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How the Decisions in Favor of the Stein Thirteen Will Affect the Litigation of Corporate Crime and Department of Justice Policies and Expand the sixth Amendment Right to Counsel

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How the Decisions in Favor of the Stein Thirteen Will Affect the Litigation of Corporate Crime and Department of Justice Policies and Expand the sixth Amendment Right to Counsel

Cover Page Footnote

I would like to thank Professor Bruce Green for his insight and valuable contribution to this Note. I would also like to thank my family and friends for their unwavering support throughout this entire process.

HOW THE DECISIONS IN FAVOR OF THE *STEIN* THIRTEEN WILL AFFECT THE LITIGATION OF CORPORATE CRIME AND DEPARTMENT OF JUSTICE POLICIES AND EXPAND THE SIXTH AMENDMENT RIGHT TO COUNSEL

*Christopher McNamara**

The U.S. Court of Appeals for the Second Circuit became the first appellate court in nearly thirty years to uphold the dismissal of criminal indictments for a Sixth Amendment right-to-counsel violation. United States v. Stein is a unique case that intertwines constitutional interpretation, constitutional remedies, white collar crime, and U.S. Department of Justice (DOJ) policy. The immediate effects of the Stein decisions not only reflect the changing attitudes at the DOJ on how to prosecute white collar crime but have simultaneously caused the DOJ to implement such changes. As the Sixth Amendment has developed and augmented, so has the interpretation of remedies when there is a right-to-counsel violation. This Note explores the Stein decisions in light of existing doctrines, and concludes that while certain parts of the decisions are legally sound, other parts—right or wrong—may present direct challenges to existing jurisprudence.

TABLE OF CONTENTS

INTRODUCTION.....	934
I. REMEDIES FOR GOVERNMENT WRONGDOING IN CRIMINAL CASES.....	936
A. Remedies Generally.....	937
1. Remedies for Constitutional Violations.....	937
2. Ethical Misconduct.....	939
B. <i>What Is the Right to Counsel and When Does It Attach?</i>	941
1. Developing the “Right” in Federal Court.....	941
2. When Does the Right to Counsel Attach?.....	944
C. <i>Remedies for a Violation of the Right to Counsel</i>	945
1. Government Interference.....	945
2. Judicial Interference.....	949
3. Ineffective Counsel.....	951

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4. Disqualification of the Chosen Attorney	952
D. <i>Government Memoranda, Prosecutors, and KPMG</i>	955
1. The Holder Memo	955
2. The Thompson Memo	956
II. <i>STEIN</i> AND ITS CONFLICT WITH SIXTH AMENDMENT CASE LAW	958
A. <i>KPMG v. The Department of Justice</i>	958
1. Raising Eyebrows in Washington DC	958
2. Communications Among KPMG, Skadden, and the U.S. Attorney's Office	959
3. KPMG Defendants in Federal Court.....	962
a. <i>Stein I</i>	962
b. <i>Stein IV</i>	964
c. <i>The Second Circuit Affirms the Dismissals</i>	967
B. <i>Stein Conflicts with Contemporary Jurisprudence</i>	969
1. Is <i>Stein</i> Consistent with What Other Courts Have Done?..	969
a. <i>When Does the Sixth Amendment Right to Counsel Attach?</i>	969
b. <i>Where Did the Violation Occur?</i>	970
c. <i>Is the Dismissal of an Indictment Consistent with Supreme Court and Lower Federal Court Case Law?</i>	972
2. Critiques of <i>Stein</i>	973
III. RECONCILING <i>STEIN</i> AND MOVING ON	975
A. <i>How Does Stein Confront, or Hide from, Doctrinal Ambiguities</i>	976
1. When Does the Right to Counsel Attach?	976
2. The Faulty Rationale Behind Determining Constitutional Violations	977
3. The Remedy Problem	978
4. Alternative Remedies	980
B. <i>"Where We're Going, We Don't Need Roads": What Does the Future Hold Post-Stein?</i>	982
CONCLUSION	982

INTRODUCTION

But if it is in the government's interest that every defendant receive the best possible representation, it cannot also be in the government's interest to leave defendants naked to their enemies.¹

These were the words used by Dennis G. Jacobs, the Chief Judge for the U.S. Court of Appeals for the Second Circuit, when he handed down the unanimous verdict of a three judge panel on August 28, 2008. In the

1. *United States v. Stein (Stein V)*, 541 F.3d 130, 157 (2d Cir. 2008).

landmark decision of *United States v. Stein*,² the Second Circuit upheld the dismissal of indictments against thirteen former employees (the *Stein* Thirteen) of the accounting magnate Klynveld Peat Marwick Goerdeler (KPMG).³ This Note will discuss the potential consequences that *Stein*'s holding will have on the Sixth Amendment and the avenues for relief available to criminal defendants whose rights to counsel are violated. As is the case with many constitutional violations, the remedy must fit the violation; in other words, the right must fit the wrong. In the context of the Sixth Amendment right to counsel, courts will look to tailor the remedy to put the defendant in the same situation she would have been absent the interference of the right to counsel.⁴ Historically, this has meant anything from dismissing an indictment, to a retrial, to absolutely no remedy whatsoever.⁵ This Note will argue that the *Stein* decisions take an expansive view of when the right to counsel attaches. Additionally, this Note will analyze whether or not the courts also took an expansive view regarding right-to-counsel violations, because the dismissal of a criminal indictment is a very rare remedy for a right-to-counsel violation.⁶

The remedy for a constitutional violation will typically match the right. For example, in a case of double jeopardy, the right is to not be tried again.⁷ Hence, the remedy, to not be tried for a second time, matches the right. When illegal evidence is offered in a criminal case, thus violating the defendant's Fourth Amendment rights, the cure (the exclusion of the tainted evidence) matches the defendant's right to not have illegal evidence used against her.⁸ For criminal defendants, the hope is that a court will dismiss an indictment or vacate a guilty finding with prejudice.⁹ Unsurprisingly, dismissing an indictment is a worst case scenario for prosecutors and a measure so definitive that judges are hesitant to make such a determination. These remedies are rarely invoked because they preclude criminal suspects—specifically those who have had indictments dismissed—from ever facing trial and allow them to escape the inquiry of culpability. In fact, this notion is so repugnant to courts that until the *Stein* decision, only one appellate court in recent memory had ever dismissed criminal indictments

2. *Id.*

3. KPMG joins Deloitte & Touche, Ernst & Young, and PricewaterhouseCoopers to comprise "The Big 4" accounting firms. See Professor Jane Kaplan, Drexel University Accounting Department, http://www.pages.drexel.edu/~kaplanje/Big_4_Firms.html (last visited Oct. 17, 2009). See generally Posting of Amir Efrati to WSJ Law Blog, <http://blogs.wsj.com/law/2008/12/01/government-throws-in-the-towel-on-kpmg/> (Dec. 1, 2008, 17:57 EST).

4. See *infra* Part I.C.

5. See *infra* Part I.C.

6. See *infra* Part II.B.1.c.

7. See *infra* Part I.A.1.

8. See *infra* Part I.A.1.

9. When a matter is dismissed with prejudice, as opposed to without prejudice, an opposing party is precluded from refileing the matter. See 24 AM. JUR. 2D *Dismissals* § 15 (2008).

due to a violation of the Sixth Amendment right to counsel.¹⁰ In the *Stein* case, the Second Circuit dismissed the indictments of thirteen former partners and associates of KPMG¹¹ implicated in a fraudulent tax shelter scheme in which the Internal Revenue Service (IRS) failed to collect on at least \$5 billion in taxes through schemes sold to 186 wealthy individuals, all clients of KPMG.¹² This Note discusses relevant federal case law involving remedies for Sixth Amendment violations, specifically those in which the violation derived from prosecutorial misconduct or interference in light of the *Stein* decision. From there, this Note reconciles the doctrines and precedents that dictate such remedies. Part I explores remedies for constitutional violations and provides some background information on the Sixth Amendment right to counsel. Part II explores the conflict in light of the *Stein* decision and compares the holdings with current jurisprudence. Part III concludes that while many courts have refused to dismiss criminal indictments for right-to-counsel violations, the decision to dismiss the indictments for four of the defendants rested on sound legal theory; however, it is questionable whether or not the remaining nine defendants should have been excused from their criminal trials. The Conclusion to this Note also analyzes how the *Stein* decision will affect the landscape of white collar litigation, constitutional remedy interpretation, and the potential expansion of the Sixth Amendment right to counsel.

I. REMEDIES FOR GOVERNMENT WRONGDOING IN CRIMINAL CASES

Part I.A discusses the remedies for various constitutional violations. An analysis of constitutional remedies—ranging from Fourth Amendment search and seizure violations to the Sixth Amendment right to a speedy trial—will provide a sufficient background against which to scrutinize right-to-counsel remedies. Part I.B details the development of the Sixth Amendment right to counsel in federal courts. Part I.C discusses the various occurrences that could give rise to a right-to-counsel violation and what the corresponding remedy would be. Part I.D describes several U.S. Department of Justice (DOJ) policies that were relevant in *Stein*.

10. See *United States v. Morrison*, 602 F.2d 529 (3d Cir. 1979).

11. *Stein V*, 541 F.3d 130 (2008). One would think this is even more exceptional, as this case has been hailed as the “largest tax fraud case in history.” Lynnley Browning, *Judge Hands I.R.S. Victory in Tax Shelter*, N.Y. TIMES, Dec. 27, 2007, at B6.

12. See Howard Gleckman, Amy Borrus & Mike McNamee, *Inside the KPMG Mess*, BUS. WK., Sept. 1, 2005, http://www.businessweek.com/bwdaily/dnflash/sep2005/nf2005091_2144_db016.htm.

A. Remedies Generally

1. Remedies for Constitutional Violations

There are numerous tools a court may use to remedy a constitutional violation, including the dismissal of a case with or without prejudice, injunctive relief, attorney sanctions,¹³ and civil damage actions.¹⁴

The type of remedy differs depending on the nature of the violation and the applicable constitutional right. For example, suppressing evidence obtained during an illegal search and seizure will often suffice under the auspices of the Fourth Amendment.¹⁵ The U.S. Supreme Court found in *United States v. Calandra*¹⁶ that the exclusionary rule¹⁷ is implemented not as a remedy deriving from personal freedom but as a deterrent against future unlawful government conduct, thereby safeguarding constitutionally protected Fourth Amendment rights.¹⁸ The courts will seek to level the playing field so that the government cannot use the fruits from the proverbial poisonous tree as evidence against a defendant in a criminal proceeding.¹⁹ This legal metaphor posits that evidence obtained from an illegal search or seizure is barred by the exclusionary rule and cannot be used against a defendant during a criminal trial; both the “tree” and its

13. See FED R. CIV. P. 11(c).

14. See *Weatherford v. Bursey*, 429 U.S. 545 (1977) (suit under 42 U.S.C. § 1983).

15. The Fourth Amendment states,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. However, there are limitations to the suppression of evidence from an illegal search. See *Hudson v. Michigan*, 547 U.S. 586 (2006) (holding that a violation of the “knock-and-announce” rule did not necessitate the suppression of all evidence found in the search); *Jones v. United States*, 362 U.S. 257 (1960) (finding that where the trial record presents a direct conflict in testimony regarding the nature of a search, courts will not resolve the conflict based on the version of the facts surrounding the warrant’s execution most favorable to the prosecution).

16. 414 U.S. 338 (1974).

17. See generally RONALD J. ALLEN & RICHARD B. KUHN, CONSTITUTIONAL CRIMINAL PROCEDURE: AN EXAMINATION OF THE FOURTH, FIFTH, AND SIXTH AMENDMENTS AND RELATED AREAS 1325–69 (2d ed. 1991).

18. *Calandra*, 414 U.S. at 347–52 (declining to apply the exclusionary rule to questions in front of a grand jury); see also *Arizona v. Evans*, 514 U.S. 1 (1995) (holding that marijuana presented as evidence was not suppressed because the flawed warrant stemmed from a clerical error of a court employee, and such a mistake fell within the good faith exception to the exclusionary rule). Courts will not necessarily suppress the evidence obtained from a good faith but unconstitutional search. The U.S. Supreme Court in *Leon v. United States*, 468 U.S. 897 (1984), alleviated some of the pressure for law enforcement officers by holding that an exception to the exclusionary rule would occur when a police officer, in good faith, conducted a search that he subjectively believed was legal at the time, and subsequently found out was technically flawed.

19. *Arizona*, 514 U.S. at 10 (citing *Leon*, 468 U.S. at 906).

“fruit” are excluded.²⁰ Often refusing to go as far as dismissing the indictment, courts will allow criminal litigation to proceed, absent the illegal evidence.²¹ In *United States v. Blue*,²² the defendant filed a motion to dismiss a criminal claim against him, citing that introducing his testimony from a related matter would violate his Fifth Amendment right against self-incrimination.²³ The Court found that the circumstances of the case did not require so drastic a step as barring the litigation altogether.²⁴ In the landmark Fifth Amendment case, *Miranda v. Arizona*,²⁵ the Court held that where a defendant’s statements were obtained during “incommunicado” interrogation in a custodial environment, without full warning of his constitutional rights, such statements would be held inadmissible as they violated the Fifth Amendment privilege against self-incrimination.²⁶ However, when a defendant’s Fifth Amendment rights are violated due to an attempt to sidestep the Double Jeopardy Clause, a court will bar the litigation entirely.²⁷

While this Note will focus on the Sixth Amendment right to counsel, it is worth mentioning another right guaranteed by the Sixth Amendment: the right to a speedy trial.²⁸ While the Constitution contains no explicit remedy for this violation, courts have interpreted a violation of the right to a speedy trial to require a dismissal of the charges.²⁹ Such interpretation has been codified in the Federal Rules of Criminal Procedure.³⁰ This remedy is

20. See generally Gary D. Spivey, Comment, ‘Fruit of the Poisonous Tree’ Doctrine Excluding Evidence Derived from Information Gained in Illegal Search, 43 A.L.R. 3d 385 (1972).

21. See generally *Leon*, 468 U.S. 897.

22. 384 U.S. 251 (1966). In *United States v. Blue*, the Court reversed the district court’s dismissal of the indictment and held that the defendant was free to pursue his Fifth Amendment claims through motions to suppress and objections to evidence. *Id.* at 256.

23. U.S. CONST. amend. V. The Fifth Amendment provides,

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id.

24. *Blue*, 384 U.S. at 255.

25. 384 U.S. 436 (1966).

26. *Id.* at 469–79.

27. See, e.g., *Tibbs v. Florida*, 457 U.S. 31, 41 (1982) (holding that a verdict of not guilty, whether found by judge or jury, “absolutely shields the defendant from retrial”); *Ball v. United States*, 163 U.S. 662, 669 (1896) (finding that a verdict of acquittal for murder is a bar to a second indictment for the same murder).

28. See U.S. CONST. amend. VI.

29. See, e.g., *Strunk v. United States*, 412 U.S. 434, 439–40 (1973) (holding that the dismissal of a guilty finding is the only appropriate remedy for deprivation of the constitutional right to a speedy trial due to the unreasonable emotional strain that a delay can have on a defendant, as well as the potential of adversely affecting the ability to present a defense and the concern of oppressive incarceration).

30. FED. R. CRIM. P. 20. See generally *Speedy Trial*, GEO. L.J. ANN. REV. CRIM. PROC. 369 (2008) (discussing issues and rights relating to the guarantee of a speedy trial).

criticized as too absolute or “unsatisfactorily severe” and could ultimately lead to dire consequences as a person who “may be guilty of a serious crime will go free, without having been tried.”³¹ However, the Court in *Strunk v. United States*³² countered that “such severe remedies are not unique in the application of constitutional standards.”³³ Notably, the Court in *Strunk* had no doubt that the defendant was guilty; in fact, he had confessed the crime to a federal agent while incarcerated.³⁴ Jurists may find this result troubling, but the Court held that it is crucial to the judicial process that a criminal defendant’s rights are upheld, so as to deter future unlawful government actions.³⁵

2. Ethical Misconduct

While the *Stein* decisions are interesting from a constitutional perspective, this perspective is inextricably intertwined with the prosecutorial misconduct that led to the constitutional violations. Courts have the ability to rectify government interference with the procedural and substantive steps of litigation through various legal mechanisms: entrapment,³⁶ due process,³⁷ and the application of supervisory powers.³⁸ In *Hampton v. United States*,³⁹ the Court recognized that “[t]he limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the Defendant. Here . . . the police, the Government informant, and the defendant acted in concert with one another.”⁴⁰ Entrapment is a valid defense when the police infiltrate the mind of the innocent man to commit a crime he would not have otherwise committed but for the police instigation.⁴¹

31. *Barker v. Wingo*, 407 U.S. 514, 522 (1972).

32. 412 U.S. 434.

33. *Id.* at 439.

34. *Id.* at 436.

35. *See, e.g., Barker*, 407 U.S. at 522.

36. Entrapment is “[a] law-enforcement officer’s or government agent’s inducement of a person to commit a crime, by means of fraud or undue persuasion, in an attempt to later bring a criminal prosecution against that person.” BLACK’S LAW DICTIONARY 573 (8th ed. 2004).

37. Due Process is “[t]he conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case.” *Id.* at 538–39.

38. A court may use its supervisory power to remedy a constitutional or statutory violation and preserve judicial integrity by ensuring that a conviction rests on the appropriate considerations when considered by a jury and to deter future illegal acts. *See United States v. Lopez*, 4 F.3d 1455, 1463 (9th Cir. 1993); *see also* Ellen S. Podgor, *Race-ing Prosecutors’ Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461, 464 (2009) (positing that “[c]ourts seldom use supervisory powers to usurp the prosecutorial charging decision”).

39. 425 U.S. 484 (1976).

40. *Id.* at 490.

41. *Id.* The Court elaborates by saying that in the case of a concerted criminal enterprise between the willing defendant and the police, the equally culpable defendant will not be afforded a dismissal, but rather the appropriate remedy will be the prosecution of the culpable police officers. *Id.*; *see also Mathews v. United States*, 485 U.S. 58 (1988) (finding

A court usually cannot exercise its inherent⁴² federal supervisory power⁴³ to evade its obligation to assess trial court errors of prejudice.⁴⁴ Furthermore, courts must exercise caution when invoking supervisory powers.⁴⁵ In *United States v. Williams*,⁴⁶ the Court held that the federal supervisory power of the court is used not only to hone the truth-finding process at trial, but also to prevent litigants from violating the substantive and procedural processes of the trial.⁴⁷ The Court reiterated its holding in *McNabb v. United States*,⁴⁸ finding that supervisory powers can be used to implement a remedy for a violation of a recognized right, to preserve judicial integrity, and to deter future illegal conduct.⁴⁹ Furthermore, *Bank of Nova Scotia v. United States*⁵⁰ expanded supervisory powers to include indictment dismissal due to prosecutorial misconduct before a grand jury, but only when the misconduct “substantially influenced the grand jury’s decision to indict” or if there was “grave doubt” that the decision to indict was independent of the misconduct.⁵¹

In the U.S. Court of Appeals for the Ninth Circuit, Judge Alex Kozinski considered a situation involving prosecutorial misconduct.⁵² During trial, the government attorney claimed that a witness did not testify in a drug case

that even where a defendant denies one or more of the elements to the crime for which he is accused, he is still entitled to an entrapment jury instruction where there is sufficient evidence to show that a reasonable juror could find entrapment); *United States v. Russell*, 411 U.S. 423 (1973) (finding that law enforcement officers’ involvement in the procedural commission of certain crimes is not proscribed and will not violate a defendant’s Fifth Amendment due process rights so long as the officer does not implant the criminally punishable design in the defendant’s head). *But see* *United States v. Nava-Salazar*, 30 F.3d 788 (7th Cir. 1994) (finding that government agents who worked closely with defendants in a drug ring, even providing them with transportation to enable the smuggling of cocaine into the United States and then within it, did not meet the standard of outrageous conduct necessary for a due process violation).

42. “On several occasions the Supreme Court has relied on a claimed inherent supervisory power over the administration of criminal justice in federal courts to reverse convictions obtained as a result of official illegality.” ALLEN & KUHN, *supra* note 17, at 936.

43. See 32 AM. JUR. 2D *Federal Courts* § 13 (2008).

44. *Nguyen v. United States*, 539 U.S. 69, 81 (2003) (citing *Bank of N.S. v. United States*, 487 U.S. 250, 254–55 (1988)).

45. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–45 (1991).

46. 504 U.S. 36 (1992).

47. See *id.* at 45–46.

48. 318 U.S. 332 (1943).

49. *United States v. Hasting*, 461 U.S. 499, 506 (1983); see also *Mesarosh v. United States*, 352 U.S. 1, 14 (1956) (finding that the Court may invoke its supervisory jurisdiction “to see that the waters of justice are not polluted”); *Weeks v. United States*, 232 U.S. 383, 398–99 (1914) (reversing the lower court when finding a combination of government misconduct and Fourth Amendment search and seizure violations).

50. 487 U.S. 250 (1988).

51. *Id.* at 256 (quoting *United States v. Mechanik*, 475 U.S. 66, 78 (1986)); see Douglas P. Currier, Note, *The Exercise of Supervisory Powers To Dismiss a Grand Jury Indictment—A Basis for Curbing Prosecutorial Misconduct*, 45 OHIO ST. L.J. 1077, 1100 (1984) (arguing that “[s]upervisory powers should be granted to courts so they may dismiss grand jury indictments in cases of prosecutorial misconduct”).

52. *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993).

because he had a Fifth Amendment right against self-incrimination.⁵³ Unbeknownst to the jury, the person in question was a government witness; that is, he had cooperated with the U.S. Attorney's Office and, in exchange for written testimony, he received either immunity or a favorable plea bargain.⁵⁴ The Ninth Circuit found that the prosecutor's misstatement was duplicitous and constituted prosecutorial misconduct.⁵⁵ Judge Kozinski vacated the guilty verdict and remanded the matter to the district court.⁵⁶

B. *What Is the Right to Counsel and When Does It Attach?*

The Sixth Amendment of the U.S. Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”⁵⁷ The Supreme Court has recognized that the right to counsel is so pivotal to the criminal justice system that it is a “fundamental” right.⁵⁸

1. Developing the “Right” in Federal Court

The Court in *Gideon v. Wainwright*⁵⁹ postulated, “The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”⁶⁰ In *Johnson v. Zerbst*,⁶¹ the Court, through the pen of Justice Hugo Black, ruled that the Sixth Amendment prevented federal courts from depriving the accused of his right to counsel, unless the right was properly waived.⁶² The Court in *Powell v. Alabama*⁶³ stated that the

right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . If charged with [a] crime, [the nonrepresented defendant] is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one.⁶⁴

53. *Id.* at 1317.

54. *See id.* at 1323–24.

55. *Id.*

56. *Id.* at 1325.

57. U.S. CONST. amend. VI.

58. *Gideon v. Wainwright*, 372 U.S. 335, 342–43 (1963).

59. *Id.*

60. *Id.* at 344. *See generally* Kyung M. Lee, Comment, *Reinventing Gideon v. Wainwright: Holistic Defenders, Indigent Defendants, and the Right to Counsel*, 31 AM. J. CRIM. L. 367 (2004).

61. 304 U.S. 458 (1938).

62. *Id.* at 463.

63. 287 U.S. 45 (1932).

64. *Id.* at 68–69.

The Court in *Powell*, or “The Scottsboro Boys Trials,”⁶⁵ for the first time recognized the possibility that this right could be of a fundamental nature.⁶⁶ Thirty years later, the Court reasoned in *Gideon* that the Sixth Amendment right to counsel should be applied to citizens of the several states through the Fourteenth Amendment.⁶⁷ Again writing for the Court, Justice Black built upon the reasoning in *Powell* and *Betts v. Brady*.⁶⁸ In *Powell*, the Court opined that the right to counsel was of a fundamental nature.⁶⁹ Then in *Betts*, the Court found that the Fourteenth Amendment makes it obligatory on the states to recognize the fundamental rights of a fair judicial process.⁷⁰ The *Betts* Court however, refused to recognize the right to counsel as one of those fundamental rights.⁷¹ Justice Black found that lawyers were essential to criminal proceedings as evinced by the vast sums of money that the government and those defendants with financial means expend on retaining the best lawyers.⁷² Indeed, the Court in *Gideon* said that these are the “strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.”⁷³

Viewed now as a necessity, subsequent courts have expanded the role of defense lawyers, to include not only advocacy in court but also presence during police lineups, interrogation, and all other matters relating to a criminal proceeding once the government shifts from investigator to adversary.⁷⁴ Another component of the right to counsel affords the accused the option of self-representation.⁷⁵ While the Court in *Wheat v. United States*⁷⁶ reaffirmed the right of self-representation, it refused to extend this right to allow a defendant to be represented by another lay person.⁷⁷

In *Wheat*, the Court issued three legitimate caveats that honed the right to counsel: A representative must be a member of the bar. She must be someone that the defendant can afford or who, alternatively, will represent the defendant. Also, the representative must not have a conflict of interest,

65. See Nannette Jolivet Brown, *75th Anniversary of Powell v. Alabama Commemorated*, LA. B.J., June/July 2008, at 19, 19 (2008).

66. *Powell*, 287 U.S. at 68.

67. *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963); see, e.g., *Herring v. New York*, 422 U.S. 853, 857 (1975) (reaffirming that the Fourteenth Amendment assures that the fundamental right of fairness is applicable to the states).

68. 316 U.S. 455 (1942).

69. *Powell*, 287 U.S. at 68.

70. *Betts*, 316 U.S. at 473.

71. *Id.* at 461–66.

72. *Gideon*, 372 U.S. at 344.

73. *Id.*

74. See *United States v. Wade*, 388 U.S. 218, 229–40 (1967).

75. *Faretta v. California*, 422 U.S. 806 (1975).

76. 486 U.S. 153 (1988).

77. *Id.* at 159 n.3; see also Lynsey Morris Barron, Comment, *Right to Counsel Denied: Corporate Criminal Prosecutions, Attorney Fee Agreements, and the Sixth Amendment*, 58 EMORY L.J. 1265, 1295–97 (2009) (advocating a clear constitutional test for Sixth Amendment violations, derived in part from the “*Wheat Test*”).

that is, a previous or ongoing relationship with the opposition, including the government.⁷⁸

Beyond the actual text of the Sixth Amendment, courts have recognized the right to court-appointed counsel for indigents,⁷⁹ but the means by which a defendant can secure her counsel of choice has become a contested issue.⁸⁰ In *Caplin & Drysdale, Chartered v. United States*,⁸¹ the Court recognized that a defendant can secure an attorney who is affordable or, alternatively, will represent him despite lack of funds.⁸² However, there are limitations to this right. *Wheat* outlined at least three circumstances in which a criminal defendant could not secure the counsel of her choosing.⁸³

The Court in *Wheat* did not address whether a defendant could secure her desired attorney at the expense of a third party. The Court in *United States v. Gonzalez-Lopez*⁸⁴ did not take issue with the fact that the defendant's family hired his initial attorney. There is Supreme Court case law that establishes a defendant should have "a fair opportunity to secure counsel of his own choice."⁸⁵ Several lower courts have extended considerable latitude to a defendant in her attempt to secure such counsel. For example, the U.S. Court of Appeals for the Fourth Circuit has held that the Sixth Amendment enables a defendant to retain counsel either through her own funds or through the aid of family and friends.⁸⁶ Subsequently, the Fourth Circuit declared that a defendant had a qualified right to use wholly legitimate funds in securing the counsel of his choice.⁸⁷ "Qualified" being the operative word, a criminal defendant does not have the right to use tainted funds to secure defense counsel.⁸⁸

In a 5-4 decision, the Court in *Caplin* found that a defendant's right to counsel had not been violated by a federal statute authorizing the government to seize funds acquired through drug enterprises.⁸⁹ The defendant argued that funds allocated to pay his attorney fell outside the bounds of the assets that the government could legally seize.⁹⁰ The Supreme Court affirmed the decision of the court of appeals, finding that a defendant does not have a right to spend tainted money on an attorney, even though the defendant is in possession of the money and has no other funds to secure counsel.⁹¹ The property argument is that while the defendant may have been in possession of the funds, they really belong to the government

78. See *Wheat*, 486 U.S. at 159.

79. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

80. See *infra* Part I.C.4.

81. 491 U.S. 617 (1989).

82. *Id.* at 624-25.

83. *Wheat*, 486 U.S. at 159.

84. 548 U.S. 140 (2006).

85. *Powell v. Alabama*, 287 U.S. 45, 53 (1932).

86. *United States v. Inman*, 483 F.2d 738, 739-40 (4th Cir. 1973).

87. *United States v. Farmer*, 274 F.3d 800, 805 (4th Cir. 2001).

88. See *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626 (1989).

89. *Id.* at 632.

90. *Id.* at 621.

91. *Id.* at 626-30.

by way of forfeiture laws.⁹² On the same day the Court decided *Caplin*, it issued a decision on another forfeiture case, *United States v. Monsanto*.⁹³ The concurring opinion in *Monsanto* underscored the Court's view that federal drug forfeiture statutes cannot be used as a constitutional shield by a defendant wishing to allocate frozen assets to acquire an attorney.⁹⁴

2. When Does the Right to Counsel Attach?

The Court has held that during critical stages of the pretrial proceedings—from arraignment to strategic consultations to trial preparation—the right to counsel is as necessary and protected as in the actual trial.⁹⁵ In *Kirby v. Illinois*,⁹⁶ the Court seized the opportunity to determine when exactly the Sixth Amendment right to counsel attaches. The Court rationalized that, since the initiation of judicial criminal proceedings is more than a “mere formalism,” the proper analysis should be whether the government has committed to prosecute the defendant. Only then, once the adversarial positions have been drawn, will the defendant be entitled to counsel.⁹⁷

The Court later expanded right-to-counsel jurisprudence by advancing that the accused need not stand alone at any stage of the prosecution, whether it is formal or informal, in or out of court, as long as counsel's absence could have an adverse effect on the fairness of the impending trial.⁹⁸ The Court held that the defendant's Sixth Amendment right to counsel was violated when neither he nor his attorney was notified of a lineup and that counsel's presence at said lineup was required absent an intelligent waiver.⁹⁹ Once the right to counsel has attached, it remains for all “critical stages” of the prosecution.¹⁰⁰

92. *Id.* at 624–33; see also John Leubsdorf, *Legal Ethics Falls Apart*, 57 *BUFF. L. REV.* 959, 989 (2009) (arguing that despite the constitutionality of forfeiture laws, they still create a roadblock in obtaining private defense counsel).

93. 491 U.S. 600 (1989). The Court found that, for the same reasons it emphasized in *Caplin & Drysdale, Chartered v. United States*, a defendant's Fifth and Sixth Amendment rights cannot be said to be unduly burdened when the Government seizes assets to be used, in part, to retain an attorney. *Id.* at 614.

94. “We rely on our conclusion in [*Caplin*] to dispose of the similar constitutional claims raised by respondent here.” *Id.* at 614.

95. *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

96. 406 U.S. 682 (1972).

97. *Id.* at 688–89; see, e.g., *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2583–84 (2008) (noting that when a defendant appears before a magistrate judge and learns of the charges against him, the Sixth Amendment right to counsel attaches as this is the initiation of the adversarial proceedings); *United States v. Gouveia*, 467 U.S. 180, 187–93 (1984) (holding that the right to appointed counsel does not attach before the institution of adversary judicial proceedings).

98. *United States v. Wade*, 388 U.S. 218, 226–27 (1967).

99. *Id.* at 237.

100. *United States v. Rosen*, 487 F. Supp. 2d 721, 731–32 (E.D. Va. 2007). The court held that interference with counsel before the right is triggered preindictment can have a “pernicious effect” on the postindictment rights of the defendant. *Id.* at 734–35; see also *United States v. Cronin*, 466 U.S. 648, 659 (1984) (holding that there will be a presumption

C. Remedies for a Violation of the Right to Counsel

The right to counsel can be violated in a number of different ways: government interference,¹⁰¹ judicial interference,¹⁰² disqualification of the defense attorney,¹⁰³ and ineffective counsel.¹⁰⁴ Generally speaking, the proper remedy for a violation of the right to counsel is “tailored to the injury suffered from the constitutional violation [and therefore does not] unnecessarily infringe on competing interests.”¹⁰⁵ While *Stein* concerns Sixth Amendment infringements caused by prosecutorial interference,¹⁰⁶ it is important to understand other instances of right-to-counsel violations and their respective remedies.

1. Government Interference

A majority of cases arising out of a potential right-to-counsel violation involve the direct or indirect interference with counsel by a government agent, whether it be a prosecutor, a police officer, or even a jailhouse informant.¹⁰⁷ The current jurisprudence on right-to-counsel remedies is best articulated in *United States v. Morrison*:¹⁰⁸ “remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.”¹⁰⁹ In *Morrison*, the interference occurred when federal agents, aware that the accused was represented by counsel, met with her outside the presence of counsel to acquire her cooperation in a related investigation.¹¹⁰ During the meeting, the agents disparaged the accused’s chosen counsel, claiming that she “would gain various benefits if she cooperated but would face a stiff jail term if she did not.”¹¹¹ Morrison refused to cooperate and continued to be represented by her attorney.¹¹² Subsequently, the defendant filed a motion to dismiss the indictment, claiming that the government interfered with her right to counsel.¹¹³ On appeal, the U.S. Court of Appeals for the Third Circuit found that a showing of prejudice or tangible effect on defendant’s representation was unnecessary to the constitutional violation, and that the

that a trial was unfair where the defendant was denied access to counsel at “a critical stage of his trial”). *But see* Nishchay H. Maskay, Comment, *The Constitutionality of Federal Restrictions on the Indemnification of Attorneys’ Fees*, 156 U. PA. L. REV. 491, 523 (2007).

101. *See infra* Part I.C.1.

102. *See infra* Part I.C.2.

103. *See infra* Part I.C.4.

104. *See infra* Part I.C.3.

105. *United States v. Morrison*, 449 U.S. 361, 364 (1981).

106. *See infra* Part II.A.2.

107. *See Arizona v. Fulminante*, 499 U.S. 279, 287 (1991) (defendant’s confession was coerced by inmate, a government informant, when the latter insisted on the former’s confession in exchange for protection against fellow inmates).

108. 449 U.S. 361.

109. *Id.* at 364.

110. *Id.* at 362–63.

111. *Id.* at 362.

112. *Id.* at 363.

113. *Id.*

dismissal of the indictment would be the appropriate remedy.¹¹⁴ However, the Supreme Court disagreed. The Court conceded that it had a history of being responsive to proven cases of government interference,¹¹⁵ but concluded that the Third Circuit's remedy went too far. The *Morrison* Court discerned the main issue concerning dismissals: the "preserv[ation] [of] society's interest in the administration of criminal justice."¹¹⁶ The Court explained that in order for there to be any remedy, there must be a violation coupled with a showing of prejudice.¹¹⁷ *Morrison* is famous for the "neutralize the taint" mentality;¹¹⁸ essentially, fix the wrong—nothing more and nothing less. The wrinkle in *Morrison* was that there was no showing of harm; though there was one inappropriate conversation between the government agents and the represented defendant,¹¹⁹ there was no demonstration that the conversation had an adverse effect on Morrison's right to counsel.¹²⁰ Additionally, Justice Byron White insisted, where the prosecution has improperly acquired incriminating evidence against the criminal defendant absent the presence of counsel, such information shall be suppressed or a new trial will be ordered if the evidence has been wrongly admitted.¹²¹ Moreover, absent demonstrable prejudice or a substantial threat of prejudice, the dismissal of an indictment is "plainly inappropriate."¹²²

114. *United States v. Morrison*, 602 F.2d 529 (3d Cir. 1979).

115. *See Moore v. Illinois*, 434 U.S. 220, 231 (1977) (holding that defendant's Sixth Amendment right to counsel was violated by a corporeal identification that occurred subsequent to the initiation of adversarial proceedings and in the absence of counsel); *Geders v. United States*, 425 U.S. 80 (1976) (finding that a right-to-counsel violation occurred when defendant was precluded from meeting with his attorney during a seventeen-hour recess between his direct and cross-examination); *Herring v. New York*, 422 U.S. 853, 864–65 (1975) (finding a violation where statutory scheme empowered a judge in a nonjury trial to decide whether or not to hear closing statements from defense counsel); *United States v. Wade*, 388 U.S. 218, 236–38 (1967) (finding that a postindictment lineup was a critical stage in proceeding and that the absence of an attorney, unless properly waived, constituted a violation of the right to counsel); *Massiah v. United States*, 377 U.S. 201, 206–07 (1964) (finding a violation to the right to counsel when codefendant tape recorded conversations postindictment with the defendant without the presence of the defendant's attorney or knowledge of the state action). *But see Gilbert v. California*, 388 U.S. 263, 267 (1967) (holding that pretrial handwriting sample does not violate right to counsel because it was submitted at a stage that was not "critical" to the proceeding. The Court in *United States v. Morrison* reasoned that the remedy "characteristically imposed" for right-to-counsel violations "is not to dismiss the indictment but to suppress the evidence or to order a new trial." *Morrison*, 449 U.S. at 365.

116. *Morrison*, 449 U.S. at 364.

117. *Id.*

118. *Id.* at 365.

119. The Court explicitly held that while it did not condone the conduct of the government agents, the proposed remedy by the U.S. Court of Appeals for the Third Circuit was inappropriate if the alleged violation had no adverse effects on the criminal defendant. *Id.* at 367.

120. *Id.* at 366.

121. *Id.* at 365–66.

122. *Id.* at 365. *But see Note, Government Intrusions into the Defense Camp: Undermining the Right to Counsel*, 97 HARV. L. REV. 1143, 1159 (1984).

In *Weatherford v. Bursey*,¹²³ a civil damages case brought against a testifying witness during the plaintiff's criminal trial, the Court held that the Sixth Amendment right to counsel was not violated when the defendant, an undercover officer, was present during meetings with the plaintiff and his attorney.¹²⁴ At the time of the arrest and ensuing conversations, the plaintiff was not aware that his codefendant was in fact an undercover agent.¹²⁵ The agent was present during two pretrial meetings, where strategy was discussed with the plaintiff and his attorney.¹²⁶ The defendant, Jack Weatherford, was called as a witness and testified against plaintiff, Brett Allen Bursey.¹²⁷ While testifying, the defendant did not discuss the contents from either of the two pretrial meetings that he attended.¹²⁸ The Court not only found that Weatherford did not interfere with the attorney-client relationship, as he was invited to the meetings, but also established that there is no per se rule preventing government agents from being present during a conversation between the accused and his defense counsel.¹²⁹

In *Massiah v. United States*,¹³⁰ the defendant's drug conviction was overturned following the use of incriminating statements he made in the absence of his attorney.¹³¹ While released on bail, the defendant engaged in what he believed to be a private conversation with his codefendant, Jesse Colson.¹³² Unknown to the defendant, Colson had agreed to cooperate with the government against Winston Massiah.¹³³ Colson arranged to have a listening device installed in his car, and one night after Massiah was released on bail, the two had a conversation that was monitored by government agents.¹³⁴ Murphy, the federal agent who monitored the conversation, testified at trial to the contents of the discussion.¹³⁵ The Court found this to be a violation of Massiah's Fifth and Sixth Amendment rights.¹³⁶ The Court said the incriminating statements were explicitly elicited by the government, as evinced by its relationship with Colson, with full knowledge that defendant Massiah was represented by counsel.¹³⁷ Essentially, the government conduct violated a fundamental notion of

123. 429 U.S. 545 (1977).

124. *Id.* at 558.

125. *Id.* at 547-49.

126. *Id.* at 547-48.

127. *Id.* at 549.

128. *Id.* at 548-49.

129. *Id.* at 551-54. In a combative dissent, Justice Thurgood Marshall chastised his brethren for jeopardizing two independent constitutional values: (1) the integrity of the adversarial system; and (2) criminal defendants' rights to effective assistance of counsel. He argued that a client will be reluctant to confide in his attorney if there is a possibility that the conversation could potentially be used against him. *Id.* at 562-63 (Marshall, J., dissenting).

130. 377 U.S. 201 (1964).

131. *Id.* at 207.

132. *Id.* at 203.

133. *Id.* at 202.

134. *Id.* at 203.

135. *Id.*

136. *Id.* at 203-07.

137. *Id.* at 204.

fairness and undermined the right of the indicted defendant to consult with his attorney.¹³⁸ In a pointed dissent, Justice White, who would go on to pen the majority opinion in *Morrison*,¹³⁹ claimed that there had been no extensive coercion in this situation and that Massiah made such comments on his own volition outside of custody.¹⁴⁰

In a case from the Ninth Circuit, *United States v. Lopez*,¹⁴¹ the defendant challenged his guilty verdict¹⁴² alleging prosecutorial interference with his right to counsel. After indictment, Jose Lopez hired Barry Tarlow as his attorney.¹⁴³ Tarlow advised Lopez that he believed there was a viable defense and that it was Tarlow's general policy not to "cooperate" with the government in exchange for pleading to a lesser charge.¹⁴⁴ Lopez's codefendant, Antonio Escobedo, had retained his own attorney, James A. Twitty.¹⁴⁵ Twitty, unlike Tarlow, was eager to negotiate a plea on behalf of his client, and Lopez was inclined to engage in plea negotiations because he was concerned that his children were being abused while he was incarcerated.¹⁴⁶ Lopez, however, did not want to retain a separate attorney to negotiate a plea for him; he was hesitant to spend the additional money and potentially lose the services of Tarlow at trial.¹⁴⁷ Consistent with Lopez's wishes, Twitty contacted the prosecutor, Lyons, and informed him of the situation.¹⁴⁸ Lyons realized the potential problems arising from meeting with a criminal defendant without counsel¹⁴⁹ and looked to circumvent these issues by contacting the judge *ex parte*.¹⁵⁰ The district court judge referred Lyons to a magistrate judge, who conducted an *in camera* interview with Lopez each time Lyons planned on meeting with him outside the presence of counsel.¹⁵¹ The magistrate judge made sure that Lopez understood he would be representing himself during the plea negotiations with the prosecutor.¹⁵² Tarlow discovered through a third party what his client and the prosecutor did behind his back.¹⁵³ Subsequently, Tarlow withdrew his representation of Lopez.¹⁵⁴ Lopez

138. *Id.* at 204–06.

139. *United States v. Morrison*, 449 U.S. 361 (1981).

140. *Massiah*, 377 U.S. at 211–12 (White, J., dissenting).

141. 4 F.3d 1455 (9th Cir. 1993).

142. Jose Lopez was convicted on charges of conspiracy to distribute and distribution of cocaine and heroin in violation of 21 U.S.C. §§ 846 and 841(a)(1) and for aiding and abetting in violation of 18 U.S.C. § 2. *Id.* at 1456.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. Lopez wanted to keep Barry Tarlow as his attorney in case the plea negotiations were unsuccessful and the case went to trial. *Id.* at 1456–57.

148. *Id.* at 1457.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

retained substitute counsel and filed a motion to dismiss the indictment alleging a Sixth Amendment violation.¹⁵⁵

The district court did not find a right-to-counsel violation because Lopez was able to find a substitute attorney.¹⁵⁶ However, the court found that the prosecutor's conduct interfered with Lopez's right to counsel of his choice.¹⁵⁷ Invoking its supervisory powers, the district court dismissed the indictment against Lopez, finding that less drastic remedies would not cure the wrong in this case.¹⁵⁸ On appeal, the Ninth Circuit found that it was within the district court's power to dismiss an indictment for prosecutorial interference, explaining that fairness in the criminal justice system required fair dealing and ethical conduct in the legal profession.¹⁵⁹ However, the Ninth Circuit advanced its holding in *United States v. Owen*,¹⁶⁰ reiterating that a dismissal of indictment is appropriate when there is "some prejudice to the accused by virtue of the alleged acts of misconduct."¹⁶¹ The Ninth Circuit held that despite Lyons' malfeasance, Lopez was not prejudiced since he was able to hire replacement counsel who was "very able and [willing to] provide him with outstanding representation."¹⁶²

2. Judicial Interference

While *Lopez* involved primarily prosecutorial misconduct, the district judge had some role, being that he allowed Lyons to question Lopez outside the presence of counsel.¹⁶³ While the judicial behavior in *Lopez* may be perceived as an indirect cause to the violation, it begs the question, what happens when a judge improperly interferes with the right to counsel?

Judicial interference with a defendant's right to counsel can occur in any number of ways. In *Geders v. United States*,¹⁶⁴ the Court found a constitutional violation stemming from the trial court's order depriving the defendant from consulting with his counsel during a seventeen-hour

155. *Id.*

156. *Id.* at 1458.

157. *Id.* The court reasoned that although the prosecutor received the district court's permission, he misled the court because he claimed the reason Lopez needed to meet outside the presence of counsel was that he believed Tarlow was being paid by a drug ring and that Lopez's family could be in danger. However, the prosecutor knew, as James A. Twitty explicitly told him, that the reason Lopez wanted to engage in negotiations was because he believed Tarlow would not be useful in a plea negotiation. *Id.* at 1457.

158. *Id.* at 1458.

159. *Id.* at 1463; *see, e.g.*, *Wheat v. United States*, 486 U.S. 153, 160 (1988) (holding that federal courts have an independent interest in ensuring that lawyers conduct themselves in such a way as is consistent with legal ethics and procedural fairness); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that when a prosecutor suppresses evidence that is favorable to the accused at trial, he violates the defendant's right to due process, which is a constitutional safeguard that ensures the fundamental fairness of trials).

160. 580 F.2d 365 (9th Cir. 1978).

161. *Lopez*, 4 F.3d 1455, 1464 (9th Cir. 1993) (quoting *Owen*, 580 F.2d at 367).

162. *Id.* at 1464 (quoting *United States v. Lopez* 765 F. Supp. 1433, 1456 (N.D. Cal. 1991), *vacated*, 4 F.3d 1455 (9th Cir. 1993)).

163. *Id.* at 1457.

164. 425 U.S. 80 (1976).

overnight recess.¹⁶⁵ The Court, while acknowledging that it is within judicial discretion to sequester witnesses, distinguished this situation because John Geders was not only a witness, but the defendant.¹⁶⁶ Chief Justice Warren Burger, writing for the majority, recognized that it is commonplace for an attorney to discuss strategy and key trial objectives with her client during recesses, especially an overnight recess.¹⁶⁷ Furthermore, the Chief Justice said, “the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer’s guidance.”¹⁶⁸ This statement is consistent with the principle articulated in *Brooks v. Tennessee*.¹⁶⁹ In *Brooks*, the Court struck down a Tennessee statute that required a criminal defendant to testify before any other defense witness.¹⁷⁰ Writing for a divided Court, Justice William Brennan emphasized that the right to counsel is inextricable from the right to put on a defense.¹⁷¹ Lawyers are skilled and trained to weigh evidence and the strength of a given case. Requiring the defendant to testify at the outset of the defense, Justice Brennan said, would be to remove the “guiding hand of counsel” and thus violate a defendant’s constitutional rights.¹⁷²

The Court was provided with a fact pattern akin to a *Geders-Brooks* hybrid of statutory law and judicial discretion in *Herring v. New York*.¹⁷³ Clifford Herring was charged with first and third degree attempted robbery.¹⁷⁴ The judge was afforded the discretion, under a state statute,¹⁷⁵ to waive closing remarks, or summations, in his capacity as the fact finder.¹⁷⁶ The Court found that presenting a final argument before a judge in a nonjury trial is a basic right and that the proscription of this right violated a defendant’s ability to defend himself.¹⁷⁷ The Court recognized a judge’s latitude in restricting a closing remark either for redundancy or in light of time restrictions. It noted, however, that a judge must respect that closing statements are pivotal in that they are the only time in the trial

165. *Id.* at 91.

166. *Id.* at 87–88.

167. *Id.* at 88–89.

168. *Id.* at 88.

169. 406 U.S. 605 (1972).

170. *Id.* at 606.

171. *Id.* at 612–13.

172. *Id.* at 613.

173. 422 U.S. 853 (1975).

174. *Id.* at 854.

175. N.Y. CRIM. PROC. LAW § 320.20(3)(c) (McKinney 1971).

176. This was a case where the defendant waived his right to a trial by jury, and undertook the option to have the judge act as the sole fact finder. *Herring*, 422 U.S. at 854. Following the ruling in *Herring v. New York*, New York amended the law so that judges must allow all parties the opportunity to present summations as if they were in front of a jury. See N.Y. CRIM. PROC. LAW § 320.20(3)(c) (McKinney 2002).

177. *Herring*, 422 U.S. at 858–59. See generally *Faretta v. California*, 422 U.S. 806 (1975) (holding that a criminal defendant has the right to act as his own attorney).

where both sides can weigh all of the evidence and point out potential strengths and weaknesses.¹⁷⁸

The Court, in both *Geders* and in *Herring*, sent the cases back down to the lower federal courts. In *Geders*, the Court held that an order precluding a criminal defendant from consulting with his attorney between the direct and cross-examination parts of the trial impinged on his Sixth Amendment right to counsel.¹⁷⁹ In *Herring*, the Court found that the denial of the defendant's rights under the New York statute mandated vacating the guilty verdict and remanded the matter back down to the lower court.¹⁸⁰

3. Ineffective Counsel

In addition to government and judicial interference with the right to counsel, a defendant may have grounds for reversal deriving from the ineffectiveness of her lawyer at trial. The applicable standard for ineffective assistance of counsel was defined in *Strickland v. Washington*.¹⁸¹ The constitutional threshold for ineffective assistance of counsel is whether the attorney's conduct so undermines the proper function the adversarial system serves that the outcome at trial cannot be perceived as a just result.¹⁸² To reverse a conviction on the grounds of ineffective counsel, a defendant must demonstrate two components: first, that the attorney's errors were so egregious that the attorney could not qualify as "counsel" under the Sixth Amendment;¹⁸³ second, that the attorney's performance was sufficiently deficient as to directly prejudice the case, thus undermining the adversary process and enabling an unjust result.¹⁸⁴ As the *Strickland* Court and numerous others observe, the judicial inquiry must be "highly deferential" to the attorney¹⁸⁵ because different attorneys will react differently to similar situations.¹⁸⁶ The *Strickland* standard presumes that an attorney is competent, especially when the attorney is experienced.¹⁸⁷ However, as the Court articulated in *United States v. Cronin*,¹⁸⁸ experience is not dispositive when analyzing an ineffective counsel allegation.¹⁸⁹

178. *Herring*, 422 U.S. at 862.

179. *Geders v. United States*, 425 U.S. 80, 91–92 (1976).

180. *Herring*, 422 U.S. at 864–65.

181. 466 U.S. 668 (1984). See generally Paul F. Wessell, *Right to Counsel, Thirteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1982–1983*, 72 GEO. L.J. 525, 529–34 (1983).

182. *Strickland*, 466 U.S. at 686–87.

183. *Id.* at 687.

184. *Id.*

185. *Id.* at 689.

186. See *id.* at 689 (discussing how even expert criminal defense attorneys would not uniformly represent a client in the same way).

187. See *Burger v. Kemp*, 483 U.S. 776, 783–96 (1987); *Chandler v. United States*, 218 F.3d 1305, 1316 (11th Cir. 2000).

188. 466 U.S. 648 (1984).

189. See *id.* at 665.

Writing for the Court in *Cronic*, Justice Stevens asserted that the defense counsel, a young attorney who specialized in real estate and was unfamiliar with criminal law, had a rebuttable presumption of competence.¹⁹⁰ This again illustrates the deference paid to attorneys in the criminal justice system. The lawyer in *Cronic*, while young and inexperienced, also only had twenty-five days to prepare for the case after the withdrawal of the previous attorney.¹⁹¹ Still, Justice Stevens maintained, there can be no finding of ineffective counsel to warrant a reversal of conviction absent a showing of ineffectiveness, and inexperience alone does not permit a declaration of ineffectiveness.¹⁹²

4. Disqualification of the Chosen Attorney

While courts inquire whether or not a chosen attorney performed competently, an interesting question is posed when a lower court prohibits the defendant's chosen attorney from representing the client. There is ample law that allows a court to remove an attorney from a criminal case for legitimate reasons. Removal can occur either directly or indirectly. A paradigmatic example involving direct removal of counsel—a court's decision to disqualify a specific attorney or attorneys from a proceeding—is the scenario of “house counsel” for organized crime families.¹⁹³ In *United States v. Gotti*,¹⁹⁴ a case before the U.S. District Court for the Eastern District of New York, Judge Israel Glasser mandated that three defense attorneys who had routinely and continually represented alleged mob members be disqualified.¹⁹⁵ Judge Glasser found that this disqualification was required for at least two reasons. First, the attorneys continued participation would create a conflict of interest, as their former clients would be testifying against current clients on behalf of the government.¹⁹⁶ Additionally, the disqualification of the attorneys was required because of their participation in the underlying obstruction of justice charge: the court had trouble foreseeing a way in which the two attorneys would not be called to testify, and the Model Code of Professional Responsibility prohibits a counselor from acting as a witness against his client because of the inability to cross-examine.¹⁹⁷ Judge Glasser appreciated the finality of his decision, conceding that he “balanced the defendants’ Sixth Amendment right to counsel of their choice against the grave peril the continued representation by those counsel poses to the integrity of the trial process.”¹⁹⁸

190. *Id.* at 657–58.

191. *Id.* at 664–65.

192. *See id.* at 666.

193. *See, e.g.,* LoCascio v. United States, 395 F.3d 51, 56 n.2 (2d Cir. 2005).

194. 771 F. Supp. 552 (E.D.N.Y. 1991).

195. *Id.* at 567.

196. *Id.* at 563.

197. *Id.* at 565; *see* MODEL CODE OF PROF'L RESPONSIBILITY DR 5-102 (1980).

198. *Gotti*, 771 F. Supp. at 566.

In addition to a court ordered attorney disqualification, a lawyer can request to withdraw as counsel and be removed from the case if there is adequate justification.¹⁹⁹ One example of a reasonable request for withdrawal is when the client does not compensate her attorney.²⁰⁰ In *Caplin*, the defendant, Christopher Reckmeyer, was charged with a multicount indictment for running a large drug importation and distribution scheme.²⁰¹ Reckmeyer's law firm challenged the constitutionality of a federal forfeiture statute,²⁰² which required the forfeiture of illegally obtained assets that Reckmeyer sought to use to fund his defense.²⁰³ The Fourth Circuit affirmed the U.S. District Court for the Eastern District of Virginia in finding that the law was unconstitutional.²⁰⁴ However, on rehearing, the Fourth Circuit reversed.²⁰⁵ The Court affirmed the decision of the Fourth Circuit in declaring that the law firm had no property claims in the forfeited assets and that the law did not violate the Sixth Amendment right to counsel.²⁰⁶ The Court held that this was not a violation of the right to counsel because, even though Reckmeyer sought to use illegitimate funds for a legitimate purpose (i.e., to pay his lawyer), such funds were no longer his property, and a defendant had no Sixth Amendment right to spend a third party's (in this case, the U.S. Government's) money.²⁰⁷ Rather than withdrawing, the law firm continued to represent Reckmeyer throughout his trial and lost \$195,000 in legal fees.²⁰⁸

Similarly, in *Gonzalez-Lopez*, the defendant was convicted in Missouri federal district court for conspiring to distribute more than 100 kilograms of marijuana.²⁰⁹ After being charged, defendant's family hired John Fahle, a local defense attorney, to handle the proceedings.²¹⁰ Following the arraignment, the defendant enlisted the services of Joseph Low, a California attorney, to either assist Fahle or to succeed him as sole counsel to the defendant.²¹¹ Low and Fahle appeared together in court at an evidentiary hearing, shortly after which Gonzalez-Lopez informed Fahle that he wanted only Low to represent him in the proceedings.²¹² Low filed two

199. See MODEL RULES OF PROF'L CONDUCT R. 1.16(b) (1983).

200. See *id.* at (b)(5)–(6).

201. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 619 (1989).

202. 21 U.S.C. § 853 (2006).

203. *United States v. Reckmeyer*, 631 F. Supp. 1191, 1193 (E.D. Va. 1986).

204. *United States v. Harvey*, 814 F.2d 905, 909 (4th Cir. 1987).

205. *In re Forfeiture Hearing As to Caplin & Drysdale, Chartered*, 837 F.2d 637, 649 (4th Cir. 1988).

206. *Caplin*, 491 U.S. at 635.

207. *Id.* at 624–28; *cf.* *United States v. Rosen*, 487 F. Supp. 2d 721, 723 (E.D. Va. 2007) (holding that accepting attorney's fee advancements from employer does not disqualify Sixth Amendment claim).

208. *Caplin*, 491 U.S. at 621.

209. *Id.* at 142.

210. *Id.*

211. *Id.*

212. *Id.*

applications with the district court for admission *pro hac vice*;²¹³ both applications were denied without any explanation.²¹⁴ Low appealed the second rejection, and his writ of mandamus was dismissed by the U.S. Court of Appeals for the Eighth Circuit.²¹⁵ Fahle filed a motion to withdraw as counsel and concurrently petitioned for sanctions against Low.²¹⁶ During this ancillary proceeding, Low was informed by the court as to why he was denied *pro hac vice*: he was in violation of Missouri Rule of Professional Conduct 4-4.2, which prohibited a lawyer from communicating with a represented party about the subject of the representation without the lawyer's consent.²¹⁷ Low, for the third time, filed to be admitted *pro hac vice*; again he was denied.²¹⁸ Gonzalez-Lopez retained another attorney and went to trial, where a U.S. Marshal was placed in between Low and the defense attorney, preventing Low from continuing to break Rule 4-4.2 by communicating with the defendant.²¹⁹ Gonzalez-Lopez was convicted.²²⁰

The Eighth Circuit vacated the conviction, finding that the court misapplied Rule 4-4.2 and thus erroneously denied Low's admission and Gonzalez-Lopez's counsel of choice.²²¹ When it reached the Supreme Court, the Court held that where there has been an erroneous deprivation of the choice of counsel, proof of a violation is incomplete absent a showing of prejudice.²²²

In his dissent, Justice Alito argued that the Sixth Amendment guarantees the right to the assistance of counsel.²²³ By his reasoning, a defendant should not automatically have a conviction reversed due to a lower court's erring in refusing to admit *pro hac vice* an attorney.²²⁴ Justice Alito advocated that a defendant should be required to demonstrate the outcome of the trial was adversely affected by the quality of assistance that the defendant received.²²⁵ Justice Alito's dissent reflects the philosophy that the Ninth Circuit used in *Lopez* to reverse the indictment dismissal against the defendant.²²⁶

213. *Pro hac vice* "usu[ally] refers to a lawyer who has not been admitted to practice in a particular jurisdiction but who is admitted there temporarily for the purpose of conducting a particular case." BLACK'S LAW DICTIONARY, *supra* note 36, at 1248.

214. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 142 (2006).

215. *Id.* at 142.

216. *Id.*

217. *Id.* at 142-43; see MODEL RULES OF PROF'L CONDUCT R. 4-4.2 (1993).

218. *Gonzalez-Lopez*, 548 U.S. at 143.

219. *Id.*

220. *Id.*

221. *United States v. Gonzalez-Lopez*, 399 F.3d 924, 926 (8th Cir. 2005).

222. *Gonzalez-Lopez*, 548 U.S. at 146.

223. *Id.* at 153 (Alito, J., dissenting).

224. *Id.* at 152-53.

225. *Id.* at 162.

226. *United States v. Lopez*, 4 F.3d 1455, 1464 (9th Cir. 1993).

D. Government Memoranda, Prosecutors, and KPMG

1. The Holder Memo

The previous part discussed various violations of the Sixth Amendment right to counsel. This section will discuss DOJ policies that are relevant to the specific violations addressed in the *Stein* case. White collar crime was becoming much more prevalent near the end of the twentieth century. The Department of Justice attempted to offer guidance to its prosecutors by circulating office advisories. On June 16, 1999, then-Deputy Attorney General Eric Holder²²⁷ issued *Federal Prosecution of Corporations*²²⁸ (Holder Memo) to the several U.S. Attorneys. This memorandum was tantamount to a “how to guide” on prosecuting corporations and their respective officers and employees. The Holder Memo laid the groundwork for several sets of DOJ advisory guidelines, including the Thompson Memo,²²⁹ the McNulty Memo,²³⁰ and the Filip Memo,²³¹ all declared to be the “progeny” of the Holder Memo.²³² According to Holder, this was in response to white-collar defense attorneys’ frustration over the lack of formal guidelines in determining whether to indict corporations (i.e., their clients).²³³ However, this memorandum was signed and dated at least two years before the advent of twenty-first century white-collar crime.²³⁴

Holder reasoned that prosecutors are increasingly faced with the decision whether to prosecute corporations. Holder obliged the prosecutors and defense attorneys by memorializing eight considerations that federal prosecutors’ could rely on in determining whether to prosecute a

227. Eric H. Holder now serves as the Attorney General in the Obama Administration. See Eric Lichtblau & John M. Broder, *Aide to Obama Seen as Choice for Justice Post*, N.Y. TIMES, Nov. 19, 2008, at A1.

228. Memorandum from Eric H. Holder, Deputy Att’y Gen., U.S. Dep’t of Justice, to All Component Heads and U.S. Att’ys (June 16, 1999) [hereinafter Holder Memo], <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html>.

229. See *infra* Part I.D.2.

230. Memorandum from Paul J. McNulty, Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components and U.S. Att’ys (Dec. 12, 2006) [hereinafter the McNulty Memo]; see also John Power, *Show Me the Money: The Thompson Memo, Stein, and an Employee’s Right to the Advancement of Legal Fees Under the McNulty Memo*, 64 WASH. & LEE L. REV. 1205, 1237 (2007) (arguing that the worst thing to do under the McNulty Memo is for a corporate employer to have an ad-hoc approach to fee advancement for its employees).

231. Memorandum from Mark R. Filip, Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components and U.S. Att’ys (Aug. 28, 2008) [hereinafter the Filip Memo]; see also Eric Lichtblau, *U.S. To Ease Pressure Tactic over Legal Help for Employees*, N.Y. TIMES, Aug. 28, 2008, at C1; Benjamin E. Rosenberg, *‘Kozlowski’: Using Internal Probes Against Employees?*, N.Y. L.J., Oct. 28, 2008, at 4; Mark J. Stein & Joshua A. Levine, *The Filip Memorandum: Does It Go Far Enough?*, N.Y. L.J., Sept. 10, 2008, at 4.

232. See Posting of Peter Lattman to WSJ Law Blog, <http://blogs.wsj.com/law/2006/12/13/the-holder-memo/> (Dec. 13, 2006, 08:47 EST).

233. *Id.*

234. See *United States v. Stein (Stein I)*, 435 F. Supp. 2d 330, 337 (S.D.N.Y. 2006) (discussing cases such as Arthur Andersen, Enron, and Tyco).

corporation.²³⁵ Three of these points were particularly important: the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government investigation, including potentially waiving the corporate attorney-client and work-product privileges;²³⁶ the existence and adequacy of a corporation's compliance program;²³⁷ and the corporation's "remedial actions," including a compliance program or the improvement of an existing one as well as disciplinary action (against the culpable employees including termination), payment of restitution, and cooperation with government agents.²³⁸

2. The Thompson Memo

In late 2001 and continuing through 2002, many high profile companies such as Enron and Tyco International found themselves facing potentially companywide prosecution.²³⁹ At the center of the Enron investigation and subsequent prosecution was Enron's auditor, Arthur Andersen LLP.²⁴⁰ In response to the public outcry over this onslaught of white collar crime, President George W. Bush on July 9, 2002, established a Corporate Fraud Task Force headed by Larry D. Thompson, the U.S. Deputy Attorney General.²⁴¹ Six months later, Thompson issued *Principles of Federal Prosecution of Business Organizations*²⁴² (Thompson Memo), a set of guidelines that effectively revised the Holder Memo and became mandatory for federal prosecutors.²⁴³ While retaining much of the pertinent language from its predecessor, the Thompson Memo discusses the protocol in

235. Holder Memo, *supra* note 228, § II.A.

236. *Id.* § VI. The Holder Memo discusses how a prosecutor should determine whether or not the corporation appears to be protecting its culpable employees or agents. Such support could occur through the advancing of legal fees, and may be considered when determining the "extent and value of a corporation's cooperation." Holder Memo, *supra* note 228, § VI.B; *cf.* Maya Krigman, Note, *Prosecutorial Discretion of the Department of Justice in Corporate Criminal Cases*, 74 BROOK. L. REV. 231, 265 (2008) (arguing that the best solution to any potential request to waive corporate attorney-client privilege would be preemptive legislation that would expressly prohibit such government misconduct).

237. Holder Memo, *supra* note 228, § VII.

238. *Id.* § VIII.

239. *Stein I*, 435 F. Supp. 2d at 337.

240. *Id.* Judge Lewis Kaplan goes on to note that Arthur Andersen collapsed following the indictment, well before the case was tried. *Id.* However, in 2005 the Court reversed the criminal conviction of Arthur Anderson due to faulty instructions to the jury. *See* Arthur Andersen LLP v. United States, 544 U.S. 696, 708 (2005); *see also* Candace Zierdt & Ellen S. Podgor, *Back Against the Wall*, CRIM. JUST., Fall 2008, at 34, 35; Charles Lane, *Justices Overtaken by Conviction*, WASH. POST, June 1, 2005, at A1.

241. *Stein I*, 435 F. Supp. 2d at 337.

242. Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components and U.S. Att'ys (Jan. 20, 2003) [hereinafter Thompson Memo], http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm; *see* Dane C. Ball & Daniel E. Bolia, *Ending a Decade of Federal Prosecutorial Abuse in the Corporate Criminal Charging Decision*, 9 WYO. L. REV. 229, 244 (2009).

243. Holder Memo, *supra* note 228, § II.A. The Thompson Memo contains nine factors that a prosecutor should take into account, as opposed to eight considerations in the Holder Memo. *See* Thompson Memo, *supra* note 242, § II.A.

awarding deferred prosecution agreements to companies.²⁴⁴ A deferred prosecution agreement is a cooperation agreement, which is a form of pretrial diversion that enables corporations to avoid firmwide prosecution for its cooperation with government agencies and payment of a large fine.²⁴⁵

The Thompson Memo has received crushing criticism from courts and commentators alike.²⁴⁶ Even Eric Holder, the father of the modern day white-collar DOJ guide, jokes that “Holder’s [Memo] was good and everything else was not as good.”²⁴⁷ The Thompson Memo was revised on December 12, 2006, by then-Deputy Attorney General Paul McNulty (McNulty Memo).²⁴⁸ The McNulty Memo revised DOJ policy, including how federal attorneys should weigh a corporation’s cooperation in light of fee advancement policies.²⁴⁹ The McNulty Memo provided that “[p]rosecutors generally should not take into account whether a corporation is advancing attorneys’ fees to employees.”²⁵⁰

244. Thompson Memo, *supra* note 242, § VI.B (“[P]ermit[ing] a non prosecution agreement in exchange for cooperation when a corporation’s ‘timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective.’” (quoting U.S. ATTORNEYS’ MANUAL 9-27.600 (2009)); *see also* Kathleen M. Boozang & Simone Handler-Hutchinson, “Monitoring” Corporate Corruption: DOJ’s Use of Deferred Prosecution Agreements in Health Care, 35 AM. J.L. & MED. 89, 96–97 (2009) (noting that the increased use of deferred prosecution agreements and nonprosecution agreements indicates the DOJ’s perception that such measures are sufficient in eliminating corporate corruption and the “ethos of corporate America”); Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1, 3–4 (2008) (arguing that courts need to scrutinize deferred prosecution agreements and remove any improper terms that could jeopardize the legality of the document).

245. *See* Michael R. Sklaire & Joshua G. Berman, *Deferred Prosecution Agreements: What Is the Cost of Staying in Business?*, WASH. LEGAL FOUND. 11, June 3, 2005, at 1. At its core, a deferred prosecution agreement is an official document that postpones prosecution, while affording a corporation the opportunity to “clean house.” *See generally* RUSSELL MOKHIBER, EDITOR, CORP. CRIME REPORTER, CRIME WITHOUT CONVICTION: THE RISE OF DEFERRED AND NON PROSECUTION AGREEMENTS (2005), *available at* <http://www.corporatecrimereporter.com/deferredreport.htm>; Zierdt & Podgor, *supra* note 244.

246. *See, e.g.,* Ball & Bolia, *supra* note 242, at 246–48; Claudius O. Sokenu, *The Role of Corporate Internal Investigations*, in WHITE COLLAR CRIME 2008: PROSECUTORS AND REGULATORS SPEAK 527 (PLI Corporate Law & Practice, Course Handbook Series No. B-1696, 2008); Carmen Couden, Note, *The Thompson Memorandum: A Revised Solution or Just a Problem?*, 30 J. CORP. L. 405, 422 (2005) (arguing that the Thompson Memo would be more appropriate if federal prosecutors treated its factors as guidelines, which they were intended to be, as opposed to a compulsory “battering ram”); Andrew Gilman, Note, *The Attorney-Client Privilege Protection Act: The Prospect of Congressional Intervention into the Department of Justice’s Corporate Charging Policy*, 35 FORDHAM URB. L.J. 1075, 1090–93 (2008); Lauren E. Taigue, Note, *Justice Department’s Policy on Corporate Prosecutions Under Attack: United States v. Stein Assails Thompson Memorandum*, 52 VILL. L. REV. 369 (2007).

247. Lattman, *supra* note 232.

248. McNulty Memo, *supra* note 230; *see also* Ball & Bolia, *supra* note 242, at 254–57.

249. *See generally* Gilman, *supra* note 246.

250. McNulty Memo, *supra* note 230, at 11. “Many state indemnification statutes grant corporations the power to advance the legal fees As a consequence, many corporations

II. *STEIN* AND ITS CONFLICT WITH SIXTH AMENDMENT CASE LAW

Part I provided the background necessary for analyzing right-to-counsel violations. Part II illustrates how *Stein* conflicts with current case law with regards to when the right to counsel attaches, how defenses can be funded, and what the appropriate remedy is for a right-to-counsel violation. Part II.A.1 discusses the preliminary investigation of KPMG and the communications between the company and the U.S. Attorney's Office. Part II.A.2 details the three *Stein* cases in federal court that have had an immediate impact on white-collar crime litigation and Sixth Amendment interpretation. Part II.B.1 analyzes the conflicts between *Stein* and federal case law. Part II.B.2 details the immediate critiques of *Stein* by practitioners and scholars alike.

A. KPMG v. The Department of Justice

1. Raising Eyebrows in Washington DC

In early 2002, the IRS began investigating potentially fraudulent tax shelters²⁵¹ and issued nine summonses to KPMG, "which was less than fully compliant."²⁵² Following investigations by the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, three senior KPMG partners,²⁵³ who would later become defendants in the *Stein* cases, testified before the Committee for public hearings in November 2003.²⁵⁴ During the hearing, those who testified did not appear honest or forthcoming.²⁵⁵ KPMG, sensing the gathering storm after the subpar performances of the three partners on The Hill,²⁵⁶ retained the services of the law firm Skadden, Arps, Slate, Meagher & Flom LLP (Skadden) to develop a cooperation strategy with the government in attempt to avoid a firmwide prosecution.²⁵⁷ One of the elements of this new

enter into contractual obligations to advance attorneys' fees Therefore, a corporation's compliance with governing state law and its contractual obligations cannot be considered a failure to cooperate." *Id.*

251. A tax shelter is a method by which to reduce current tax liability by offsetting the income from one source from losses or deductions from another source. See IRS, Frequently Asked Tax Questions and Answers, <http://www.irs.gov/faqs/faq/0,,id=199691,00.html> (last visited Oct. 17, 2009).

252. *United States v. Stein (Stein I)*, 435 F. Supp. 2d 330, 338 (S.D.N.Y. 2006).

253. Jeffrey Stein, Richard Smith, and Jeffrey Eiseheid were all reassigned at KPMG. Stein was the deputy chair and chief operating officer of the firm; Smith was the vice chair for tax services; and Eiseheid was a partner in the personal financial planning practice. Notably, Stein contracted to retire from the firm, with a three year consulting position worth more than \$3.6 million dollars over the term. Additionally, Stein and KPMG agreed that the latter would bear the cost of an attorney "acceptable to both him and the firm or, if joint representation were inappropriate or if Mr. Stein were the only party to a proceeding, by counsel reasonably acceptable to Mr. Stein." *Id.* at 339.

254. *Id.* at 338-39.

255. *Id.*

256. See David Cay Johnston, *Skeptical Hearing for Audit Firm*, N.Y. TIMES, Nov. 19, 2003, at C3.

257. *Stein I*, 435 F. Supp. 2d at 339.

cooperative approach would be to put distance between the firm and the three senior partners who testified before the Committee.²⁵⁸ In 2004, the IRS made a criminal referral to the DOJ, which in turn delegated the matter to the U.S. Attorney's Office (USAO) for the Southern District of New York.²⁵⁹

2. Communications Among KPMG, Skadden, and the U.S. Attorney's Office

The USAO notified Skadden of the referral and an initial meeting was set for February 25, 2004.²⁶⁰ In the days and weeks leading up to the meeting, the USAO issued subject letters to several KPMG employees²⁶¹ informing them that their practices at KPMG were within the scope of a grand jury's investigation.²⁶² Skadden partner Robert S. Bennett, Assistant U.S. Attorneys (AUSA) Shirah Neiman and Justin Weddle, as well as a number of other counselors from each side attended the meeting.²⁶³ Once the meeting began and the semantics had ceased, AUSA Weddle expressly inquired as to what KPMG's position was on the advancement of legal fees.²⁶⁴ Mr. Bennett "tested the waters to see whether KPMG could adhere to its practice of paying its employees' legal expenses,"²⁶⁵ by asking the prosecutors what their perspective was. AUSA Neiman responded by indicating that the government would take into account KPMG's legal obligations but that the Thompson Memo had to be given consideration.²⁶⁶ Specifically, the Thompson Memo reiterates the language of the Holder Memo regarding corporate cooperation and advancing legal fees: "while cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents . . . through the advancing of attorneys fees . . . may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation."²⁶⁷ Representatives for

258. *See id.*

259. *Id.*

260. *Id.* at 341.

261. Facts indicate that these letters were issued to between twenty and thirty KPMG partners and employees. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* Judge Kaplan found that before meetings with the USAO in February 2004, it had been KPMG's unwavering policy to advance and pay legal fees for its partners, principals, and employees, who through the scope of their employment, were involved in any criminal, civil, or regulatory proceeding. This policy had never before included capped fees or limitations on fee advancing. *Id.* at 340. Additionally, KPMG had recently paid \$20 million to defend four of its partners in a criminal investigation and civil action brought by the Securities and Exchange Commission (SEC) over the company's involvement with the Xerox Corporation. *Id.*; see KPMG LLP, Exchange Act Release No. 51574, Fed. Sec. L. Rep. (CCH) ¶ 75,896, at 63,877 (Apr. 19, 2005).

266. *Stein I*, 435 F. Supp. 2d at 341.

267. Thompson Memo, *supra* note 242, § VI.B.

KPMG indicated that it was the firm's practice to pay legal fees,²⁶⁸ but that Delaware law permitted the company to do as it pleased.²⁶⁹ Skadden attorneys declared that KPMG would not pay the fees for any employee who declined to cooperate with the government investigation or who invoked the Fifth Amendment.²⁷⁰ AUSA Neiman responded, saying that "misconduct" should not or cannot "be rewarded" [under] federal guidelines.²⁷¹ This statement was construed by Skadden attorneys to mean that any advancement of fees, beyond what was legally prescribed, could count against KPMG if it was hoping to avoid firm-wide prosecution.²⁷² On March 2, 2004, Bennett told AUSA Weddle that KPMG did not necessarily believe that it owed a legal obligation to advance fees, but that "it would be a big problem" for the firm not to do so considering its partnership structure.²⁷³

Following a conference call in which AUSA Weddle advised KPMG to tell employees to be fully open with the investigation, even if that meant admitting to criminal acts, Bennett issued a letter to each KPMG employee targeted by the USAO informing them of KPMG's new Fee Policy.²⁷⁴ KPMG then issued a second memorandum, this time to nontargeted employees, reiterating that those who were asked to meet with federal prosecutors would have competent legal counsel and "reasonable fees" paid for by the firm.²⁷⁵ The USAO was disappointed by the "tone" of the

268. *Stein I*, 435 F. Supp. 2d at 355–56. KPMG is a Delaware limited liability partnership whereby the partnership agreement is governed by the Delaware Revised Partnership Statute Act. *Id.* at 355 n.117.

269. "Subject to such standards and restrictions, if any, as are set forth in its partnership agreement, a partnership may, and shall have the power to, indemnify and hold harmless any partner or other person from and against any and all claims and demands whatsoever." DEL. CODE ANN. tit. 6, § 15-110 (2008).

270. *Stein I*, 435 F. Supp. 2d at 342.

271. *Id.*

272. *See id.*

273. *United States v. Stein (Stein V)*, 541 F.3d 130, 138 (2d Cir. 2008) (quoting *Stein I*, 435 F. Supp. 2d at 345).

274. "Fees and expenses would be [i] capped at \$400,000 per employee; [ii] conditioned on the employee's cooperation with the government; and [iii] terminated when an employee was indicted." *Stein V*, 541 F.3d at 138 (citing *Stein I*, 435 F. Supp. 2d at 345–46).

275. *Stein I*, 435 F. Supp. 2d at 346 n.62. For an interesting article on the vices of advancing and subsidizing legal fees for corporate executives, see Peter Margulies, *Legal Hazard: Corporate Crime, Advancement of Executives' Defense Costs, and the Federal Courts*, 7 U.C. DAVIS BUS. L.J. 55, 74 (2006) (arguing that subsidization of executives' legal fees "compounds agency costs and moral hazard, and conflicts with both legal ethics and substantive law" (citing Pamela H. Bucy, *Indemnification of Corporate Executives Who Have Been Convicted of Crimes: An Assessment and Proposal*, 24 IND. L. REV. 279 (1991); Sean Griffith, *Uncovering a Gatekeeper: Why the SEC Should Mandate Disclosure of Details Concerning Directors' and Officers' Liability Insurance Policies*, 154 U. PA. L. REV. 1147 (2006))). Professor Pamela Bucy argued that amidst corporate executives' indemnification, even those who are found guilty, societal goals of fairness and crime deterrence become "[l]ost in the shuffle." Bucy, *supra*, at 350. *But see* Stephen A. Radin, "Sinners Who Find Religion": *Advancement of Litigation Expenses to Corporate Officials Accused of Wrongdoing*, 25 REV. LITIG. 251, 291 (2006) (arguing that there are some very good reasons why mandatory legal fee advancement for corporate executives is a good thing,

second memo and advised KPMG to encourage employees to “meet with investigators without the assistance of counsel.”²⁷⁶ Skadden requested that AUSAs notify them when a KPMG employee was not fully cooperating so that the employee’s legal fees could be cut off, his employment terminated, or both.²⁷⁷

After the matter passed to the U.S. Deputy Attorney General, James Comey, Skadden’s Bennett persisted with his assessment that KPMG had been remarkably cooperative, as evidenced by KPMG’s “pressure on employees to cooperate by conditioning legal fees on cooperation.”²⁷⁸ On August 29, 2005, KPMG entered into a deferred prosecution agreement with the DOJ.²⁷⁹ In lieu of criminal prosecution, KPMG agreed to pay a \$456 million fine, to admit extensive wrongdoing, and to commit itself to cooperating fully with any future government investigation or prosecution.²⁸⁰ On the same day, federal prosecutors indicted the first six of the *Stein Thirteen*,²⁸¹ and, pursuant to the Fee Policy, KPMG immediately ceased paying their legal fees.²⁸² Then, on October 17, 2005, the government filed a superseding indictment, adding thirteen more defendants and totaling the criminal charges to include forty-six counts spread among nineteen defendants for conspiracy to defraud the IRS, tax evasion, and obstruction of internal revenue laws.²⁸³

including the fact that directors “solely by virtue of their job, face the potential of litigation costs that are far disproportionate to the directors’ fees they receive”).

276. *Stein I*, 435 F. Supp. 2d at 346; see also Robert J. Anello, *Preserving the Corporate Attorney-Client Privilege: Here and Abroad*, 27 PENN ST. INT’L L. REV. 291, 294 (2008) (noting that while many defense attorneys complained about the coercive tactics of government attorneys, very few actually held their ground against the government until after the *United States v. Stein* decisions).

277. *Stein V*, 541 F.3d at 138–39 (citing *Stein I*, 435 F. Supp. 2d at 347). For example, Mark Watson and Richard Smith, two KPMG employees under investigation, consented to attend proffer sessions only out of fear that KPMG would terminate their legal fees if they did not oblige. *Id.* at 139 (citing *United States v. Stein*, 440 F. Supp. 2d 315, 330–33 (S.D.N.Y. 2006)). Robert Bennett’s letter to the U.S. Attorney’s Office states, “[w]henver your [o]ffice has notified us that individuals have not . . . cooperat[ed], KPMG has promptly and without question encouraged them to cooperate and threatened to cease payment of their attorney fees and . . . to take personnel action, including termination.” *Id.* (quoting Letter from Robert Bennett, Partner, Skadden, Arps, Slate, Meagher & Flom LLP, to United States Attorney’s Office (Nov. 2, 2004)).

278. *Id.*

279. *Id.* (citing *Stein I*, 435 F. Supp. 2d at 349–50).

280. *Id.* (citing *Stein I*, 435 F. Supp. 2d at 349–50).

281. *Id.* These employees were Jeffrey Stein, Richard Smith, Jeffrey Eischeid, Vice Chairman of Tax Services John Lanning, Philip Wiesner, a former tax partner, and Mark Watson, a tax partner. *Id.*

282. *Id.* at 139–40 (citing *Stein I*, 435 F. Supp. 2d at 350).

283. *Id.* at 139 n.4. The remaining defendants included Carol G. Warley, former tax partner Larry DeLap, former tax partner and associate general counsel Steven Gremminger, former partners Gregg Ritchie, Randy Bickham, and Carl Hasting, and former tax partner and chief financial officer of KPMG Richard Rosenthal. *Id.* at 139.

3. KPMG Defendants in Federal Court

On January 12, 2006, the defendants appeared in district court and filed a collective motion to dismiss all indictments on the grounds that the government improperly interfered with KPMG's position of advancing legal fees, thus violating their Sixth Amendment right to counsel.²⁸⁴ On March 30, 2006, Judge Lewis Kaplan of the U.S. District Court for the Southern District of New York asked the government if it was willing to acknowledge that KPMG was free to use its independent business judgment when determining whether or not to advance funds and, if the government answered in the affirmative, that KPMG would not risk jeopardizing the deferred prosecution agreement by potentially resuming fee advancement.²⁸⁵

The prosecutor responded, "That's always been the case, your Honor. That's fine. We have no objection to that They can always exercise their business judgment. As you described it, your Honor, that's always been the case. It's the case today, your Honor."²⁸⁶

a. Stein I

Described as the largest tax fraud case in history, *Stein* was "by no means a garden-variety criminal case."²⁸⁷ With that context in mind, Judge Kaplan granted the motion to dismiss on June 26, 2006, drawing four factual conclusions.²⁸⁸ First, the Thompson Memo induced KPMG to depart from its longstanding policy of unlimited fee advancement to employees, which motivated KPMG attorneys to inquire in the very preliminary stages of dialogue with the USAO whether this company policy would be an issue.²⁸⁹ Second, the federal prosecutors repeatedly mentioned federal guidelines as a way of "reinforc[ing] the threat inherent in the Thompson Memo[]," meaning that the USAO could claim that KPMG was being uncooperative by unconditionally advancing legal fees.²⁹⁰ Judge Kaplan expressed concern not only with the Memo but with its author, former Deputy AG Thompson, as well.²⁹¹ Judge Kaplan recognized that a defendant, either innocent or guilty, may incur substantial legal fees,

284. *Id.* at 140.

285. *Id.*

286. *Id.*

287. *Stein I*, 435 F. Supp. 2d at 362.

288. *Id.* at 382.

289. *Id.* at 352.

290. *Id.* at 352–53.

291. *Id.* at 338. Judge Kaplan discussed comments by Deputy Attorney General Larry D. Thompson in which the latter "defended pressuring companies to cut off payment of defense costs for their employees on the ground that 'they [the employees] don't need fancy legal representation' if they do not believe that they acted with criminal intent [S]uch a view, [according to Judge Kaplan] would be misguided, to say the least." *Id.* at 338 n.13 (quoting Laurie P. Cohen, *In the Crossfire: Prosecutors' Tough New Tactics Turn Firms Against Employees*, WALL ST. J., June 4, 2004, at A1).

especially in a complex corporate litigation: “defense costs in investigations and prosecutions arising out of complex business environments often are far greater than in less complex criminal matters. . . . [E]ven the innocent need substantial resources to minimize the chance of an unjust indictment and conviction.”²⁹² Third, the government intentionally behaved so as to minimize the role of defense attorneys.²⁹³ Fourth, had it not been for the conduct of prosecutors coupled with the pressures of the Thompson Memo, KPMG would have paid defendants’ legal fees and expenses without consideration of cost.²⁹⁴ Judge Kaplan chastised the federal prosecutors, claiming that “[j]ustice is not done when the government uses the threat of indictment . . . to coerce companies into depriving their present and even former employees of the means of defending themselves against criminal charges in a court of law.”²⁹⁵

Judge Kaplan found that such interference violated the defendants’ Fifth and Sixth Amendment rights to counsel.²⁹⁶ Citing to *Wheat*,²⁹⁷ Judge Kaplan postulated that the constitutional guarantee of the Sixth Amendment extends to “an individual’s right to choose the lawyer or lawyers he or she desires.”²⁹⁸ Additionally, a defendant is allowed to mount the defense that he or she chooses.²⁹⁹ He further noted that “a lack of full cooperation by a prospective defendant is insufficient to justify the government’s interference with the right of individual criminal defendants to obtain resources lawfully available to them in order to defend themselves.”³⁰⁰ Affirming a defendant’s right to use wholly legitimate funds to pay for counsel and reasoning that these particular defendants’ relied (to their detriment) on KPMG’s historical promise to pay fees and their consistent practice of doing precisely that, Judge Kaplan found that “the legal fees at issue now-were in every material sense, [the defendants’] property, not that of a third party.”³⁰¹ Additionally, Judge Kaplan held that there was no need to exhibit prejudice caused by the Sixth Amendment violation because the “right to be represented as [the employees] choose . . . like a deprivation of

292. *Stein I*, 435 F. Supp. 2d at 338 n.13.

293. *Id.* at 353; see also Sarah Ribstein, Note, *A Question of Costs: Considering Pressure on White-Collar Criminal Defendants*, 58 DUKE L.J. 857, 863–66 (2009) (analyzing why litigation costs are so high in white-collar crime).

294. *Stein I*, 435 F. Supp. 2d at 353.

295. *Id.* at 381–82.

296. *Id.* at 382. While this Note will not directly focus on the Fifth Amendment implications of the KPMG case, for a discussion of this issue, see generally Brandon L. Garrett, *Corporate Confessions*, 30 CARDOZO L. REV. 917 (2008) (arguing that while corporate compliance may not raise Fifth Amendment issues, it is in the firm’s best interest to adequately inform their employees prior to formal compliance interviews).

297. 486 U.S. 153 (1988).

298. *Stein I*, 435 F. Supp. 2d at 366.

299. *Id.* (citing *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989)).

300. *Id.* at 369.

301. *Id.* at 367.

the right to counsel of their choice, is complete irrespective of the quality³⁰² of the representation they receive."³⁰³

While he initially rejected the option of dismissal as a remedy, Judge Kaplan invited the defendants to file a civil suit against KPMG.³⁰⁴ This, reasoned Judge Kaplan, would enable them to attain their promised legal fees, curing the constitutional violation.³⁰⁵ Judge Kaplan also suggested several other potential alternatives.³⁰⁶

b. Stein IV³⁰⁷

The U.S. Court of Appeals for the Second Circuit overruled Kaplan's ruling on ancillary jurisdiction.³⁰⁸ The Second Circuit found that the underlying issues in *Stein I* were constitutional issues arising out of prosecutorial conduct and the Thompson Memo.³⁰⁹ For Judge Kaplan to claim federal jurisdiction over state contract claims and thus compel KPMG to appear in a civil matter ancillary to a separate criminal matter would not be appropriate, according to the appellate court, especially considering that the constitutional remedy would be ascertained only if KPMG were found guilty, and payment of fees would not be "an indispensable remedy and may not even constitute a full remedy."³¹⁰ After being overruled by the Second Circuit,³¹¹ Judge Kaplan officially dismissed the indictments for the thirteen defendants on July 16, 2006.³¹² Judge Kaplan made findings that

302. *See supra* Part I.C.3.

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

304. *Id.* at 379.

305. *Id.* at 380. The U.S. Court of Appeals for the Second Circuit ruled that Kaplan did not have ancillary jurisdiction over the matter. *See Stein v. KPMG LLP*, 486 F.3d 753 (2d Cir. 2007).

306. Judge Kaplan found that the way to cure the violation would be to have the defendants' already incurred and future legal fees paid for. *Stein I*, 435 F. Supp. 2d at 374. One obvious remedy would have been to have the government pay for the defense funds; essentially, the government would pay for what it broke. *Id.* However, this was problematic because the doctrine of sovereign immunity, absent a waiver by Congress, protects the government from paying monetary damages. *Id.* at 374–75. There has been some debate in other courts as to whether severe government misconduct can trump, and thus, pierce sovereign immunity. *Id.* at 375. However, Judge Kaplan agreed with current jurisprudence that supervisory powers are discretionary, while sovereign immunity is absolute and impregnable. *Id.* at 375–76 (citing *United States v. Horn*, 29 F.3d 754, 767 (1st Cir. 1994)). In addition to claiming personal and subject matter jurisdiction over a civil suit against KPMG, Judge Kaplan advised that either through KPMG's initiative or through government pressure via the deferred prosecution agreement, the firm could pay the legal fees. This would have remedied, or at least "mitigated substantially," the government's unconstitutional interference. *Id.* at 377–80.

307. To be clear, there were four respective *Stein* cases before the U.S. District Court for the Southern District of New York. The second and third matters are not at issue in this Note.

308. *Stein*, 486 F.3d at 756.

309. *Id.* at 762.

310. *Id.* at 762–63.

311. *Id.* at 756.

312. *United States v. Stein (Stein IV)*, 495 F. Supp. 2d 390, 394 (S.D.N.Y. 2007).

four of the defendants were denied the counsel of their choice; and the remaining nine, though not deprived of their choice of counsel, were substantially limited by the government in their ability to mount the necessary discovery and other pretrial mechanisms to prepare for trial.³¹³ Echoing *Gonzalez-Lopez*, the district court held that when one's choice of counsel is wrongfully denied, the violation is complete, regardless of the quality of the defense received.³¹⁴

Judge Kaplan was reluctant to dismiss the indictments in *Stein I*. However, two events occurred since the initial proceeding that likely swayed him to dismiss: First, the Second Circuit overruled him by finding that the district court did not have ancillary jurisdiction to hear the civil suit against KPMG.³¹⁵ Second, new evidence came to light before the court,³¹⁶ including three important documents from a twenty-two million page production in *Stein IV*.³¹⁷ The first piece of evidence was a transcript of a voicemail message left on February 18, 2004, by then-KPMG CEO Eugene O'Kelly.³¹⁸ This message was delivered to all KPMG partners and informed them that the firm had discovered that the USAO would be launching an investigation and that any former or present employee asked to appear before the prosecutors would be provided competent counsel at the firm's expense.³¹⁹ Judge Kaplan found this particular piece of evidence to illuminate the government's influence over KPMG's new Fee Policy.³²⁰ Judge Kaplan reasoned that this voicemail, left seven days before the initial meeting between Skadden and the USAO, indicated that KPMG had a clear intent to advance legal fees prior to meetings with federal prosecutors.³²¹ Judge Kaplan admonished the prosecutors' conduct, pronouncing that their behavior "shock[ed] the conscience."³²²

Given the district court's initial holding in *Stein I*, the government did not oppose a motion to dismiss the indictments for the *Stein Thirteen*.³²³ Even so, Judge Kaplan performed an independent analysis and found that

313. *See id.* at 415–19.

314. *Id.* at 422. Judge Kaplan found that while a violation may be complete, it could still be cured. For example, the defendant in *United States v. Gonzalez-Lopez* was able to have a retrial with his chosen attorney, thus curing the constitutional violation. *Id.*; *see also* *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151–52 (2006).

315. *See Stein*, 486 F.3d at 764.

316. *Stein IV*, 495 F. Supp. 2d at 407.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* at 408.

322. *Id.* at 412–13.

323. *Id.* at 419. Some attorneys believe the government conceded defeat as a strategic measure to have the case brought before the Second Circuit on appeal. *See* Andrew Weissmann et al., *District Court Dismisses Charges Against 13 Former KPMG Employees*, CLIENT ADVISORY (Jenner & Block LLP), July 23, 2007, at 1–2, available at http://www.jenner.com/files/tbl_s20Publications%5CRelatedDocumentsPDFs1252%5C1769%5CDistrict_Court_Dismisses_Charges_Against_13_Former_KPMG_Employees_0707.pdf.

dismissal was proper.³²⁴ His analysis uncovered that four of the defendants were deprived of their chosen counsel.³²⁵ Judge Kaplan found that the entire *Stein* Thirteen had been forced, due to KPMG's cutoff of payments, to substantially curtail their defenses.³²⁶ Judge Kaplan reasoned that by virtue of KPMG's withholding of funds, any question of prejudice against the defendants would have to be presumed.³²⁷ The court further indicated that without KPMG's contributions, none of the *Stein* Thirteen could afford their anticipated defenses.³²⁸

Judge Kaplan, in a pointed conclusion, blamed the government for allowing the *Stein* Thirteen to walk free.³²⁹ Forced to dismiss the indictments, Kaplan explained he "reached this conclusion only after pursuing every alternative . . . and only with the greatest reluctance."³³⁰ The court recognized the charges that the *Stein* Thirteen faced, and acknowledged that the merits of the case could have and should have been decided.³³¹ The court explained that the USAO "deliberately or callously" interfered unlawfully with legally obtainable funds that could have, and should have, been used to mount the KPMG employees' defenses.³³² Such illicit behavior, the court continued, was "intolerable in a society that holds itself out to the world as a paragon of justice."³³³ Judge Kaplan dictated that no other remedy could place the defendants, none of whom could personally finance their defenses, back in the situation they would have been in absent government interference (i.e., using legally anticipated funds to retain a lawyer and mount a viable defense).³³⁴ Additionally, this

324. *See Stein IV*, 495 F. Supp. 2d at 419.

325. *See id.* at 421–22.

326. *See id.* at 423.

327. *Id.*

328. *Id.* Mark Watson had assets of approximately \$80,000 and owed his lawyers about \$1 million, which would be difficult to pay, considering he was fired. *Id.* Second, Carl Hasting was insolvent at the time of *Stein IV*. *Id.* Third, Randy Bickham had less than \$300,000 in assets and owed his lawyers over \$600,000, and his inability to pay these fees led his attorneys to threaten him with a motion to withdraw as counsel. *Id.*; see MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(5)–(6) (1983). While the other *Stein* defendants were in better financial shape, with assets ranging from \$1 to \$5 million, the district court found this irrelevant, as the most expensive part of litigation, the trial itself, had yet to happen. *Stein IV*, 495 F. Supp. 2d at 423–25. The legal fees ranged from about \$500,000 to about \$3.6 million per defendant. *Id.* at 423–24. Defense attorneys predicted that if the case proceeded to trial, costs could reach anywhere from \$7 to \$24 million per defendant, averaging about \$13 million per defendant. *Id.* at 424.

329. *Id.* at 428.

330. *Id.* at 427.

331. *Id.*

332. *Id.*

333. *Id.* at 427–28.

334. *Id.* at 422–25. The government, despite conceding the dismissal of the thirteen defendants, argued that they raised the Criminal Justice Act (CJA) as an alternative remedy. *See id.* at 419–20. However, there are two reasons why this was not an adequate remedy: First, the defendants' were not financially eligible for protection under the CJA upon indictment, and thus would need to spend most of their assets in order to qualify. Second, the CJA establishes a \$7000 maximum fee for felony cases (though a judge may elect to raise this fee under the appropriate circumstances), which raises concerns that attorneys

remedy could be perceived as a punishment for the federal prosecutors, who used their “life and death power over KPMG” to coerce its employees to give into government pressures. Additionally, “the Constitution barred the government from doing directly what it forced KPMG to do for it.”³³⁵ Consequently, the district court formally dismissed the indictment against the *Stein Thirteen*.³³⁶

c. *The Second Circuit Affirms the Dismissals*

On August 28, 2008, the Second Circuit affirmed the Southern District of New York’s ruling in *Stein IV*.³³⁷ Concurring with Kaplan’s factual findings from *Stein I* and *Stein IV*, Chief Judge Jacobs held, first, that dismissal of the indictments would be necessary to cure any Sixth Amendment violation by the government and, second, that KPMG’s adoption and enforcement of the Fee Policy was tantamount to state action.³³⁸ Then, the Second Circuit calculated that the government’s preindictment conduct was not immune to the employees’ right-to-counsel claims.³³⁹ Essentially, the government argued, perhaps in vain, that the alleged violations occurred before any right to counsel was triggered, since it would have occurred before the indictments.³⁴⁰ The problem with that argument was that, viewed in an expansive light, the effects of the government interference would violate the right to counsel once it attached

would be inclined to limit their defenses out of fear of nonpayment. *Id.* at 420–21. Kaplan did not go as far as to say that the attorneys appointed under the CJA would not pass constitutional muster under the *Strickland* test for effective counsel, but he found that this remedy would not be the equivalent of what the defendants would have had, absent the unconstitutional acts by the government. *Id.* at 421.

335. *Id.* at 413–14.

336. *See generally id.* While the government conceded the dismissal of the indictments for thirteen defendants, prosecutors refused to dismiss the indictments against four other defendants in the case, and Judge Kaplan agreed. Three of the four defendants, including former tax employees Robert Pfaff and John Larson and former tax attorney Ray Ruble, were found guilty of multiple counts of tax evasion. A fourth defendant, former KPMG partner David Greenberg, was exonerated on all counts. *See* Lynnley Browning, *3 Convicted in KPMG Tax Shelter Case*, N.Y. TIMES, Dec. 18, 2008, at B11.

337. *Stein V*, 541 F.3d 140 (2d Cir. 2008). Coincidentally, hours after the decision was announced, Deputy Attorney General Mark Filip held a press conference at the New York Stock Exchange to announce revisions to the McNulty Memo. *See* Filip Memo, *supra* note 231. Filip conveyed that unlike the previous McNulty Memo (where the DOJ reserved the right to consider the advancing of attorney fees if it had a negative impact on the cooperation), under the new operating guidelines fee advancement would only be scrutinized in the rarest of situations where such advancement would rise to the level of criminal obstruction of justice. *See* Filip Memo, *supra* note 231, at 12–13; *see also* McNulty Memo, *supra* note 230.

338. *Id.* State Action is “[a]nything done by a government; esp[ecially], in constitutional law, an intrusion on a person’s rights (esp[ecially] civil rights) either by a governmental entity or by a private requirement that can be enforced only be governmental action (such as racially restrictive covenant, which requires judicial action for enforcement).” BLACK’S LAW DICTIONARY, *supra* note 36, at 672.

339. *Stein V*, 541 F.3d at 153.

340. *See id.*

following a formal criminal indictment. Last, the court affirmed that the *Stein* Thirteen were each deprived of their Sixth Amendment right to counsel.³⁴¹

The Second Circuit held that though “[d]ismissal of an indictment is a remedy of last resort,”³⁴² it was appropriate given that, out of the thirteen defendants, four lost their chosen attorneys. Also, all thirteen *Stein* defendants had their defenses severely limited due to lack of financial resources that would have been available to them absent the government’s violation of their constitutional rights.³⁴³ The government did this by influencing KPMG to change its policy of advancing legal fees through the Thompson Memo and prosecutorial influence, leading to a new Fee Policy, which called for fee caps and limitations.³⁴⁴ The government argued that it had cured the violation on March 30, 2006, when, in responding to an interrogatory posed by Judge Kaplan, an AUSA responded that KPMG was always free to use its business judgment as to whether or not to pay the legal fees for its employees.³⁴⁵ Neither Judge Kaplan nor the Second Circuit was persuaded. The Second Circuit held that such an “isolated and ambiguous statement in a proceeding to which KPMG was not a party (and the nearly 16-month period of legal limbo that ensued) did not restore defendants to the status quo ante.”³⁴⁶

Due to KPMG’s unwavering history of paying legal fees for its employees, there was no reason to believe it would completely change the policy, especially given former KPMG Chief Executive Officer Eugene O’Kelly’s reassurance to employees that the firm would pay for their legal fees presuming the pending government investigation.³⁴⁷ The Second Circuit ruled that since the defendants expected to receive legal fees from KPMG, the fees were essentially the defendants’ property.³⁴⁸ To prove reliance on the fees, the KPMG defendants need not, according to the court, make any showing of prejudice, since nearly every aspect of their defense and strategy was influenced by the lack of funds they would have received, but for the government’s interference.³⁴⁹ During oral arguments, the government conceded that it was in its best interest that “every defendant receive the best possible representation he or she can obtain.”³⁵⁰ However, this would make little sense given that such representation may “stymie”

341. *Id.* at 135–36.

342. *Id.* at 144 (citing *United States v. Morrison*, 449 U.S. 361, 365 (1981)).

343. *See id.* at 151 & n.10.

344. *Id.* at 143–44.

345. *See id.* at 140.

346. *Id.* at 145.

347. *See United States v. Stein (Stein IV)*, 495 F. Supp. 2d 390, 407 (S.D.N.Y. 2007).

348. *United States v. Stein (Stein V)*, 541 F.3d 130, 151 (2d Cir. 2008); *cf. Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 634–35 (1989) (stating that abuse claims need to be raised and evaluated on a case-by-case basis).

349. *Stein V*, 541 F.3d at 151; *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006) (holding that there was no need to demonstrate prejudice once the right-to-counsel violation is complete).

350. *Stein V*, 541 F.3d at 157.

prosecutors by facing worthy adversaries.³⁵¹ Additionally, as Judge Kaplan pointed out, KPMG would not then want to pay the legal fees (as an alternative remedy to dismissal of the indictments) as it had already paid \$456 million in fines under its deferred prosecution agreement and did not wish to appear to cave under government pressure.³⁵²

B. Stein Conflicts with Contemporary Jurisprudence

The Second Circuit's decision in *Stein* is the first case since 1979 in which a federal court of appeals issued an order dismissing an indictment for a right-to-counsel violation.³⁵³ In *United States v. Morrison*,³⁵⁴ the Third Circuit found that the defendant's right to counsel had been violated and, regardless of any demonstration of prejudice at trial, that the defendant was entitled to a dismissal of her indictment with prejudice.³⁵⁵ This legal reasoning was not sufficient for the Supreme Court.³⁵⁶ However, in light of the recent holding in *Gonzalez-Lopez*, determining that no prejudice was required to cause a right-to-counsel violation where counsel was wrongly disqualified, the Second Circuit may have current jurisprudence on its side.³⁵⁷ The previous section laid out the specifics of the *Stein* cases. Part II.B.1 analyzes how the *Stein* decisions are consistent with, yet at times dissimilar to, existing federal court precedents. Part II.B.2 discusses some of the early critiques and criticisms of the *Stein* decisions.

1. Is *Stein* Consistent with What Other Courts Have Done?

a. When Does the Sixth Amendment Right to Counsel Attach?

*Kirby v. Illinois*³⁵⁸ held that the right to counsel attaches once the government has positioned itself to prosecute the defendant.³⁵⁹ *United States v. Wade*³⁶⁰ supplanted this decision by postulating that counsel should be present at critical stages of the prosecution.³⁶¹ The Second Circuit agreed that while the right of counsel attaches after some initiation of adversarial proceedings—such as, arraignment, indictment, or a preliminary hearing—the inquiry does not end there.³⁶² The Second Circuit endorsed Judge Kaplan's analysis, finding that, although defendants' rights

351. *Id.*

352. *Id.* at 145–46.

353. *See* *United States v. Morrison*, 602 F.2d 529 (3d Cir. 1979).

354. *Id.*

355. *See id.*

356. *See* *United States v. Morrison*, 449 U.S. 361, 367 (1981) (holding that where a Sixth Amendment violation has had no adverse impact on the defendant, dismissal of the indictment is an inappropriate remedy).

357. *Id.* at 146.

358. 406 U.S. 682 (1972).

359. *Id.* at 688–89.

360. 388 U.S. 218 (1967).

361. *Id.* at 226–27.

362. *United States v. Stein (Stein V)*, 541 F.3d 130, 153 (2d Cir. 2008).

attached upon their indictment, the government's action preindictment could have no other effect but to negate the funds that would have been accessible to the defendants postindictment, in violation of the Constitution.³⁶³ In *United States v. Rosen*,³⁶⁴ the Eastern District of Virginia reasoned that if the government coerced a company into cutting off the advancement of legal fees for its employees, and this interference was purported to undermine the defendants' relationship with counsel postindictment, the government had violated the defendants' right to expend their own resources once the right to counsel attached.³⁶⁵ This case is similar to *Stein* because the district court found fee advancement to be the property of the defendants to whom such aid was promised, as opposed to the vested property interest of a third party.³⁶⁶ In contrast, the property at issue in *Caplin* was illegally obtained and thus became frozen assets through federal drug forfeiture laws.³⁶⁷ As such, the defendant no longer had a proprietary right to allocate these funds to secure a defense because, though he was in possession of some of the funds, he no longer had good title after he committed the criminal violation.³⁶⁸

b. *Where Did the Violation Occur?*

During oral arguments before the appellate court, the prosecution submitted that it was in the government's best interest if every defendant received the "best possible representation he or she can obtain."³⁶⁹ The Second Circuit found this to be a non sequitur, as the government could not simultaneously leave the defendants "naked to their enemies," while also wishing the same defendants had proper protection.³⁷⁰ The court decided not to disturb Judge Kaplan's findings that four of the defendants, unable to retain the counsel of their choice due to the new fee policy, were deprived counsel of choice without justification.³⁷¹ There was no need under *Gonzalez-Lopez* to show harm, as the right-to-counsel violation was complete.³⁷² However, the government could have cured this violation but did not.³⁷³ On appeal, the government claimed that it cured any alleged violation when it reiterated that KPMG was free to use its business

363. *Id.* But see Maskay, *supra* note 100, at 523 (arguing that the court in *Stein* erred in interpreting the attachment of the right to counsel preindictment because there is no Supreme Court precedent on the matter and that such a finding "rests on a blanket assumption that the government's actions will have a postindictment effect that is unconstitutional under the Sixth Amendment").

364. *United States v. Rosen*, 487 F. Supp. 2d 721 (E.D. Va. 2007).

365. *Id.* at 733–34.

366. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989).

367. *See id.* at 620–22.

368. *See id.* at 624–29.

369. *United States v. Stein (Stein V)*, 541 F.3d 130, 157 (2d Cir. 2008).

370. *Id.*

371. *Id.* at 151 & n.10.

372. *United States v. Stein (Stein IV)*, 495 F. Supp. 2d 390, 422 (S.D.N.Y. 2007).

373. *See Stein V*, 541 F.3d at 136.

judgment; the government did not confirm that KPMG's fee advancement would not have a detrimental effect on its deferred prosecution agreement.³⁷⁴ The Southern District of New York and the Second Circuit were not persuaded, and ruled that the violation was complete and uncured.³⁷⁵

The Second Circuit also affirmed that all thirteen of the *Stein* defendants had their rights violated, as they were forced to limit the scope of their defense due to insufficient funds.³⁷⁶ The court found that the government interfered with the defendants' right to counsel by causing KPMG to impose a financial burden.³⁷⁷ Some could counter by saying that most criminal defendants do not have access to endless funds to secure a not guilty verdict.³⁷⁸ The Second Circuit reasoned that these defendants were indicted on a "fairly novel theory of criminal liability" when the discovery contained more than twenty-two million documents and would require expert witnesses to make sense of this complex litigation.³⁷⁹ The potential lack of resources and adequate pretrial measures has been interpreted by at least one court to be a *Strickland* test, that is, a query of ineffective counsel.³⁸⁰ In *Rosen*, the court discussed the potentially persuasive presumption of prejudice in *Stein*, highlighting the millions of pages of documents, the hundreds of depositions, and "an anticipated trial of such length that some defense counsel could not even afford to attend . . . let alone prepare for it, absent fee advances."³⁸¹ If the Second Circuit meant to make an impaired counsel argument, it begs the question, where is the prejudice?³⁸² The district court in *Rosen* conceded that *Stein* was much more complex than the case before it (two-count indictment against two defendants), but the district court was skeptical of a per se rule that would presume prejudice where the government interferes with a defendant's right to use his resources.³⁸³ In *Cronic*, the Supreme Court disposed of the Sixth Amendment claim despite the complexity of the case, the lack of experience of the defense attorney, and the limited time before the commencement of the trial.³⁸⁴ Justice Stevens repudiated these arguments, maintaining that the claims did not amount to sufficient harm.³⁸⁵ However, the case against Harrison Cronic dealt with serious, though fairly simple, mail fraud

374. *Id.* at 145.

375. *See id.*

376. *See id.* at 151.

377. *See id.*

378. *See Lee, supra* note 60.

379. *Stein V*, 541 F.3d at 157. The Second Circuit estimated the length of the criminal trial being between six and eight months. *Id.*

380. *See United States v. Rosen*, 487 F. Supp. 2d 721, 734 (E.D. Va. 2007).

381. *Id.* at 735.

382. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding that the second prong of the ineffective counsel test requires a showing that the attorney in question prejudiced the defense).

383. *See Rosen*, 487 F. Supp. 2d at 734–35.

384. *See id.* at 662–65.

385. *See id.* at 666.

charges,³⁸⁶ as opposed to the complex issues present in a corporate litigation case such as *Stein*.

c. Is the Dismissal of an Indictment Consistent with Supreme Court and Lower Federal Court Case Law?

As previously noted, only one other appellate court has decided to dismiss an indictment due to a violation of the Sixth Amendment right to counsel in the last thirty years.³⁸⁷ In *Morrison*, the Court quickly disposed of the Third Circuit's mandate, finding that the defendant was not prejudiced by the sole communication she had with federal agents.³⁸⁸ However, "courts must consider the totality of the circumstances of each case when reviewing such claims."³⁸⁹ Clearly the *Stein* cases present different issues for debate, as the crux of the violations stemmed from the government's interference with attorneys' fees. However, in the case of the four defendants denied the counsel of their choice, their remedy is more consistent with the Court's ruling in *Gonzalez-Lopez*, since their inability to retain their counsel of choice is a completed violation, and one that was not cured by the government. In *Gonzalez-Lopez*, retrial would not be unduly prejudicial to the defendant, as his violation would be cured: he could proceed to trial with his chosen attorney.³⁹⁰ The sine qua non of constitutional violations is putting the defendant back in the status quo ante.³⁹¹ The four *Stein* defendants lacked the financial means to acquire the services of the attorneys they would have hired but for the cutting off of attorneys' fees.³⁹²

The remedy for a constitutional violation must be one that "as much as possible restores the defendant to the circumstances that would have existed had there been no constitutional error."³⁹³ While it is irrefutable that dismissal of an indictment is a worst case scenario, it is not improper. In a student note published in the *Harvard Law Review* shortly after the decision in *Morrison*, the author asserted that while courts may in some cases find dismissal wholly inappropriate, it is recognized that occasionally it may be necessary.³⁹⁴ When determining an alternative remedy to dismissal, courts need to focus on the remedial effect on the individual defendant.³⁹⁵ Here, the Southern District of New York and the Second Circuit found that there was no way to place the *Stein* Thirteen back into the legal and financial

386. *See id.* at 664–65.

387. *See supra* notes 353–54 and accompanying text.

388. *See United States v. Morrison*, 449 U.S. 361, 366 (1981).

389. Wessell, *supra* note 181, at 533.

390. *United States v. Stein (Stein IV)*, 495 F. Supp. 2d 390, 422 (S.D.N.Y. 2007).

391. This is as opposed to punishing government misconduct, which is generally reserved to the courts through their federal supervisory powers. *See supra* Part I.A.2.

392. *See Stein IV*, 495 F. Supp. 2d at 423.

393. *United States v. Carmichael*, 216 F.3d 224, 227 (2d Cir. 2000).

394. *See Government Intrusions*, *supra* note 122, at 1159.

395. *See id.*

situations they would have been in absent the government harm.³⁹⁶ Recall that some of them were insolvent;³⁹⁷ none of them would have been able to sustain a lengthy and expensive trial without the legal fees upon which they relied.³⁹⁸ Judge Kaplan struggled with the notion of dismissing these indictments and searched for plausible alternatives. He recognized that a jurist must act “to ensure the integrity of the adversary system of criminal justice as well as to punish the guilty”; however, these twin aims are “often difficult to reconcile.”³⁹⁹

2. Critiques of *Stein*

The Second Circuit’s historic decision will have some effect on the legal and corporate communities in this country for the foreseeable future. The question is whether the Second Circuit’s holding will have sweeping ramifications, or be confined to the facts of the case. Unsurprisingly, practitioners and scholars immediately voiced their reactions to this decision.⁴⁰⁰

This ruling in *Stein* will have an effect on legal practitioners.⁴⁰¹ This decision coupled with the Filip Memo will require federal prosecutors to temper any aggressive conduct.⁴⁰² Several major law firms have released statements and legal clarifications since *Stein* and the Filip Memo. The general consensus seems to be that, while *Stein* is an important decision, it is limited to its particular facts: “a situation in which the government actually coerced an organization, and the organization’s employees had a legitimate property interest in the item withheld (advancement of legal fees).”⁴⁰³ This is an interesting way to look at *Stein*, as it conjures up images of general corporate practices and policies as well as Supreme Court jurisprudence. Legal fee advancement and indemnification of corporate executives has been described as the “mainstay of corporate life for the last fifty years.”⁴⁰⁴ If the Filip Memo is able to reel federal prosecutors in, so that they do not consider legal fee advancement when determining corporate cooperation, it is unlikely that a *Stein* case will occur again.⁴⁰⁵

396. See *supra* Part II.A.2.a–c.

397. See *Stein IV*, 495 F. Supp. 2d at 423.

398. See *id.*

399. See *Government Intrusions*, *supra* note 122, at 1161.

400. As of October 5, 2009, only one other court has cited *Stein V*, 541 F.3d 130 (2d Cir. 2008). In *S.E.C. v. Dunn*, 587 F. Supp. 2d 486, 511–12 (S.D.N.Y. 2008), the defendant failed to draw a parallel between that case and *Stein V*, in pursuit of relief for a state action claim.

401. See *infra* notes 409–12 and accompanying text.

402. See Dan Small, *Attitude Adjustment*, NAT’L L.J., Sept. 10, 2008, at 23.

403. Robert J. Kipnees & Khizar A. Sheikh, *The Investigation and Prosecution of Business Organizations*, METROPOLITAN CORP. COUNS., Oct. 2008, at 49.

404. Margulies, *supra* note 275, at 56.

405. See Stuart Altman & Sujit Raman, *Major Developments in Corporate Criminal Law: Department of Justice Issues New Corporate Charging Policy and Second Circuit Court of Appeals Upholds Dismissal of Indictments in KPMG Fees Case*, LITIGATION ALERT (Hogan & Hartson LLP, Wash. D.C.), Sept. 2008, available at

However, “[o]nly time will tell whether the Filip Memo and the lessons of the *Stein* decision will result in greater respect for a company’s need . . . [to] determine appropriate levels of employee indemnification, discipline and communication during a government investigation.”⁴⁰⁶

According to Robert Kipness and Khizar Sheikh, attorneys from Lowenstein Sandler PC, companies may change the way in which they balance the risks of indictments, deferred prosecution agreements or nonprosecution agreements, plea bargains, and trials.⁴⁰⁷ *Stein* and the Filip Memo warn corporate attorneys of the potential dangers in not retaining competent legal counsel at the start of any government inquiry. Such counsel will be tasked with formulating a strategy, and will gauge how willing the corporation should be in its cooperation with the government or regulatory agencies.⁴⁰⁸

In an early response to the Thompson Memo and the *Stein* decisions, Rebecca Walker of Kaplan & Walker LLP, envisioned several consequences.⁴⁰⁹ First, the way in which a company handles the suspected misconduct of its employees is critical, from establishing effective whistleblowing procedures to disciplining the actors. A second option for companies would be to reconsider their policies or bylaws pertaining to fee advancement.⁴¹⁰

Laurence Urgenson and Audrey Harris of Kirkland & Ellis LLP argue that the Second Circuit’s decision likely will require the government, employers, and corporate counsel to reflect on the implications of *Stein* on internal investigations and cooperation with government agents.⁴¹¹ This decision also enables corporate counsel to ask previously difficult questions about whether cooperation would cause a constitutional violation of employees’ rights.⁴¹²

Legal bloggers alike have lionized the district and circuit court decisions. Professor Eugene Volokh posted to his legal and political weblog, The Volokh Conspiracy, that he concurred with the courts’ judgments regarding wholly legitimate funds: “Constitutional rights generally . . . include the rights to pay for what it takes to exercise the right—to pay for counsel. . . . They likewise include the rights to pay for what it takes to exercise the right

<http://www.hhlaw.com/files/Publication/e4934a69-9b47-4167-83b0-6bad5aa2277c/Presentation/PublicationAttachment/66b22bd4-4598-4897-a727-7446a4628597/Lit.pdf>.

406. See Stein & Levine, *supra* note 231, at 9.

407. See Kipness & Sheikh, *supra* note 403.

408. *Id.*

409. Rebecca Walker, *The Thompson Memo: Implications of the Stein Decision for Corporate Compliance*, in CORPORATE COMPLIANCE AND ETHICS INSTITUTE 2007 (PLI Corporate Law & Practice, Course Handbook Series No. B-1595, 2007), WL 1595 PLI/CORP 483.

410. *Id.* at 495.

411. Audrey L. Harris & Laurence A. Urgenson, *Is the White-Collar Defense Attorney Headed for Extinction?*, BUS. CRIMES BULL., May 2006, at 1.

412. *Id.*

using money donated by friends, family, well-wishers, or others.”⁴¹³ Professor Volokh went on to say that while it was certainly true that KPMG could have voluntarily decided not to front legal costs, the defendants’ constitutional rights were only jeopardized when the government asked for cooperation and mandated that such cooperation would be dependent on the advancing of attorneys fees to employees.⁴¹⁴ Another legal blog stated that contrary to what many think, the government did not lose the *Stein* case. The government’s position, adverse to popular belief, was that it had won: “[w]hen justice is done for all, as is reflected in [the Second Circuit] opinion—the prosecution, defense, and society win[.]”⁴¹⁵ John Savarese of Wachtell, Lipton, Rosen & Katz, while perhaps agreeing in sentiment with his fellow blogger, found the *Stein* case to represent “a decisive victory to the defendants in this high-profile matter.”⁴¹⁶

Stein is a fascinating case because, while it was decided on constitutional grounds, it may have long-term effects not only on the Sixth Amendment right to counsel, but potentially on constitutional remedies. The decisions have already shaped DOJ policy, attorney strategy, and white-collar investigations and litigation. The chief conflict within this Note is how to reconcile *Stein* with the right to counsel and constitutional remedy cases before it.

III. RECONCILING *STEIN* AND MOVING ON

Stein, described as a “‘prodefendant’ development[.]”⁴¹⁷ has already had a major impact on how the DOJ determines whether to prosecute a corporation and its employees. Judge Kaplan’s opinion in *Stein I* reportedly led the DOJ to revamp the Thompson Memo, resulting in the McNulty Memo.⁴¹⁸ Subsequently, the DOJ modified the McNulty Memo so that legal fee advancement is no longer considered to be a factor in determining a corporation’s cooperation with a government investigation.⁴¹⁹ However, what is truly fascinating is the potential effect the *Stein* decisions will have on the Sixth Amendment right to counsel as well as constitutional remedies.

413. Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/archives/archive_2008_08_24-2008_08_30.shtml (Aug. 29, 2008, 1:41 EST).

414. *Id.*

415. Posting of Ellen S. Podgor to White Collar Crime Prof Blog, http://lawprofessors.typepad.com/whitecollarcrime_blog/2008/08/commentary-on-s.html (Aug. 28, 2008).

416. Posting of John F. Savarese to The Harvard Law School Forum on Corporate Governance & Financial Regulation, <http://blogs.law.harvard.edu/corpgov/2008/09/28/us-v-stein/> (Sept. 28, 2008, 12:18 EST).

417. Rosenberg, *supra* note 231.

418. Lichtblau, *supra* note 231; *see* Taigue, *supra* note 246, at 403–06.

419. *See* Filip Memo, *supra* note 231.

A. How Does Stein Confront, or Hide from, Doctrinal Ambiguities?

1. The Right to Counsel Attaches When?

Consistent with Judge Kaplan's decisions, the Second Circuit held that the right to counsel attached upon commencement of formal adversarial proceedings.⁴²⁰ In *Stein*, the indictments of the defendants constituted formal adversarial proceedings.⁴²¹ However, as the district court found, and the *Rosen* court agreed, "pernicious effects" at the preindictment stages can have a latent effect on the postindictment proceedings.⁴²² In fact, by influencing KPMG to adopt its current fee policy, the government made it impossible for the defendants not to be harmed because once the defendants were indicted, their fees would be terminated.⁴²³

While this proposition may make logical sense, no statute or Supreme Court case supports it.⁴²⁴ In *Rosen*, the district court held that constitutional violations that occurred before an indictment could create constitutional violations postindictment.⁴²⁵ However, *Rosen* is a case arising in a district court in Virginia, not in the Second Circuit.⁴²⁶

This Note argues that the Southern District of New York and the Second Circuit were correct in this regard. In fact, courts across the country should take a very serious look at this expansive interpretation of when the right to counsel attaches. At its core, the right to counsel is about the preservation of the adversarial process.⁴²⁷ The government conceded at oral argument before the Second Circuit that it was in its best interest that all defendants obtain the best possible representation they could.⁴²⁸ Despite this statement, the prosecutors did everything they could to minimize the role of defense counsel.⁴²⁹

When the prosecutors' conduct prior to the indictments impaired the defendants' relationships with their attorneys postindictment, "the preindictment actions ripen[ed] into cognizable Sixth Amendment deprivations upon indictment."⁴³⁰ It is contradictory to society's notion of justice to reward government malfeasance simply because it occurs before any formal indictment. In cases like *Stein*, where the government has done what it can to handicap the attorney-client relationship, such pervasive acts should not be tolerated, and courts need to not "enable the government," which controls when an indictment will be made, to "hobble an individual's post-

420. *United States v. Stein (Stein V)*, 541 F.3d 130, 152 (2d Cir. 2008).

421. *Id.*

422. *Id.* at 153.

423. *Id.*

424. *See Maskay, supra* note 100, at 523.

425. *Id.* at 733–34.

426. *See Stein V*, 541 F.3d at 153.

427. *See Strickland v. Washington*, 466 U.S. 668, 686–87 (1984).

428. *See Stein V*, 541 F.3d at 157.

429. *Id.* at 141.

430. *Id.* at 153.

indictment ability to retain counsel of choice” by exerting undue influence over the defendant’s employer.⁴³¹

2. The Faulty Rationale Behind Determining Constitutional Violations

To clarify, in *Stein* two distinct constitutional arguments can be made: the first, on behalf of the four defendants who were denied their counsel of choice; the second, on behalf of the remaining nine defendants, whose defenses were handicapped due to the limited available funds.⁴³²

For the four defendants whose right-to-counsel violations derived from the total loss of their chosen counsel, the violation of their rights is more grounded in the law than it is for the remaining nine defendants. In *Gonzalez-Lopez*, the Court found that once a counsel of choice has been erroneously disqualified, the constitutional violation is “complete.”⁴³³ Unlike in *Gonzalez-Lopez*, where the district court fumbled an attorney application for *pro hac vice*,⁴³⁴ the counsel for each of the four *Stein* defendants were not explicitly disqualified by the court, but they were indirectly disqualified by the government’s interference with KPMG’s fee policy. Recall, in *Wheat*, the Court found that a defendant may hire an attorney he can lawfully afford or, alternatively, who will provide legal services absent such fee.⁴³⁵ Unfortunately for these four defendants, their chosen attorneys did not donate their services free of charge.⁴³⁶ The violation of these four defendants’ rights to counsel was properly judged “complete.”⁴³⁷

As for the other nine defendants, the courts held that their rights to counsel had been violated because their defenses were severely limited where, but for the government interference, they would not otherwise have been.⁴³⁸ While Judge Kaplan recognized that not every criminal defendant is constitutionally required to have the “Dream Team”⁴³⁹ of defense lawyers, those who are fortunate to have some other entity pay for their legal expenses, as KPMG did in the Xerox case,⁴⁴⁰ are entitled not to have that interfered with by the government.⁴⁴¹ This basic principle makes sense. It is permissible to use one’s own funds to secure an attorney and a defense strategy.⁴⁴² In addition to the property argument to be made (that the *Stein* Thirteen had a property right in the yet-to-be-advanced legal fees),

431. *United States v. Rosen*, 487 F. Supp. 2d 721, 733 (E.D. Va. 2007).

432. *See United States v. Stein (Stein IV)*, 495 F. Supp. 2d 390, 415–20 (S.D.N.Y. 2007).

433. *Id.* at 146.

434. *See supra* note 213.

435. *See id.* at 159.

436. *Stein IV*, 495 F. Supp. 2d 390, 421–22 (S.D.N.Y. 2007).

437. *Id.* at 422 (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006)).

438. *Id.* at 418–19.

439. *Id.* at 425.

440. *Id.* at 408 (“The Xerox investigation . . . was the criminal and SEC investigation in which KPMG spent over \$20 million on the individual defenses of four of its personnel.”).

441. *Stein IV*, 495 F. Supp. 2d at 425.

442. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624–25 (1989).

corporate executives are constantly advanced and indemnified for their legal fees,⁴⁴³ in some cases even when they are found guilty.⁴⁴⁴

3. The Remedy Problem

Having found a violation of the Sixth Amendment right to counsel, the issue then becomes, what to do next? The courts here have operated under the general theory of Sixth Amendment violations such that “remedies should be tailored to the injury suffered from the constitutional violation.”⁴⁴⁵ In the Second Circuit, the caveat is that the remedy must—as much as possible—restore the defendant to the circumstances that would have existed in the absence of the constitutional violation.⁴⁴⁶ For the four defendants, the proper remedy was the dismissal of the indictments. In *Gonzalez-Lopez*, the defendant could have had his violation cured through reversal and a trial with his chosen attorney, who had previously been wrongfully excluded from representing his client.⁴⁴⁷ So, while the violation was complete upon disqualification, it was still able to be cured.⁴⁴⁸ Here, the four defendants had already been to court four times (not including arguments before the Second Circuit) and two and a half years had gone by. The government at no point cured the violation, which it could have.⁴⁴⁹ The Second Circuit and the Southern District of New York found that the oral statements made by the AUSA on March 30, 2006, did not cure the violation.⁴⁵⁰ Even though federal prosecutors conceded KPMG was always free to use its business judgment, the government failed to acquiesce or even directly respond when asked whether KPMG’s deferred prosecution agreement would be in jeopardy if they advanced attorneys fees.⁴⁵¹ Had the prosecutors done that, it is possible that the government may have cured the violation by permitting access to funds. The Second Circuit found that such a declaration, absent KPMG, a necessary party, would be in vain.⁴⁵² Also, it is possible the damage was already done.

At that point they had already expended \$456 million in fines, in addition to fines and legal fees for their involvement in the Xerox matter.⁴⁵³ The likelihood is that the resources KPMG may have once had to devote to defense funds no longer exist. Essentially, these four defendants cannot be made whole again. Absent paying their debts and continuing to pay their expensive legal fees, which KPMG is under no obligation to do, these

443. See Margulies, *supra* note 275, at 56.

444. See Bucy, *supra* note 275, at 350.

445. *United States v. Morrison*, 449 U.S. 361, 364 (1981).

446. *United States v. Carmichael*, 216 F.3d 224, 227 (2d Cir. 2000).

447. See *United States v. Stein (Stein IV)*, 495 F. Supp. 2d 390, 422 (S.D.N.Y. 2007).

448. See *United States v. Stein (Stein V)*, 541 F.3d 130, 136 (2d Cir. 2008).

449. *Id.*

450. *Cf. id.* at 145.

451. *Id.*

452. See *id.*

453. See *United States v. Stein (Stein I)*, 435 F. Supp. 2d 330, 349–50 (S.D.N.Y. 2006); see also *supra* note 265 and accompanying text.

defendants cannot be made whole.⁴⁵⁴ Even if the defendants could retain funded counsel through the Criminal Protection Act,⁴⁵⁵ the court-appointed lawyer could be the next Clarence Darrow, but, following the close of the trial, he will not indemnify Mr. Watson for the nearly \$1 million he already owes his previous attorney.⁴⁵⁶

The situation with the remaining nine defendants, those who are still represented by their chosen counsel, is more complex. While these defendants claim government interference, it would appear that their biggest issue at trial would be mounting a defense. The potential remedy for them could be to appoint counsel and funds through the court.⁴⁵⁷ The defendants might then argue this would be on its face ineffective counsel, since there could be no way that a court appointed lawyer could devote six to eight months on the matter, cipher through twenty-two million pages of documents, and interview the expert witnesses.⁴⁵⁸ And truth be told, these defendants would probably be right. Regardless, the defendants still would have been deprived of the funds they were entitled to because of the government interference.⁴⁵⁹ However, the district court in *Rosen* did not go so far as to establish a per se rule presuming ineffectiveness.⁴⁶⁰ The *Rosen* court also dealt with fee advancement, and the defendants claimed an inability to mount the defense they would have been entitled to had they received the fees they expected. But the court found that there was no evidence of ineffective counsel as their representatives argued zealously and competently on their behalves.⁴⁶¹ While this evidence did not exist in *Stein*, and while the court in *Rosen* refused to pass judgment on the complexity of the *Stein* case,⁴⁶² the court resisted a presumption of prejudice. That being said, *Stein* was no “garden-variety criminal case.”⁴⁶³

While it is difficult in *Stein* to reconcile the dismissal of an indictment, it is unlike *Cronic*, where the charge was mail fraud, or *Rosen*, with two indictments for two defendants. *Stein* is flooded with millions of pages in documents, hundreds of witnesses, and an estimated trial length of up to

454. See *Stein V*, 541 F.3d at 144–46.

455. 18 U.S.C. § 3006A (2006); see *United States v. Stein (Stein IV)*, 495 F. Supp. 2d 390, 420–21 (S.D.N.Y. 2007).

456. See *Stein IV*, 495 F. Supp. 2d at 423.

457. One area of recourse might be through the Criminal Justice Act. See 18 U.S.C. § 3006A (2006).

458. See *Stein IV*, 495 F. Supp. 2d at 407. However, Judge Kaplan did not make a ruling on whether court appointed counsel would meet the constitutional requirements of effective counsel. *Id.* at 421.

459. See *id.* at 407 n.156.

460. See *United States v. Rosen*, 487 F. Supp. 2d 721, 731–34 (E.D. Va. 2007).

461. See *id.* at 734–36.

462. The court in *Rosen* described *Stein* as “a ‘19 defendant, 46 count superseding indictment charg[ing] what has been called the largest criminal tax case in United States history’ . . . involv[ing] millions of pages of documents and hundreds of depositions.” *Id.* at 735 (quoting *United States v. Stein*, No. S105 CRIM 0888(LAK), 2005 WL 3071272 (S.D.N.Y. Nov. 15, 2005)).

463. *United States v. Stein (Stein I)*, 435 F. Supp. 2d 330, 362 (S.D.N.Y. 2006).

eight months.⁴⁶⁴ Additionally, we can all draw solace from the legal reasoning in *Morrison*, which held that the dismissal of an indictment is “plainly inappropriate” unless there is a showing of “demonstrable prejudice, or substantial threat thereof.”⁴⁶⁵ Even if these nine defendants could not show actual prejudice under *Morrison*, the threat that they would be prejudiced by the government’s interference with their rights to mount a defense is a sufficiently substantial threat.⁴⁶⁶

4. Alternative Remedies

The government argued that it cured any and all right-to-counsel violations when it conceded during oral arguments that it had always been the USAO’s policy to allow KPMG to exercise its business judgment.⁴⁶⁷ However, seven days before representatives of KPMG met with the AUSAs, KPMG CEO Eugene O’Kelly informed the partners that all current and former employees of the company would be represented by competent legal counsel at the firm’s expense.⁴⁶⁸ Mr. O’Kelly made this declaration having been informed that a criminal referral was made to the USAO.⁴⁶⁹ This statement and the firm’s unvarying policy of paying legal costs for its employees does not necessitate capping and terminating fee advancements. Seeing that the dismissal of the indictments is such a final, definitive remedy, it begs the question of what the government could have done to prevent the dismissals other than not commit an injustice in the first place.

One possibility might have been to draft a nonprosecution agreement with KPMG before *Stein IV*.⁴⁷⁰ By doing so, the government could still have collected the \$456 million dollar fine and have the company assume liability for the fraudulent tax practices. This was a viable option for the government.⁴⁷¹ In light of the removal of top personnel at KPMG who were involved in the tax shelters and KPMG’s proven “cooperation,” the government should have pursued this course. This would arguably cure any constitutional claims the *Stein* Thirteen would have against the government; it would also put the ball in KPMG’s court by opening it up to a potential civil claim from the defendants on either a tort or contract theory. However, despite all of this, the courts may have reached another conclusion with regards to the remedy.

One such conclusion, as mentioned, would be for the defendants to proceed with their trials. For those who have or would have lost their

464. See *United States v. Stein (Stein V)*, 541 F.3d 130, 157 (2d Cir. 2008).

465. *Stein I*, 435 F. Supp. 2d at 361–62.

466. See *Stein V*, 541 F.3d at 157–58.

467. *Id.* at 140.

468. *United States v. Stein (Stein IV)*, 495 F. Supp. 2d. 390, 407 (S.D.N.Y. 2007).

469. *Id.*

470. See MOKHIBER, *supra* note 245. A nonprosecution agreement occurs when a prosecutor agrees not to criminally prosecute the corporation in exchange for a payment of a fine, cooperation, and changes in the corporate structure. *Id.*

471. See generally Zierdt & Podgor, *supra* note 244.

attorneys, the court could appoint representation for indigent defendants.⁴⁷² However, the law is likely on the side of the defendants and the courts here. Though the Second Circuit did not distinguish between the four and nine respective *Stein* defendants the way that the district court chose to, the *Stein* Thirteen's constitutional violations were complete when the government interfered with their rights to chosen counsel and to mount the defense of their choosing.⁴⁷³ Since the government did not cure this defect, either by exerting pressure or paying the defendants' fees, the only way in which to put the defendants back in the position they would have been absent the government interference would be dismissal of the indictments.⁴⁷⁴

While KPMG successfully avoided companywide prosecution, which of course was its goal, it did not help its employees or the government investigation with its vague and weak-willed responses regarding fee advancement and indemnification. There may have been two ways in which KPMG could have avoided the headache. First, corporations should have an indemnification policy through which the company would agree to reimburse legal fees for its employees unless an employee is found guilty or liable, the company is released from indemnification.⁴⁷⁵ Every state has a statute for corporate indemnification.⁴⁷⁶ These are default rules and, like most things, could have been contracted around. Another alternative would be for corporations to put the fee-advancement policy in employment contracts.⁴⁷⁷ That way when the USAO inquired about the fee policy, KPMG could have said it was under contractual obligations, without being perceived as uncooperative. In the February 25, 2004, meeting between KPMG's lawyers and the AUSAs, the issue of fee advancement became relevant only because KPMG did not necessarily have a legal obligation to advance fees—it was only corporate practice and policy.⁴⁷⁸ It is probable that even if the firm paid the *Stein* Thirteen's legal fees, which they would have been legally obligated to pay in the first place, KPMG could still have fully cooperated and allowed the government access to its employees.⁴⁷⁹

472. See *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932); see also 18 U.S.C. § 3006A (2006).

473. See *United States v. Stein (Stein V)*, 541 F.3d 130, 144–45 (2d Cir. 2008).

474. *Id.* at 146.

475. See generally *Bucy*, *supra* note 275.

476. See *United States v. Stein (Stein I)*, 435 F. Supp. 2d 330, 354–55 (S.D.N.Y. 2006).

477. See *Power*, *supra* note 230, at 1208.

478. See *Margulies*, *supra* note 275; see, e.g., *Stein I*, 435 F. Supp. 2d at 340–45.

479. See *Thompson Memo*, *supra* note 242, § VII, VI.B n.4 (“Obviously, a corporation’s compliance with governing law should not be considered a failure to cooperate.”). Had KPMG expressly included fee advancement and indemnification clauses in their employment contracts, under the existing DOJ guidelines, they wouldn’t be breaking any laws or considered uncooperative with the government, since they would be contractually obligated to abide by the contracts.

B. “Where We’re Going, We Don’t Need Roads”: What Does the Future Hold Post-Stein?

In light of the Filip Memo, the consensus among scholars and practitioners is that another case like *Stein* is unlikely to ever be decided again.⁴⁸⁰ If the corporations and the prosecutors stick to the new guidelines, such a case never should.⁴⁸¹ Government attorneys, at least those prosecuting white-collar crime in the Southern District of New York, will likely tone down their unfettered aggression, in light of Judge Kaplan’s warning. As one commentator put it, it’s time for an “attitude adjustment” for federal prosecutors.⁴⁸² Additionally, in December 2008, federal prosecutors abstained from petitioning the Supreme Court to grant certiorari.⁴⁸³ This move underscores government disappointment at the outcome of the *Stein* Thirteen decisions. However, federal prosecutors did receive an early holiday present with the convictions of three remaining defendants, coupled with the two previous KPMG employees that took plea bargains, raising the total to five out of nineteen convictions from the KPMG case.⁴⁸⁴

CONCLUSION

Perhaps the most important thing to understand is that in 2009, in light of *Stein*, the cure for a violation of the constitutional right to counsel must be matched to the wrong. The dismissal of the indictments was not a remedy predicated on caprice or shaky law. Judge Kaplan did what he could to prevent dismissing the indictments. He opted for a less restrictive remedy in trying to attain ancillary jurisdiction so that he could hear a civil claim against KPMG, which could have cured the government’s violation. However, this ruling was overturned by the Second Circuit. The *Stein* decisions take an expansive view on the Sixth Amendment right to counsel, specifically, when the right to counsel attaches, as well as constitutional remedies. While it is possible, as some scholars suggest, that the Second Circuit holding in *Stein* will be limited to its facts, the case represents the straw that broke the camel’s back for violations of the Sixth Amendment rights of employees of corporations. Additionally, there is no telling what long-term ramifications the holding can have on constitutional remedies, especially considering that the Supreme Court will not have the chance to either affirm or deny the remedy à la *Morrison*.

480. See *supra* Part II.B.2.

481. See *supra* Part II.B.2.

482. See Small, *supra* note 402.

483. See Efrati, *supra* note 3.

484. See Browning, *supra* note 336.