felons to waive their Fifth Amendment privilege against self-incrimination,” and they do so “all the time [even though] the vast majority of [those criminals] do not have access to . . . high-priced legal talent.”

Thus, prosecutors’ responsibility to ensure that criminal proceedings are fair still leaves them with very broad discretion, especially in investigations, and allows them to use tactics that induce or compel witness cooperation. Accordingly, prosecutorial encroachments on access to counsel are not per se unethical, nor does prosecutors’ use of the broad discretion afforded them necessarily create procedural unfairness. Rather, one must look to the specific practice and its consequences, in light of prosecutors’ ethical responsibilities, to determine whether that practice is ethical.

171. Green, supra note 12, at 1588. Model Rule 3.8(a) bars prosecution of “a charge that the prosecutor knows is not supported by probable cause.” Model Rules of Prof’l Conduct R. 3.8(a) (2003). “Since the law requires criminal charges to be supported by probable cause, however, this provision adds nothing to the standard already established by law.” Green, supra note 12, at 1588; see Melilli, supra note 134, at 680 (noting that this sole check on prosecutors’ charging discretion is “unimposing” and “essentially meaningless”).


173. See Green, supra note 125, at 633. Specifically, prosecutors are able to employ agents to use deceit to gather information, while other lawyers may not. See id. at 633 & n.117.

174. See United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987) (“No practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence.”); Michael A. Simons, Vicarious Snitching: Crime, Cooperation, and “Good Corporate Citizenship,” 76 St. John’s L. Rev. 979, 979 (2002) (“Judicial leniency for cooperators traces its roots back hundreds of years to the common law practice of approvement, and American prosecutors have been striking deals with cooperators since at least the nineteenth century.”) (footnote omitted)); Wray & Hur, supra note 36, at 1182. Indeed, the ABA Task Force that prepared the report and resolution opposing the Justice Department’s policy on advancement acknowledged that using the threat of prosecution to secure cooperation was well established. Recommendation 302B, supra note 91, at II.

175. Thompson Memo Hearings, supra note 52, at 121 (statement of Paul J. McNulty, Deputy Att’y Gen. of the United States).
Moreover, although prosecutors investigating crimes generally may be free from judicial interference and externally imposed restrictions, they might still be expected to self-regulate according to some standards of conduct. Indeed, scholars note that the Justice Department has issued internal guidelines, collected as the United States Attorneys’ Manual (the “Manual”), to help prosecutors exercise their discretion carefully, filling gaps left by external rules. In some cases, the Justice Department uses its guidelines to address sensitive subjects. For example, to deal with the “important and sensitive” issue of capital punishment, the Justice Department has guidelines to direct prosecutors in seeking the death penalty. Similarly, the Justice Department has guidelines for subpoenaing members of the media and defense lawyers, recognizing that these two types of subpoenas have caused public outcry over freedom of the press and concerns about the attorney-client relationship, respectively. For all of those practices, the Manual imposes procedural restrictions, requiring prosecutors to obtain approval from senior leadership at Justice Department headquarters in Washington, D.C. (“Main Justice”) before proceeding. In some cases, the Manual also sets out the specific

176. See supra notes 133-34 and accompanying text.
178. See Benjamin R. Civiletti, The Prosecutor as Advocate, 25 N.Y.L. Sch. L. Rev. 1, 2 (1979); Podgor, supra note 169, at 169.
179. See Bruce A. Green, Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?, 8 St. Thomas L. Rev. 69, 77 (1995) (noting that for the most part the manual addresses issues not covered by the ethics codes); Levenson, supra note 133, at 556 n.10 (noting that the manual sets forth factors a prosecutor should consider in making decisions).
181. See Dep’t of Justice Manual, Printed Version, supra note 177, tit. 9, 9-10.000; see also Little, supra note 180, at 407-19 (discussing the guidelines).
184. See, e.g., Cramton & Udell, supra note 172, at 360 & n.283 (noting the criminal defense bar’s attacks on subpoenaing attorneys and claims that the practice “sow[ed] distrust” between lawyers and clients).
185. Little, supra note 180, at 351 & n.13.
186. See, e.g., Dep’t of Justice Manual, Printed Version, supra note 177, tit. 9, 9-10.040 (requiring prosecutors to obtain the Attorney General’s approval to proceed with a death penalty prosecution); id. tit. 9-11.255 (requiring prosecutors to obtain the Attorney General’s approval before subpoenaing a journalist to testify to the grand jury and the approval of the Assistant Attorney General of the Criminal Division before subpoenaing an attorney to
factors or types of factors that the senior officials must consider in reaching a determination.\textsuperscript{187} In other cases, the internal guidelines may not define the factors,\textsuperscript{188} but instead stipulate how Main Justice will weigh whatever factors prosecutors propose.\textsuperscript{189}

Besides giving guidance to prosecutors, the Manual's benefits include increasing fairness\textsuperscript{190} and uniformity\textsuperscript{191} in the enforcement of federal law. One commentator has noted that it also prevents mistakes and abuses.\textsuperscript{192} Scholars explain that the guidelines can also provide an important benefit that is specific to prosecutors: It can help them avoid external regulations that they feel would remove too much of their discretion.\textsuperscript{193} Finally, while the Justice Department's internal guidelines may provide the basis for the Department to discipline a prosecutor, they are not enforceable by the

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\textsuperscript{187} See, e.g., Dep't of Justice Manual, Printed Version, supra note 177, tit. 9, 9-13.410 (indicating that approval to subpoena attorneys is given based on whether the information sought is privileged; the information could be obtained from alternative sources; the information is essential to the case and in criminal cases that there are reasonable grounds to believe a crime was or is being committed; the need for information outweighs the potential adverse effects on the attorney-client relationship; and the subpoena is narrowly drawn); Dep't of Justice Manual, Online Version, supra note 182, tit. 9, 9-13.400 (indicating that approval to subpoena journalists or media records is given based on whether the information sought is essential to the case, the information could be obtained from alternative sources or through negotiations with the media, and the subpoena is narrowly drawn).

\textsuperscript{188} For example, the Manual allows the government in determining whether to seek capital punishment to consider "any legitimate law enforcement or prosecutorial reason [that] weighs for or against seeking the death penalty." Dep't of Justice Manual, Printed Version, supra note 177, tit. 9, 9-10.080.

\textsuperscript{189} See id. The guidelines require prosecutors to consider whether "statutory aggravating factors applicable to the offense and any non-statutory aggravating factors sufficiently outweigh the mitigating factors." Id. Furthermore, the policy defines which aggravating and mitigating factors can be considered, based on evidentiary standards, and sets a threshold for the aggravating factors; mandates a qualitative, not quantitative, analysis of the factors; and permits the disregard of "weak" aggravating or mitigating factors. See id.

\textsuperscript{190} See, e.g., id. ("The authorization process is designed to promote consistency and fairness.").

\textsuperscript{191} See, e.g., id.; see also Michael Edmund O'Neill, When Prosecutors Don't: Trends in Federal Prosecutorial Declinations, 79 Notre Dame L. Rev. 221, 237 (2003). Indeed, achieving uniformity may have been the primary goal of the Holder Memo. Id. at 244.

\textsuperscript{192} See Conference, The Independent Counsel Process: Is it Broken and How Should it Be Fixed?, 54 Wash. & Lee L. Rev. 1515, 1546 (1997) ("[T]he whole purpose of [the U.S. Attorneys' Manual] is so that there can be a uniform, cohesive system of law enforcement throughout the United States, with the centralized control in Washington, to make sure that some Assistant or some U.S. Attorney isn't going off half-cocked in a way that would be detrimental to law enforcement in general." (quoting Robert Fiske, former U.S. Att'y for the S. Dist. of N.Y.).

\textsuperscript{193} See Green, supra note 179, at 76 (noting that the Justice Department may have developed its internal guidelines on subpoenaing criminal defense lawyers to forestall courts from adopting Model Rule 3.8(t)); Little, supra note 15, at 744-45 (suggesting the same and noting that most of the guidelines focus on issues that have been controversial in the past). For a brief history and overview of the Justice Department's internal guidelines, see Podgor, supra note 169, at 170-75.
courts, nor do they create substantive rights for defendants that would allow them any redress if a prosecutor violated a guideline.194

II. CRITIQUES, DEFENSES, AND ETHICAL IMPLICATIONS OF THE GOVERNMENT’S POLICY ON SCRUTINIZING ADVANCEMENT

Despite the Justice Department’s changes to its policy, the debate over scrutinizing advancement continues. Some commentators believe that the recent changes will substantially curb the practice.195 Others express doubts about whether the changes in the McNulty Memo go far enough196 or have definitively stated their belief that it does not.197 Accordingly, critics have called for passage of the Specter bill,198 with its full range of protections and its bar on scrutinizing advancement in all cases. Part II of this Note explores the debate over government scrutiny of advancement in greater detail and draws out the inherent prosecutorial ethics-related implications. First, Part II.A describes the policy arguments underlying the proposal to bar all scrutiny of advancement, including (1) that scrutinizing advancement denies individuals access to adequate representation, (2) that the Justice Department’s articulation of its policy undermines the presumption of innocence, and (3) that the emphasis on cooperation, including scrutiny of advancement, undermines the adversarial system. Part II.A then identifies the ethical concerns that dovetail with those arguments. Next, Part II.B explains the Justice Department’s defense of scrutinizing advancement in certain cases and its claim that the new policy reflects

194. See Green, supra note 179, at 77; see also In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 974-76 (D.C. Cir. 2005) (holding that the Justice Department guidelines on subpoenaing journalists create no substantive rights); McNulty Memo, supra note 111, at XIII.B (noting that the memorandum does not “create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal”).

195. See Gina Passarella, White-Collar Bar Wants More from Department of Justice, Legal Intelligencer (Phila.), Dec. 14, 2006, at 1 (citing one white collar defense attorney who thought that although the McNulty Memo could have gone further he was “more comfortable” than the ABA’s Mathis with the changes to the policy on advancement); Jonathan Peterson & Kathy M. Kristof, U.S. Eases Its Tactics on Suspect Firms, L.A. Times, Dec. 13, 2006, at C1 (noting that the new policy “stops short of an about-face, but it puts significant checks on individual prosecutors” (quoting Professor Robert Weisberg, Director of Stanford University’s Criminal Justice Center)).

196. See, e.g., Editorial, The McNulty Memo, supra note 110 (“The book is open . . . on whether the McNulty Memo goes far enough.”).

197. See Browning, supra note 109 (“The way the world really works is you have a prosecutor who says ‘I can’t ask you to . . . not pay fees,’ . . . [b]ut the message to you, the company, might be ‘Well, if we do that, we might just score some brownie points.’” (quoting Robert Bennett, who represented KPMG during the events at issue in Stein)); Press Release, ABA, Statement by ABA President Karen J. Mathis Regarding Revisions to the Justice Department’s Thompson Memorandum (Dec. 12, 2006) [hereinafter ABA Press Release on McNulty Memo], available at http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=59; Press Release, Ass’n of Corporate Counsel, DOJ’s “McNulty Memorandum” Falls Short on Prosecutorial Reforms, Says Association of Corporate Counsel (Dec. 12, 2006), available at http://www.acca.com/php/cms/index.php?id=34&action=item&item_id=20061212_1402.

198. See ABA Press Release on McNulty Memo, supra note 197.
prosecutors’ practice of applying scrutiny only in rare situations. Part II.B then describes the ethical obligations underlying those claims.

A. Critics of Scrutinizing Advancement Cite Public Policy Problems, Revealing Prosecutorial Ethics Concerns

1. Scrutiny of Advancement Interferes with Access to Competent Representation

One critique of scrutinizing advancement is that, by limiting or preventing an organization from making money available to employees for legal costs, the practice denies those employees access to adequate representation. The ABA, echoing criticisms of the Stein court,\(^\text{199}\) has pointed out that in a white collar criminal investigation, the accused must spend significant amounts of money to put on a defense.\(^\text{200}\) One reason for the substantial cost is that such cases involve lengthy investigations and trials, with large numbers of documents and depositions. For example, in Stein, the defendants faced 5 million to 6 million pages of documents produced in discovery, 335 deposition transcripts, 195 income tax returns, and more than a 1000 pages of pretrial motions in a trial that the court estimated would last at least six months.\(^\text{201}\) Another reason white collar crime cases are expensive is that they involve highly complex corporate and financial transactions.\(^\text{202}\) To competently represent defendants in such cases, counsel must have special skills, business sophistication, and resources, and they will charge clients accordingly.\(^\text{203}\) For those reasons, the Stein court estimated that a defendant might need to spend “$500,000 to $1 million, if not significantly more.”\(^\text{204}\) Indeed, press accounts have revealed that in extraordinary white collar cases, defense costs may be


\(^{200}\) See Recommendation 302B, supra note 91, at III n.30.

\(^{201}\) Stein, 435 F. Supp. 2d at 362 & n.163. But see Margulies, supra note 34, at 56 n.192 (noting that although white collar criminal defense usually is expensive, exceptions exist, including Stein, which involved only a modest number of “key” documents and a fraud committed in “cookie-cutter” fashion); see also id. at 28-29 (suggesting that defense costs need not be so high if corporate clients or insurers exerted pressure on attorneys not to pad their bills).

\(^{202}\) See Stein, 435 F. Supp. 2d at 338 n.13; Recommendation 302B, supra note 91, at III n.30.


\(^{204}\) Stein, 435 F. Supp. 2d at 362 n.163; see also Koppel, supra note 88 (quoting John Hasnas, a professor at Georgetown University’s McDonough School of Business, who stated, “It is hard to defend a white-collar case for less than $100,000, and most cost much, much more than that”).
considerably higher.\textsuperscript{205} The Stein court and others have pointed out that many individuals lack the resources to pay for such a defense,\textsuperscript{206} or for an appeal if convicted.\textsuperscript{207} Accordingly, the ABA has claimed that employees rely on their employer organizations to fund their defenses.\textsuperscript{208} Government consideration of advancement in charging decisions, however, can put pressure on organizations to limit or deny those payments, according to the ABA.\textsuperscript{209} Many commentators have noted that an indictment can cause serious damage to an organization.\textsuperscript{210} For example, prosecutors’ decision to indict accounting firm Arthur Andersen practically destroyed it, reducing it from a firm with 28,000 employees in the United States and 90,000 worldwide to one with a staff of only 200 people.\textsuperscript{211} Commentators have further noted that despite such effects, prosecutors have virtually unlimited discretion to indict an organization.\textsuperscript{212} Consequently, these commentators believe that, when prosecutors present an organization with the possibility of indictment, they compel the company to cooperate with an investigation.\textsuperscript{213} To determine what they must do to cooperate,

\textsuperscript{205} See Palmeri, supra note 203 (noting that the defense for former Enron CEO Jeffrey Skilling reached $70 million).

\textsuperscript{206} United States v. Stein, 461 F. Supp. 2d 201, 203 (S.D.N.Y. 2006) (denial of defendants’ motion for a continuance) (“While it appears that some of the KPMG Defendants may be well off, there is a real and growing possibility that some and perhaps all lack funds necessary to [pay for] their defense.”).

\textsuperscript{207} See Browning, supra note 203.

\textsuperscript{208} See Recommendation 302B, supra note 91, at III (noting that “[e]ven for those employees who can afford a lawyer, it will often be difficult if not impossible to afford a lawyer” with the right expertise and capacity unless their employer pays the fees).

\textsuperscript{209} See infra note 217 and accompanying text.

\textsuperscript{210} See Comm. on Capital Mkt. Regulation, supra note 95, at 85 (“[C]riminal indictments of entire companies . . . effectively result[] in the liquidation of the entire firm; with this comes the attendant disruption of the lives of many employees and stakeholders who are totally innocent of wrongdoing.”); Jonathan D. Glater & Alexei Barrionuevo, Decision Rekindles Debate Over Andersen Indictment, N.Y. Times, June 1, 2005, at C1; Has the Government Gone Too Far?, supra note 98 (statement of Andrew Husksa, former Chief Assistant U.S. Att’y, U.S. Dep’t of Justice, E. Dist. of N.Y., and former Senior Counsel to former Deputy Att’y Gen. Thompson, U.S. Dep’t of Justice) (noting that an indictment can cause “negative publicity, revocation of debts, [and] debarment from government business,” sending an organization into a “death spiral”).

\textsuperscript{211} Glater & Barrionuevo, supra note 210.

\textsuperscript{212} See Has the Government Gone Too Far?, supra note 98 (statement of Andrew Husksa, former Chief Assistant U.S. Att’y, U.S. Dep’t of Justice, E. Dist. of N.Y., and former Senior Counsel to former Deputy Att’y Gen. Thompson, U.S. Dep’t of Justice) (“The only check on a prosecutor’s discretion to indict a company is the vote of a grand jury, which has never constituted a serious impediment to a prosecutor who has a decent case of criminal wrongdoing by company officers.”); see also Niki Kuckes, The Useful, Dangerous Fiction of Grand Jury Independence, 41 Am. Crim. L. Rev. 1, 8-9 (2004) (noting that the grand jury does not provide a meaningful check on prosecutors).

\textsuperscript{213} See Wray & Hur, supra note 36, at 1170 (citing N. Richard Janis, Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice Is Being Destroyed, Wash. Law., Mar. 2005, at 32, 44); Has the Government Gone Too Far?, supra note 98 (statement of David Pitofsky, former Principal Deputy Chief, Criminal Div., U.S. Dep’t of Justice, E. Dist. of N.Y.) (“The Thompson Memo is a tool—a crowbar—that prosecutors can use to convert companies into agents of the state.”); see also
organizations will look to the government’s policy, and if they see that paying employees’ attorneys’ fees may be considered a sign of noncooperation, then they will try to limit or altogether deny those payments. 214

While the ABA has acknowledged the legitimacy of the general principle that the government may use the threat of prosecution to compel cooperation, 215 it has faulted the government for linking its policy on advancement to its determination to charge an organization. 216 The ABA has claimed that when the government scrutinizes advancement as part of its evaluation of an organization’s cooperation, it pressures the organization into decisions that deny its employees access to attorneys with the capacity and acumen required to defend them effectively in a white collar crime proceeding. 217 Indeed, some observers have suggested that the cost of a defense in a corporate crime investigation is so daunting that some individuals choose not to put on a defense at all and instead plead guilty. 218 Thus, government scrutiny of advancement can interfere with the payments, reducing or eliminating individuals’ access to the kind of counsel that they may need to mount an adequate defense.

2. The Government Policy’s Terminology Undermines the Presumption of Innocence

Critics have also charged that the way that the Justice Department articulates its policy on scrutinizing advancement undermines the presumption of innocence. These critics have faulted the government’s policy for allowing prosecutors to examine “a corporation’s promise of support to culpable employees and agents . . . through the advancing of attorneys fees.” 219 That language regarding “culpable” employees, which appeared in the Thompson Memo, appears in similar form in the McNulty Memo. Specifically, the new policy states that although prosecutors generally should not consider advancement except in certain cases, in such cases “advancement is considered with many other telling facts to make a determination that the corporation is acting improperly to shield itself and its culpable employees from government scrutiny.” 220 The ABA has

Hasnas, supra note 149, at 627 (noting that the Sentencing Guidelines turn an organization into an “auxiliary” in the prosecution of its individual employees).


215. See Recommendation 302B, supra note 91, at II.

216. See id. at III.

217. See id. (noting that prosecutor scrutiny of advancement causes organizations to make decisions that limit or deprive employees of support and resources for their defense).

218. Cohen & Davies, supra note 3 (reporting that some observers believed that former Enron accountant Richard Causey pled guilty because he lacked the $20 million that his lawyers estimated that it would cost to defend him).

219. Thompson Memo, supra note 45, at VI.B.

220. McNulty Memo, supra note 111, at VII.B.3 n.3.
criticized the use the word "culpable," noting that the government provides no definition of the term. Moreover, the ABA has claimed that before prosecutors bring charges or the organization has completed its internal investigation, it may not be clear which employees are culpable. Consequently, in determining whether an employee is "culpable" and thus off limits for advancement, organizations may "feel compelled either to defer to the government investigators’ initial judgment or to err on the side of caution." The ABA has argued that it is "inconsistent with the presumption of innocence" for the government to put organizations in this position.

Additionally, critics have charged that organizations, eager to appease prosecutors, "hesitate to advance attorneys’ fees and costs to individual employee-defendants for fear of appearing to ‘protect[] [their] culpable employees,’" even where the facts do not warrant an organization’s negative treatment of its employees. In other words, the policy pressures organizations to avoid supporting employees where no facts lead the organizations themselves to believe that their employees broke the law but where the organizations believe that the employees “appear” culpable to prosecutors. Indeed, the Stein court described this same problem when it observed that the Thompson Memo gave KPMG an incentive to find that it had no legal obligation to advance fees to the defendants, because prosecutors’ skepticism of the firm’s finding such an obligation would likely lead to an indictment and the organization’s doom. Similarly, some critics have charged that where the policy pressures companies to make early determinations about employees’ culpability, it not only encourages organizations to withhold support, it exacerbates a natural tendency for them actively to scapegoat one or more employees. While organizations looking to avoid prosecution may already have an incentive to “heap scorn, fairly or unfairly, on one or a few employees,” the

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221. See Recommendation 302B, supra note 91, at III n.19.
222. Id. at III.
223. Id. at III n.19.
224. Id. at VI n.44.
225. Wray & Hur, supra note 36, at 1181 (alterations in original) (quoting Thompson Memo, supra note 45, at VI.A).
226. See id. at 1182; see also Hasnas, supra note 149, at 626 (noting that an organization may be denied cooperation credit “if it advances the legal fees of an employee the government regards as guilty”).
227. See United States v. Stein, 435 F. Supp. 2d 330, 364 (S.D.N.Y. 2006) (“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 language of the Thompson Memorandum itself” because “[i]t would be irresponsible to take the chance that prosecutors might view it as ‘protecting . . . culpable employees and agents.’”).
government policy's emphasis on "culpable" employees may have taken "what was previously an ad hoc corporate strategy—find someone to 'throw under the bus'—and codified it as an essential step to corporate survival."229

Thus, the critics believe that the language in the government's policy creates or increases incentives for an organization to label employees "culpable" before gathering all the facts, and possibly even in contradiction to the employees' apparent innocence. Plus, they charge that the policy, as stated, may increase or regularize the tendency of some organizations to foist the blame for widespread misconduct onto the shoulders of a few employees, making these scapegoats appear more culpable then they would otherwise appear. Those results, the critics have claimed, "stand[] the presumption of innocence principle on its head."230

3. The Emphasis on Cooperation, Including Scrutiny of Advancement, Undermines the Adversarial System

A third criticism of the government's scrutiny of advancement is that, as a component of the overall policy emphasizing organizations' cooperation, it undermines the adversarial system of justice. For example, one critic characterized the scrutiny of advancement discussed in Stein as one piece of evidence that the government sought a form of "full cooperation" that aligned the organization with the government and against employees.231 Others have taken up the same theme, asserting that the emphasis on cooperation gives the government "too much power,"232 and noting that where the government's power overwhelms defendants it threatens the adversarial system.233

Commentators have cited three aspects of the government's policy that create such a power imbalance. First, they have noted that scrutiny of advancement leads organizations to withhold it from employees who need it, decreasing the resources available to them to mount a defense.234 Second, critics have explained how focusing on cooperation in determining whether to indict—as the McNulty Memo does235 and as the Thompson

229. See Has the Government Gone Too Far?, supra note 98 (statement of David Pitofsky, former Principal Deputy Chief, Criminal Div., U.S. Dep't of Justice, E. Dist. of N.Y.).
230. Thompson Memo Hearings, supra note 52, at 93 (statement of Karin J. Mathis, President, ABA). The policy's language may also create unfairness. See Duggin, supra note 53, at 914 ("While few would suggest that protection of 'culpable' employees is appropriate, punishment or termination of an employee simply because a third party—whether a co-worker, prosecutor or agency—views that person as 'culpable' is difficult to square with basic notions of fairness.").
231. See Janis, supra note 213, at 35.
233. See id. at 1145 (explaining this phenomenon in the context of deferred prosecution agreements).
234. See supra Part II.A.1.
235. McNulty Memo, supra note 111, at VII.
Memo before it did—has the effect of increasing the resources available to the government. Because indictments can damage an organization so severely, most organizations will cooperate with the government to avoid being charged. To cooperate, organizations will likely launch their own internal investigations to uncover culpable employees and turn that information over to prosecutors. As a result, a policy’s emphasis on cooperation and threat of indictment allows the government to deputize organizations to join the prosecution team. “A corporate employee caught in the crosshairs of a corporate fraud investigation [must] fight against the resources of the U.S. government and . . . a major U.S. corporation. The combined firepower of both against a single person is awesome.” In other words, they argue that a policy that emphasizes cooperation significantly augments the government’s power.

Third, critics have noted that other provisions of the government’s policy regarding cooperation disadvantage individuals. Those critics pointed to provisions in the Thompson Memo—provisions that the McNulty Memo retained—that instruct prosecutors assessing an organization’s cooperation to consider the organization’s assistance to employees in preparing a defense, its retention of such employees without sanction for their misconduct, and its sharing information about the government investigation with the employees as part of a joint defense agreement. They noted that such provisions create incentives for the organization to fire or otherwise punish the employees and to withhold from the employees information about the investigation. Furthermore, critics have noted that the government’s consideration of an organization’s waiver of its attorney-client and work product protections creates an incentive for the entity to reveal employee statements to the government. Thus, the policy might

236. See supra note 50 and accompanying text.
237. See Wray & Hur, supra note 36, at 1170.
238. See supra notes 210-12 and accompanying text.
239. See supra note 213 and accompanying text.
240. See Hasnas, supra note 149, at 629-30 (noting that the Thompson Memo created pressure for companies to turn over incriminating information to the government); supra note 47.
241. See supra note 213 and accompanying text.
243. See Duggin, supra note 53, at 904; Hasnas, supra note 149, at 626.
244. See Duggin, supra note 53, at 904-05; Hasnas, supra note 149, at 626 (noting that even an organization that complies with one provision of the Thompson Memo may still fail to win cooperation credit if it fails to fire an employee whom the government considers guilty, or cooperates with such an employee in preparing a defense).
245. See Hasnas, supra note 149, at 625 (noting that the waiver of the organization’s attorney-client privilege permits the government to obtain statements of possible targets and that prosecutors’ control of cooperation credit often leaves organizations little choice but to accede to waiver requests (citing David M. Zornow & Keith D. Krakauer, On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations, 37 Am. Crim. L. Rev. 147, 154 (2000)).
deny employees the protection of the organization's privilege, further reducing their leverage in an investigation and following proceedings.

In sum, critics have charged that the advancement provision contributes directly to the power imbalance between the government and individuals by stripping resources from employees,\textsuperscript{246} and that the advancement provision acts together with other parts of the government's policy further to undermine defendants' position and augment the government's own resources. An emphasis on full cooperation allows the government to "stack the deck against individual defendants,"\textsuperscript{247} and such a discrepancy can undermine the adversarial system.\textsuperscript{248} One commentator noted that while this result may not lead to injustice for the "clearly guilty," who should be convicted, or the "clearly innocent," who will be acquitted no matter the resources stacked against them, there is an "extremely broad middle section" of defendants or potential defendants who may be prejudiced by the imbalance.\textsuperscript{249}

4. Public Policy Critiques of Advancement Reveal Ethics Concerns

An examination of critics' public policy arguments against scrutinizing advancement reveals several ethical considerations. For example, if the claims that such scrutiny denies individuals access to adequate representation\textsuperscript{250} and undermines the adversarial system\textsuperscript{251} are viewed in light of the prosecutorial ethics framework,\textsuperscript{252} it appears that the government's consideration of attorneys' fee payments conflicts with prosecutors' obligations in some ways. First, prosecutors have some responsibility to ensure defendants' access to competent counsel,\textsuperscript{253} but since scrutinizing fee payments denies individuals' ability to pay for an adequate defense,\textsuperscript{254} such scrutiny seems to interfere with that responsibility. Second, the duty to seek justice impels prosecutors to achieve "adversarially valid results,"\textsuperscript{255} but the government's policy on advancement creates a dramatic power imbalance that runs counter to such adversarial validity—it reduces individuals' resources and disadvantages their defenses\textsuperscript{256} while increasing the government's resources.\textsuperscript{257} Specifically, even though some of the accused are "clearly guilty,"\textsuperscript{258} for

\textsuperscript{246} See supra Part II.A.1.
\textsuperscript{247} Wray & Hur, supra note 36, at 1145.
\textsuperscript{248} See supra note 233 and accompanying text.
\textsuperscript{249} Has the Government Gone Too Far?, supra note 98 (statement of David Pitofsky, former Principal Deputy Chief, Criminal Div., U.S. Dept' of Justice, E. Dist. of N.Y.).
\textsuperscript{250} See supra Part II.A.1.
\textsuperscript{251} See supra Part II.A.3.
\textsuperscript{252} See supra Part I.C.1-2.
\textsuperscript{253} See supra notes 153-55 and accompanying text.
\textsuperscript{254} See supra note 217 and accompanying text.
\textsuperscript{255} See supra notes 142-43 and accompanying text.
\textsuperscript{256} See supra Part II.A.1; supra notes 243-45 and accompanying text.
\textsuperscript{257} See supra notes 237-42 and accompanying text.
\textsuperscript{258} See supra note 249 and accompanying text.
the government, with its superior resources, to convict these individuals may be factually fair but adversarially invalid.

The duty to seek justice requires prosecutors to represent the sovereign, but the power discrepancy undermines that goal as well, for several reasons. One reason is that the sovereign should not punish the innocent, but the resource imbalance may lead to convictions of those who are innocent but not "clearly" so: In some cases their defenses may be inadequate at trial, and in other cases they may plead guilty rather than try to prove their innocence. Moreover, prosecutors have a responsibility to preserve the perception of fair process, but the scale of the imbalance created by the policy on advancement undermines the representation of the government as a just sovereign. Thus, ethical concerns about achieving adversarially valid results and about preserving actual and apparent procedural fairness support the critics' policy arguments about the dangers of government scrutiny of advancement.

The effect of the Justice Department's policy on the presumption of innocence also implicates ethical considerations. First, by undermining the presumption of innocence, the government is more likely to punish the innocent, which the sovereign has a duty not to do. Furthermore, to the extent that prosecutors do undermine the innocence presumption, they erode one of the foundations of procedural fairness, which they have a responsibility to uphold. Moreover, by impeding advancement, prosecutors may appear to be usurping the court's role in determining guilt or innocence by seeking to "punish those whom [the prosecutors themselves] deem culpable." Thus, even if a court ultimately convicted an individual who was denied fee advancement, the prosecutor, by having earlier "punished" the individual, might have created an appearance that the investigative and adjudicative process was unfair. Accordingly, ethical considerations regarding the importance of procedural fairness reveal that the Justice Department's articulation of its policy conflicts with prosecutors' ethical obligations.

259. See supra note 144 and accompanying text.
260. See supra note 146 and accompanying text.
262. See supra note 218 and accompanying text.
263. See supra note 148 and accompanying text.
264. See supra notes 247-48 and accompanying text.
265. See supra Part II.A.2.
266. See supra note 249 and accompanying text.
267. See supra note 146 and accompanying text.
268. See supra notes 145-46 and accompanying text.
B. Defenders of Scrutinizing Advancement Cite Policy Justifications and Practical Considerations, Revealing Ethics Obligations

1. The Danger of Stonewalling Justifies Scrutiny of Advancement

The Justice Department’s policy reflects the government’s position that it needs to be able to scrutinize the payment of attorneys’ fees to determine if the money is being used to protect culpable employees in an attempt to thwart an investigation. To explain this concern, the government has argued that “the payment of legal fees to employees can be one aspect of a corporation impeding an investigation where the corporation ‘circles the wagons’ by, among other things, essentially muffling relevant corporate witnesses and controlling the flow of information to the government.”

Scholars note that drug rings and criminal syndicates are not the only organizations to engage in such obstruction; corporations may do so as well.

According to these scholars, stonewalling may occur in different scenarios and through different mechanisms. For example, where the organization retains or refers the attorney who will represent its employees, the organization may purposefully select a lawyer who will discourage employees from cooperating with the government. Indeed, scholars have given the following example regarding the case against financier Michael Milken:

When considering which lawyers to recruit to represent potential witnesses in the Milken case, “[m]ore important” than the “lawyers’ skills and reputations . . . were the lawyers’ track records in government cases. [Lawyers for Milken’s company] wanted lawyers whose strong philosophical preference was to fight the government rather than cooperate with it.”

Even where the organization does not select the lawyer and merely provides referrals, scholars have noted that stonewalling may occur. For example, an organization may maintain a network of lawyers whose interest in continuing to receive referrals inclines them to recommend against employees’ cooperation with the government, even when cooperation might be better for the employees. When criminal organizations are involved, an employee’s acceptance of a lawyer “hand-picked by the organization,” along with subsidies for the lawyers’ fees, can signal the employee’s loyalty

270. See supra note 113 and accompanying text.
271. Government’s Memorandum, supra note 81, at 4-5.
272. See supra note 35 and accompanying text.
273. See supra notes 34-35 and accompanying text.
274. Richman, supra note 34, at 123 n.188 (omission and first alteration in original) (quoting Stewart, supra note 35, at 314-15).
275. See Margulies, supra note 34, at 25-26; see also Richman, supra note 34, at 126 (describing a theoretical “white-collar attorney who hopes for more referrals and fees from the target corporation or lawyers to whom she owes her employment” and thus serves the corporation’s interests over those of the employee she was hired to represent).
to the criminal enterprise, and thus raises the risk that the acceptance is "a pre-commitment device that hinders the individual's ability to inform on his colleagues."276 Indeed, one press account noted that in some cases the government suspects that lawyers may have had incentives not to uncover or not to report evidence of wrongdoing.277 Thus, where organizations provide not only advance fees, but also choose or provide a referral for the lawyer who represents the employee, there is a greater opportunity for stonewalling.

While commentators have focused on provision of counsel and referrals and on attempts to protect the organization itself, the Justice Department has stated its concerns more broadly:

[A] corporation's advancement of legal fees can concern prosecutors where that fact, taken with other facts, gives rise to a real concern that the corporation is "circling the wagons," or, in other words, is using or conditioning the payment of attorneys' fees as a tool to limit or prevent the communication of truthful information from current and former employees to the government, in order to protect either the employees or the corporation itself.278

In other words, however an organization uses the payment of fees to limit employee disclosures, such payments raise real concerns. Plus, while in some cases the organization may stonewall for its own benefit, in other cases the organization may use its resources not to protect "itself" but to protect "the employees" under investigation.

Whatever the reasons and mechanisms for stonewalling, at least one court has recognized that "corporate [stonewalling] no doubt occur[s]."279 Where it does occur, one scholar notes that it impedes access to accurate and complete information, without which the government cannot fully assess the scope of misconduct that is the focus of its investigation.280

Moreover, according to the Justice Department, the need to ensure that executives do not escape justice was particularly acute in the wake of recent

276. Margulies, supra note 34, at 25.
277. See James Bandler & Kara Scannell, In Options Probes, Private Law Firms Play Crucial Role, Wall St. J., Oct. 28, 2006, at A1 (reporting that the Securities and Exchange Commission (SEC) launched a system to track, among other things, how "independent" the government believed the private lawyers conducting probes of companies had been, which would help the government "judge [the] credibility" of the lawyers' findings). The press report described one investigation involving potential backdating of stock option grants that prompted SEC concern. Id. There, a statistical analysis concluded that the odds were 300 billion to one that the company's grants had been randomly selected, but when the company "used its longtime outside counsel to conduct the probe," the lawyers reported "that there was no intentional backdating to enrich executives." Id.
278. Thompson Memo Hearings, supra note 52, at 120 (statement of Paul J. McNulty, Deputy Att'y Gen. of the United States).
279. United States v. Stein, 435 F. Supp. 2d 330, 363 (S.D.N.Y. 2006) (likening the phenomenon to the Watergate case, "in which the legal fees of individuals who broke into the offices of the Democratic National Committee were paid, along with other 'hush money,' to buy the silence of the burglars and to protect higher-ups").
280. Duggin, supra note 53, at 893.
corporate scandals, because "the American public needed to know that a
CEO or a CFO of a Fortune 500 company was not immune from
prosecution because of his wealth, position, or friends," and that the
American judicial system is not one "where a pickpocket who steals 50
dollars faces more jail time than a CEO who steals 50 million dollars." In
other words, in the face of enormous corporate crime, prosecutors need
to ferret out the facts and cannot allow organizations to shield culpable
employees. Thus, scholars recognize that prosecutors have a legitimate
interest in uncovering the truth and, therefore, are "justifiably wary" of
ttempts to shield culpable actors. Indeed, Judge Kaplan, although
finding fault with the wording of the Justice Department's policy and
prosecutors' implementation of it in Stein, acknowledged that no one would
"suggest that an entity's obstruction of a government investigation—what
the government has called 'circling the wagons'—should be ignored in a
charging decision."

2. Prosecutors Scrutinize Advancement Only Rarely and Only as One
Factor Among Many

While the Justice Department has argued that prosecutors must retain
discretion to scrutinize advancement, it claims that prosecutors never
exercised their discretion to apply scrutiny except in rare cases, and it
claims that the new policy mandates such a sparing use of the practice.
McNulty, in announcing the new policy, noted that it reduces prosecutors'
discretion to take advancement into account, generally prohibiting
prosecutors from considering it except in extremely rare cases. He
claimed that this bottom-line standard made explicit what prosecutors had
been doing under the Thompson Memo, saying: "Let me emphasize this—

281. Thompson Memo Hearings, supra note 52, at 110 (statement of Paul J. McNulty,
Deputy Att'y Gen. of the United States); see also Paul J. McNulty, Deputy Att'y Gen., U.S.
Dep't of Justice, Prepared Remarks at the Lawyers for Civil Justice Membership Conference
Regarding the Department's Charging Guidelines in Corporate Fraud Prosecutions (Dec. 12,
2006) [hereinafter McNulty, Remarks on McNulty Memo, available at
http://www.usdoj.gov/dag/speech/2006/dag_speech_061212.htm (claiming the Justice
Department's response to the public outcry over the Enron scandal and contemporary
widespread, large-scale corporate frauds "reflected the duty [that prosecutors] owe to the
American public," including the duty "to enforce the law").

282. Thompson Memo Hearings, supra note 52, at 110 (statement of Paul J. McNulty,
Deputy Att'y Gen. of the United States) (quoting Penalties for White Collar Crime: 
Hearings Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary, 107th
Cong. 261 (2002) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary));
see also McNulty, Remarks on McNulty Memo, supra note 281 (noting that in carrying out
their duty to enforce the laws against corporate fraud, "prosecutors . . . are committed to the
fair administration of justice and equal treatment under the law").

283. Duggin, supra note 53, at 893; see also Margulies, supra note 34, at 56
("[P]rosecutors act appropriately when they set conditions of cooperation for collective
entities that are reasonably related to the goals of promoting thorough investigations . . . .")


286. Id.
the advancement of attorneys' fees has always been a rare consideration in our corporate prosecutions." He explicitly based his claim on the provisions in the McNulty Memo and in the Thompson Memo prohibiting the government from scrutinizing advancement where organizations had state law or contractual obligations to pay attorneys' fees under state law. Specifically, he argued that "[b]ecause corporations often do have these [obligations] which have been construed by courts to provide advancement and indemnification, fee advancement could be, and was, considered rarely." In other words, the government argues that it has, and always had, limited discretion to scrutinize advancement, since there are few situations in which advancement is not required by law and thus where it is immune from government scrutiny.

Additionally, where legal requirements do not immunize advancement from government scrutiny, the government has noted that it still may only consider the advancement as one factor among many that may indicate attempts to impede an investigation. Prior to the adoption of the McNulty Memo, the Justice Department pointed out that its policy on fee advancement did not constitute "a blanket [g]overnment statement that a corporation's payment of legal fees will be weighed negatively in the charging decision." To the contrary, the government claimed that prosecutors worry about advancement only when it occurs in combination with other factors that may indicate noncooperation. Such factors would include "[an organization's] overly broad assertions of corporate representation of its employees, a refusal to sanction wrongdoers, a failure to comply with document subpoenas and a failure to preserve documents." In addition, McNulty suggested that, where an organization's advancement policy was not "applied consistently" to all employees, it would raise concerns. On the other hand, he claimed that, where advancement did not occur in combination with those other

287. Id. Indeed, the Justice Department has characterized the McNulty Memo as "clarifying" the intent of the Thompson Memorandum. Id.

288. Id. In his remarks, McNulty incorrectly stated that the Thompson Memo "specifically stated that where there was a legal or contractual obligation to advance fees, prosecutors could not consider that factor." Id. In fact, the Thompson Memo had no such provision regarding contractual obligations; it only prohibited scrutiny of advancement where the advancement was required by state law. See supra note 49 and accompanying text. The McNulty Memo, by contrast, does specifically prohibit taking advancement into account when either state law provisions or contractual obligations require an organization to advance attorneys' fees. See supra note 117 and accompanying text.


290. Government's Memorandum, supra note 81, at 5; see also Thompson Memo Hearings, supra note 52, at 119-20 (statement of Paul J. McNulty, Deputy Att'y Gen. of the United States) (noting that advancement "is a small part of the overall assessment as to whether a corporation cooperated" and that advancement will not count against an organization absent other circumstances indicating a pattern of noncooperation).

291. See Thompson Memo Hearings, supra note 52, at 120 (statement of Paul J. McNulty, Deputy Att'y Gen. of the United States).

292. Id.

293. Id.
circumstances, the payments would not indicate stonewalling.\textsuperscript{294} Indeed, commentators have noted that under the Thompson Memo, prosecutors did not always challenge the cooperation of organizations that advanced attorneys' fees.\textsuperscript{295}

While McNulty made those claims in reference to the Thompson Memo, he has recently claimed that the McNulty Memo uses the same approach, actually formalizing it into a requirement. Specifically, he described the McNulty Memo provision as follows:

\begin{quote}
[F]ee advancement can be considered where the totality of the circumstances show[s] that it was intended to impede a government investigation.
\end{quote}

As a practical matter, this factor is never considered alone. It is always combined with other telling facts to show that the corporation is attempting to shield itself and its culpable employees.\textsuperscript{296}

Further, McNulty emphasized that the situations in which “[c]orporations may use advancement, and other methods, to stop the flow of information from the company to the government so that [the government] cannot investigate the conduct effectively . . . [are] very, very rare.”\textsuperscript{297} Additionally, he explained that “prosecutors must come to me for approval before they can consider [advancement] in charging decisions.”\textsuperscript{298} In short, McNulty emphasized that the Justice Department’s new policy places safeguards on advancement to protect it from scrutiny except in limited circumstances.

Commentators have noted that the changes to the policy do limit prosecutors’ ability to take advancement into account. For example, a former Deputy Attorney General who advised McNulty on the creation of the new guidelines characterized the McNulty Memo as imposing “a bottom-line standard saying it’s [not] appropriate to [scrutinize advancement] except in extremely limited circumstances.”\textsuperscript{299} Moreover,
one scholar suggested that a process requiring approval from the Deputy Attorney General may act as a practical deterrent, because young prosecutors will not be comfortable seeking approval from someone so senior.\(^{300}\) Indeed, one commentator characterized the new policy’s substantive and procedural checks as “significant.”\(^{301}\)

3. Defenses of Scrutinizing Advancement Reveal Ethics Obligations

Just as the prosecutorial ethics framework sheds light on the arguments against scrutinizing advancement, that framework also reveals considerations inherent in the arguments supporting the government’s policy. Indeed, several ethical considerations are implicit in the arguments about scrutinizing advancement to ensure that the payments do not facilitate stonewalling. For example, the duty to seek justice requires prosecutors to punish wrongdoers\(^{302}\) and it may require them to enforce the law strenuously.\(^{303}\) Where crime has actually occurred, however, stonewalling keeps prosecutors’ from fulfilling that duty, since it impedes their ability to uncover the truth and punish the guilty.\(^{304}\) Moreover, the payment of attorneys’ fees can be, and sometimes is, used in furtherance of a criminal conspiracy.\(^{305}\) In such cases, the money may be subject to forfeiture, as in Caplin & Drysdale and Monsanto.\(^{306}\) If so, prosecutors’ scrutiny of advancement, and any consequent denial of advancement by the organization, would not violate the right to counsel.

The Justice Department’s attempt to prevent stonewalling in the corporate context may reflect other important ethical priorities of prosecutors. The public expects its government to prosecute corporate crime.\(^{307}\) In the wake of large-scale corporate fraud, that duty is particularly pressing.\(^{308}\) Plus, in representing the sovereign, prosecutors must honor the public’s expectation that similarly situated criminals be treated equally and must ensure that punishments are proportional to the crimes committed.\(^{309}\) When corporate crime is widespread, the public’s faith in the justice system depends in part on seeing that corporate criminals...
are prosecuted and receive sentences in proportion to their crimes, but stonewalling could allow white collar criminals to avoid some or all criminal liability. If prosecutors allowed that to occur, they might send the message to the public that the government treats corporate criminals more leniently than other wrongdoers and does not actually punish corporate criminals or does not punish them in proportion to the magnitude of their crimes. Indeed, McNulty’s testimony to the Senate Judiciary Committee implied that, by failing in these responsibilities, prosecutors fail to preserve the American public’s perception that its criminal justice system is fair. Prosecutors’ ethical responsibility to represent the sovereign compels them to avoid these results.

III. ON BALANCE, ETHICAL CONSIDERATIONS FAVOR THE JUSTICE DEPARTMENT’S POSITION, BUT THE MCNULTY Memo NEEDS FURTHER CLARIFICATION

Part III evaluates the considerations raised in Part II in light of the ethics framework raised in Part I to shed new light on the debate over scrutinizing advancement. Part III.A balances the considerations and concludes that allowing prosecutors to retain discretion to consider advancement is consistent with the requirements and limits of prosecutorial ethics. Part III.B suggests that the Specter bill’s blanket prohibition on scrutinizing advancement should not be adopted. Part III.C argues that the recent changes to the Justice Department’s policy allows prosecutors the discretion they require to carry out their ethical obligations, but it lacks specific directions for prosecutors in using their discretion. Finally, Part III.D proposes a change to the Justice Department’s policy that would clarify it.

A. The Ethical Considerations and the Context of Prosecutorial Discretion Suggest that Prosecutors Should Be Able to Scrutinize Advancement in Some Instances

Examining the ethical issues underlying the policy arguments for and against scrutinizing advancement reveals that prosecutors face conflicting ethical responsibilities. On the one hand, scrutinizing advancement may undermine the presumption of innocence, which could also lead to wrongful punishment of the innocent and actual and perceived procedural unfairness. To the extent that it does so, such scrutiny interferes with prosecutors’ ability to represent the sovereign and to seek justice. Additionally, the way that their scrutiny exacerbates the power imbalance between the government and individual defendants may lead to increased

310. See supra note 282 and accompanying text.
311. See supra notes 280-83 and accompanying text.
312. Cf. supra note 282 (commenting that the public’s need to know that its justice system is fair explained the Justice Department’s use of all the tools at its disposal, including scrutinizing advancement).
313. See supra notes 267-69 and accompanying text.
punishment of the innocent and actual and perceived procedural unfairness, and it will often lead to adversarially invalid results. These results impair prosecutors’ ability to fulfill their responsibility to act as representatives of the sovereign. Moreover, the effect of the imbalance on defendants’ access to the type of counsel needed in a white collar crime case can lead to procedural unfairness and constitutes an encroachment on the right to competent counsel that may be somewhat at odds with the policies underlying the ethics codes and some court decisions.

On the other hand, three considerations provide a counterweight to those concerns. First, by taking advancement into consideration when stonewalling arises, prosecutors increase their ability to uncover facts and, ultimately, to punish the guilty. Seeing that guilty executives do not escape justice in turn improves the government’s ability to ensure equal treatment of criminals and punishments that are proportional to crimes, and it helps to restore the public’s faith that its sovereign will enforce the law fairly and without regard to defendants’ social status.

Second, although the ethics codes place safeguards on the right to counsel, they also acknowledge exceptions to those safeguards. In some cases, the government can deprive individuals of funds even if they need the money to put on a defense. Moreover, while scrutinizing advancement leads to a power imbalance that encroaches on individuals’ access to competent counsel, the Stein court acknowledged the validity of the practice when stonewalling occurs. Plus, prosecutor scrutiny of advancement may only partially impinge on an individual’s defense. For example, in Stein, KPMG reacted to the government’s scrutiny by capping advancement at a level that would have provided defendants with forty to eighty percent of the court’s estimate of the cost of a defense. Moreover, although some organizations have a policy of advancing fees, which makes the money seem clearly legally available to defendants, where no such policy exists, an organization is free to deny the money. Under such circumstances, employees would have no right to the money, so conduct by prosecutors that has the effect of limiting advancement likely would not violate the right to counsel.

Third, the ethical rules recognize that prosecutors should be granted broad discretion, especially during investigations, where organizations

314. See supra note 261 and accompanying text.
315. See supra notes 250-51, 267-69 and accompanying text.
316. See supra Part II.B.1.
317. See supra notes 306-12 and accompanying text.
318. See supra notes 156-68 and accompanying text.
319. See supra note 166 and accompanying text.
320. See supra note 284 and accompanying text.
321. KPMG capped advancement at $400,000 for most employees. See supra note 72 and accompanying text. The court estimated the trial’s cost to the defendant at $500,000 to $1 million. See supra note 204 and accompanying text.
322. See supra notes 86-87 and accompanying text.
323. See supra notes 165-68 and accompanying text.
324. See supra notes 169-75 and accompanying text.
often advance attorneys' fees and where the payment of fees may be most important. For example, the practices of using the threat of prosecution to compel cooperation and of seeking the waiver of important rights are well established, even though such practices may create hardship for individuals under investigation and where those individuals lack expensive legal counsel. Moreover, ethics rules set a low standard for charging decisions, and where the government scrutinizes advancement it does so in the context of a charging decision. Thus, weighing advancement as a factor in determining an organization's cooperation is consistent with the broad grant of discretion to prosecutors.

While considering advancement in every case would be at odds with some of prosecutors' ethical responsibilities, prosecutors would not be able to fulfill other ethical responsibilities if they could not scrutinize advancement in the cases where corporate stonewalling is likely. Furthermore, prosecutors' wide discretion in investigating crimes indicates that the practice is not unethical merely because it may impinge on individuals' rights to some extent.

B. The Specter Bill Is Inconsistent with Prosecutors' Ethical Obligations and Standards of Prosecutorial Discretion and Thus Should Not Be Adopted

The Specter bill contains a provision that would forbid the government from taking advancement into account in any case. Critics charge that scrutiny of advancement undermines the presumption of innocence, interferes with access to counsel, and skews the adversarial system; of course, the Specter bill would address all of these public policy concerns by prohibiting such scrutiny. Moreover, since the critical policy concerns imply related conflicts between scrutinizing advancement and some of prosecutors' ethical obligations, the legislation also would protect prosecutors from taking action contrary to those ethical responsibilities. Specifically, it would eliminate the chance that prosecutors' scrutiny of advancement would lead to a conviction contrary to an innocent person, or that it would create adversarially invalid results or the perception of procedural unfairness because of prejudgment of individuals.

However, such a ban also would prevent prosecutors from fulfilling other obligations. Specifically, the government should prevent stonewalling and prosecutors have related ethical obligations, namely to prosecute white
collar criminals, to punish those criminals in proportion to their crimes, and to protect the perception that the criminal justice system is fair. \(^{334}\) The flat ban on scrutinizing advancement would prevent prosecutors from carrying out these duties. Moreover, the established principle of giving prosecutors leeway to investigate crimes and exercise discretion in charging is well established. \(^{335}\) The ban, however, would contravene that established principle, and it would do so precisely where prosecutors’ ability to charge should be unhampered, namely where an organization is likely using advancement to shield culpable employees from the law. Accordingly, the Specter bill should not be implemented in its current form, nor should any other legislation that includes an absolute ban on taking advancement into account regardless of whether the advancement was used improperly.

C. The McNulty Memorandum Is More Consistent with Prosecutors’ Ethical Obligations, but It Contains Ambiguity that Undermines Its Usefulness

Unlike the proposal in the Specter bill, the McNulty Memo proposes circumscribing prosecutors’ ability to scrutinize advancement while still leaving them discretion to do so in some cases, \(^{336}\) which is more consistent, on balance, with policy and ethics considerations. Nonetheless, a careful reading of the new policy in light of recent Justice Department statements about how it will be implemented reveals some ambiguity that the government should correct.

The McNulty Memo goes a long way toward limiting prosecutors’ ability to consider advancement in charging decisions. First, the policy creates a significant procedural limit on the government’s scrutiny of advancement, allowing prosecutors to take it into account only after receiving approval to do so from the Deputy Attorney General. \(^{337}\) Not only does this allow the Deputy Attorney General to monitor prosecutors’ use of discretion on this issue, but since more junior prosecutors may worry about seeking approval from someone so senior, \(^{338}\) the approval process likely also deters requests to scrutinize advancement except where prosecutors can offer a very compelling case to their supervisors.

Second, the new policy includes several substantive limits on prosecutors’ ability to scrutinize discretion. Like the Thompson Memo, the new policy flatly prohibits considering advancement where state law requires the organization to advance fees, but it expands on the prior policy by recognizing that such obligations can arise through employment agreements as well as under state laws mandating advancement. \(^{339}\) Moreover, it states that prosecutors may only take the payment of attorneys’

\(^{334}\) See supra Part II.A.2.
\(^{335}\) See supra notes 169-75 and accompanying text.
\(^{336}\) See supra notes 111-20 and accompanying text.
\(^{337}\) See supra note 298 and accompanying text.
\(^{338}\) See supra note 300 and accompanying text.
\(^{339}\) See supra note 288 and accompanying text.
fees into account in “extremely rare cases,” which takes away prosecutors’ discretion to take advancement into account in all but a small number of situations. Furthermore, to exercise their discretion, prosecutors can consider the payment of attorneys’ fees as a sign of noncooperation only where it was used to impede an investigation, looking at several factors in a totality of the circumstances test.

Accordingly, under the McNulty Memo, prosecutors’ discretion to consider advancement is limited first to the “rare” subset of cases where organizations are not under a legal or contractual obligation to pay attorneys’ fees and second, within that subset, to the “very, very rare” set of cases where “the totality of the circumstances show[s] that [the advancement] was intended to impede a criminal investigation.” Thus, the new policy’s substantive and procedural checks on prosecutors’ ability to scrutinize advancement are significant. Those limits in turn help resolve the policy concerns raised by critics of the government’s scrutiny of advancement and also the ethical concerns about the practice.

Despite the significant checks that the new policy places on prosecutors’ ability to scrutinize advancement, however, the McNulty Memo’s wording and the Justice Department’s public comments on its new advancement provision suggest that prosecutors still can take advancement into account even where no evidence exists that the advancement itself was used improperly. There are two reasons why the new policy creates ambiguity. The first reason is that the totality of the circumstances test does not say what type of circumstances prosecutors may consider. In describing that test, the McNulty Memo references the discussion in the government’s brief in United States v. Smith. While the discussion in that brief emphasizes the point that prosecutors are permitted to look at advancement as a sign of noncooperation only in the context of other facts indicating obstruction, it does not list any specific conduct prosecutors should look for as evidence that the organization meant to impede their investigation. Indeed, the Justice Department may have intended not to set forth a bright-line test or

340. See supra note 112 and accompanying text.
341. See supra notes 290-96 and accompanying text.
342. See supra notes 288-89 and accompanying text.
343. See supra note 297 and accompanying text.
344. See supra note 296 and accompanying text.
345. See supra note 301 and accompanying text.
346. See supra note 114 and accompanying text.
347. See supra notes 115-16 and accompanying text. Instead, the government’s brief focuses on refuting the factual and legal issues that served as the basis for the constitutional analysis in the earlier Stein orders. See Brief for the United States of America, supra note 114, at 42-45. The brief does mention some of KPMG’s conduct that tends to indicate stonewalling. See, e.g., id. at 61 (noting that the events at issue in Stein occurred when KPMG was itself under investigation and had a “well-documented history of impeding or obstructing other [government investigations”]). However, it does not contain any argument that KPMG actually used advancement to stonewall the investigation. See generally id.
exhaustive list of factors indicating what circumstances would trigger the exception and allow prosecutors to take advancement into account.\textsuperscript{348}

The second reason for the policy's ambiguity is that the Justice Department has not made clear how its policy on advancement specifically relates to its policy on obstruction of investigations by means other than advancement. Indeed, McNulty made several public comments about how the Justice Department implements its policy on advancement that suggest a link between the advancement provision and the McNulty Memo's "Obstructing the Investigation" provision.\textsuperscript{349} In his statement to the Senate Judiciary Committee on the Thompson Memo, McNulty claimed that prosecutors take advancement into account only when it occurs in combination with other factors indicating obstruction of an investigation, and then he gave examples of those indicators that included several signs of an obstruction scheme that are unrelated to advancement.\textsuperscript{350} Three of the examples McNulty listed as evidence of impeding an investigation when discussing the Thompson Memo match examples listed in the McNulty Memo's "Obstructing the Investigation" provision.\textsuperscript{351} On the one hand, those comments preceded the creation of the new policy, and McNulty did not offer examples of relevant circumstances when discussing the test in the new policy.\textsuperscript{352} On the other hand, in his comments on the McNulty Memo, he highlighted the similarities between prosecutors' conduct under the old policy and the new policy.\textsuperscript{353} Plus, in those later comments he suggested that the rare cases where prosecutors consider advancement are those in which organizations "use advancement, and other methods, to stop the flow of information."\textsuperscript{354} Indeed, the press has quoted him as saying that prosecutors may weigh the decision to pay legal fees if an organization "engages in a 'pattern of obstruction.'"\textsuperscript{355}

All of these comments suggest that the Justice Department's policy is susceptible to an interpretation that would allow the government to use signs of conduct aimed at obstruction generally, even if such conduct did not involve advancement, to conclude that advancement itself was used improperly. Thus, for example, if an organization offered advancement to employees for legitimate corporate purposes, but the organization had made a frivolous claim of privilege, the government could give it a negative mark for obstructing the investigation (under section VII.B.4 of the McNulty

\textsuperscript{348} See supra note 299 and accompanying text.
\textsuperscript{349} The "Obstructing the Investigation" subsection immediately follows (but is separate from) the subsection on "Shielding Culpable Employees and Agents" that discusses advancement. McNulty Memo, supra note 111, at VII.B.4, VII.B.3. Each subsection is listed under the section on "Charging a Corporation: The Value of Cooperation." Id. at VII.
\textsuperscript{350} See supra notes 291-92 and accompanying text.
\textsuperscript{351} See supra note 120.
\textsuperscript{352} See supra notes 296-97 and accompanying text (omitting mention of any circumstances or specific factors to consider under the new policy's totality of the circumstances test).
\textsuperscript{353} See supra note 287 and accompanying text.
\textsuperscript{354} See supra note 297 and accompanying text (emphasis added).
\textsuperscript{355} See supra note 297.
Memo), and it could use the improper privilege claim as a factor in the totality of the circumstances test to argue that the advancement justifies a second negative mark for shielding culpable employees (under section VII.B.3 of the McNulty Memo). In short, the policy allows the government to treat advancement that merely accompanies obstruction of an investigation the same as advancement that the organization intended to use to further that obstruction.

Taken together, the new checks on discretion and the remaining ambiguity in the totality of circumstances test create a policy that limits the government’s discretion to scrutinize advancement to a handful of cases. However, the policy reserves broad discretion in defining those few cases, at least for the Deputy Attorney General who approves the requests to consider advancement, if not for individual prosecutors. Since some large and important organizations may not have state law or contractual obligations to advance attorneys’ fees, if they engage in any conduct impeding an investigation then their advancement of fees, innocent or not, may count against them. Indeed, since KPMG had made frivolous privilege claims early in the government’s investigation, and since the firm may have had no obligation to advance fees to many of its employees, the McNulty Memo would allow the Justice Department to count the payments against the firm. Some critics have continued to express skepticism about how effectively the new policy will limit government scrutiny of advancement in important cases, and the remaining uncertainty about when and how prosecutors will examine advancement justifies such concerns.

Additionally, the remaining ambiguity frustrates the goals and benefits of the guidelines, which also undermines the usefulness of the new policy. First, the Justice Department intended for its new policy to reinforce the perception of fairness. By failing to separate conduct indicating obstruction of the investigation from the use of advancement to shield culpable employees, however, the policy appears to allow unfair government targeting of legitimate advancement. Second, the Justice Department’s internal guidelines generally help achieve uniformity in the application of federal law and prevent mistakes and abuses, as well as preempt overly restrictive external regulations.

Other guidelines achieve those ends by providing concrete details for the Justice Department to follow in implementing its policy. For example, to subpoena defense lawyers and members of the media, the United States Attorneys’ Manual requires prosecutors to obtain approval from Main

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356. For example, KPMG and Ernst & Young are both Delaware LLPs, see supra note 26, and they are two of the four biggest accounting firms. Reilly, supra note 94.
357. See supra notes 57-58 and accompanying text.
358. See supra note 68 and accompanying text.
359. See supra notes 196-97 and accompanying text.
360. See supra note 148.
361. See supra notes 191-92 and accompanying text.
362. See supra note 193 and accompanying text.
Justice and lists factors that will be considered in determining if that approval is warranted. The guidelines on seeking the death penalty also require approval from Main Justice. While the death penalty guidelines do not list the specific types of factors that can be considered, they do impose evidentiary standards that limit what qualifies for consideration and describe the type of analysis Main Justice should conduct in weighing the factors submitted. On the one hand, the McNulty Memo’s advancement provision resembles those other guidelines because it requires approval from a senior official who can prevent abuses and mistakes. Furthermore, the Deputy Attorney General could choose to apply the policy uniformly by approving requests to count advancement only where advancement itself was used to obstruct an investigation. To that extent, the McNulty Memo could accomplish many of the same goals as other internal guidelines. On the other hand, since the ambiguity in the McNulty Memo would allow the Deputy Attorney General to grant approval to count advancement merely because a company engaged in conduct such as making frivolous assertions of privilege, the new policy does not necessarily increase uniformity in those cases in which the government takes advancement into account. Moreover, even if the current Deputy Attorney General decided to grant approvals only where the advancement itself was improper, the policy would not prevent his successor from reading the policy differently.

Finally, where the Justice Department imposes self-created guidelines, it can head off more restrictive, externally imposed regulation. Nonetheless, some continue to doubt that the new policy goes far enough. The lingering ambiguity in the totality of circumstances test somewhat weakens the Justice Department’s case that it has self-regulated and, therefore, should not be subjected to outside regulation. For these reasons, the McNulty Memo’s lack of specificity undermines its usefulness.

D. A Proposal to Clarify the McNulty Memo

Although the McNulty Memo generally is consistent with the requirements of prosecutorial ethics, the Justice Department could make it more useful by clearing up the ambiguity in how it will apply the advancement provision’s totality of the circumstances test. The provision should address whether an organization’s purpose and effect in offering advancement is specifically to obstruct an investigation, not whether other actions that the organization took are obstructive. Accordingly, the Justice Department should add language to clarify how it will use the totality of circumstances test. Specifically, the policy should be amended to state the following:

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363. See supra notes 185-87 and accompanying text.
364. See supra notes 185-86 and accompanying text.
365. See supra notes 188-89 and accompanying text.
366. See supra note 193 and accompanying text.
367. See supra notes 196-97 and accompanying text.
Where the corporation impedes the investigation by engaging in the conduct described in VII.B.4 ("Obstructing the Investigation"), such conduct does not necessarily indicate that the advancement itself constitutes an improper attempt to shield the corporation and its culpable employees from government scrutiny. Rather, other facts are required that show that in the totality of the circumstances the advancement is part of the obstruction scheme.

That language would guide the use of the totality of the circumstances test, leaving the government discretion to consider advancement where it is relevant, while preventing the automatic addition of a negative mark for innocent advancement merely because other factors such as frivolous privilege assertions are present. Moreover, the change would underscore how infrequently the Justice Department should take advancement into account, providing additional meaning to the Justice Department’s bottom-line standard that it will scrutinize advancement only in “extremely rare cases.”

Already, the new policy’s requirements should decrease controversy by helping to assure uniform application of scrutiny of advancement and to prevent abuses or other problems. By taking the additional step of amending the language to clarify the purpose and use of the totality of the circumstances test, the government would likely improve the consistency of the policy’s application, reinforce the perception of fairness, and head off more restrictive external regulations, such as the Specter bill.

CONCLUSION

The debate over the government’s policy on advancement continues, with some still calling for additional restrictions beyond what the Justice Department has developed thus far. Although scrutiny of advancement raises public policy and ethical concerns, several other concerns mitigate against banning the practice outright. Thus, prosecutors should retain discretion to consider advancement in some cases, although they should exercise that discretion only where it is necessary. While the McNulty Memo goes a long way toward achieving the proper balance, it could be adjusted to better accomplish that end. This Note’s proposed alteration would prevent the government from considering advancement in cases where it merely accompanies other forms of obstruction unrelated to the shielding of culpable employees.

368. See supra notes 285-87.
369. See supra notes 336-45 and accompanying text.
Notes & Observations