07-3042-CR

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

-against-

JEFFREY STEIN, JOHN LANNING, RICHARD SMITH, JEFFREY ESICHEID, PHILIP WIESNER, MARK WATSON, LARRY DELAP, STEVEN GREMMINGER, GREGG RITCHIE, RANDY BICKHAM, CAROL G. WARLEY, CARL HASTING, RICHARD ROSENTHAL,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICI FORMER ATTORNEYS GENERAL AND U.S. ATTORNEYS IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

No nongovernmental corporate party or similar entity appears as a party or amicus curiae in this proceeding. Thus, no corporate disclosure statement is required by Rule 26.1.

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INTEREST OF THE AMICI

Amici Dick Thornburgh, Edwin Meese III, William Weld, and Stuart Gerson are former Attorneys General and U.S. Attorneys with a continuing interest in the integrity and stature of the Department of Justice (the "Department" or the "DOJ").[1] Because of their experience at the DOJ, *amici* are familiar with the Department's commitment to the highest ethical standards, and with the kinds of practices that are—and are not—consistent with those standards. They also know what kinds of investigative and litigation techniques are necessary to the Department's effective prosecution of corporate crime, and which are unnecessary and even counter-productive to that mission.

Amici believe that the prosecution's conduct in this case marked a significant departure from the Department's traditionally high ethical standards, and contravened core values underlying the criminal justice system. *Amici* further believe that the kind of conduct at issue here is unnecessary to the effective

[1] Dick Thornburgh served as U.S. Attorney General from 1988 to 1991; Assistant Attorney General for the Criminal Division of the Department of Justice from 1977 to 1979; and U.S. Attorney for the Western District of Pennsylvania from 1969 to 1975. Edwin Meese III served as U.S. Attorney General from 1985 to 1988 and Deputy District Attorney for Alameda County, California from 1959 to 1967. William Weld served as Assistant Attorney General for the Criminal Division of the Department of Justice from 1986 to 1988 and U.S. Attorney for the District of Massachusetts from 1981 to 1986. Stuart Gerson served as Acting U.S. Attorney General in 1993; Assistant Attorney General for the Civil Division of the Department of Justice from 1989 to 1993; and Assistant U.S. Attorney for the District of Columbia from 1972 to 1975.

prosecution of corporate crime, and indeed hinders effective corporate investigations and diminishes corporate compliance with the law. This Court should not condone conduct of that sort. *Amici* therefore urge this Court to affirm the district court's order. *Amici* have filed a motion for leave to file an amicus brief concurrently with this brief. The Government has indicated that it will neither support nor oppose that motion.

INTRODUCTION

The Department of Justice Mission Statement declares that the DOJ is responsible not simply for "seek[ing] just punishment for those guilty of unlawful behavior," but also for "ensur[ing] [the] fair and impartial administration of justice for all Americans."[2] Consistent with this broad commitment, the Department has long required its attorneys to maintain the highest possible ethical standards. The U.S. Attorney Manual, for example, admonishes that the "basic responsibilities of Federal attorneys . . . [include] making certain . . . that the rights of individuals are scrupulously protected." *See* U.S. Attorney Manual §§ 9-27.001, 9-27.110 (Dec. 2006).[3] As Attorney General (later Justice) Robert Jackson put it nearly seventy years ago, U.S. Attorneys must be "animate[d]" by "the spirit of fair play and

[2] U.S. Dep't of Justice, Mission Statement, http://www.usdoj.gov/02organizations/ (last visited Jan. 8, 2008).
[3] Available at www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/title9.htm.

decency."[4]

The courts, too, recognize that U.S. Attorneys are "the representative[s] not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). United States Attorneys "may prosecute with earnestness and vigor." *Id.* But "while [they] may strike hard blows," they are "not at liberty to strike foul ones." *Id.* Rather, prosecutors are "officer[s] of the court whose duty is to present a forceful and truthful case to the jury, not to win at any cost." *Shih Wei Su v. Filion*, 335 F.3d 119, 126 (2d Cir. 2003); *see also, e.g.*, *Briggs v. Goodwin*, 712 F.2d 1444, 1449 n.36 (D.C. Cir. 1983).

The prosecutors' conduct in this case was inconsistent with these high standards. As the district court found, the Government pressured KPMG into refusing to advance Appellees' legal fees through the threat of corporate indictment, and in so doing violated Appellees' constitutional rights. Working within the framework set out by the now-superseded "Thompson Memorandum," *see United States v. Stein* ("*Stein I*"), 435 F. Supp. 2d 330, 363 n.167 (S.D.N.Y.

[4] *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary* (Sept. 12, 2006) (hereinafter "*Thompson Memorandum Hearing*"), *available at* http://judiciary.senate.gov/testimony.cfm?id=2054 (statement of Edwin Meese III).

2006), the prosecutors in this case repeatedly emphasized to KPMG attorneys that in deciding whether to indict KPMG—an event that no major financial services corporation has ever survived—the Government would pay close attention to whether KPMG chose to advance or pay its employees' attorneys' fees. *Id.* at 352-53.

In response, KPMG changed its longstanding practice of advancing legal fees to employees and indemnifying them against legal fees incurred in defending actions arising out of their employment. Instead, it sharply limited the fees it would pay for each individual, conditioning any fee payments on cooperation with the Government's investigation and cutting off all fees for anyone the Government indicted. And in response to criticism by prosecutors, KPMG also revised a memorandum it had previously sent to its employees reminding them of their right to legal representation at meetings with the Government and explaining the benefits counsel could provide. *Id.* at 346-47. The revised memo omitted discussion of the benefits of counsel and failed to advise employees that they had the right *not* to speak to the Government. *Id.* at 346.

As Appellees explain, the district court correctly concluded that this conduct violated the Constitution and was appropriately remedied by dismissing the Appellees' indictments. *See* Appellees' Br. at 65-109; *see also Stein I*, 435 F. Supp. 2d at 362-73; *United States v. Stein* ("*Stein II*"), 495 F. Supp. 2d 390, 419-

427 (S.D.N.Y. 2007). *Amici* submit this brief to make two additional, related points.

First, based on their experience in the Department, *amici* believe the prosecutors' conduct in this case, in addition to violating the Fifth and Sixth Amendments of the Constitution, was inconsistent with the high standards of conduct that should be expected of lawyers at the DOJ. Department lawyers of course should not use tactics that deprive defendants of their constitutional rights. Nor should they seek to gain litigation advantage by attempting to undermine a defendant's legal representation. In addition, the prosecutors here, guided by the Thompson Memorandum, inappropriately assumed that able legal counsel was a potential *obstruction* to a DOJ investigation, and that the individual defendants a corporation chose to indemnify could be presumed "culpable" before they were ever tried. These assumptions are flatly inconsistent with two basic tenets of our legal system: that representation by able counsel enhances, rather than detracts from, the proper operation of the criminal justice system; and that persons are entitled to a presumption of innocence. The prosecutors' conduct in this case reflected poorly on the DOJ, as is evidenced by the widespread criticism it has received, and in *amici*'s view, it damaged the Department's reputation for scrupulously ethical conduct.

Second, and also important, the tactics at issue in this case, in addition to

being inappropriate, are wholly unnecessary to the prosecution of corporate crime. DOJ attorneys have numerous tools available to investigate potential wrongdoing—there is no need for them to attempt to facilitate investigations or prosecutions by interfering with defendants' right to counsel. Nor (as the Department has since recognized) is it generally necessary or appropriate to consider a corporation's advancement of attorneys' fees in order to determine whether the corporation is cooperating with an investigation: there are far better indicators of corporate cooperation and compliance with law. Beyond this, the kind of conduct at issue here is, in *amici*'s assessment, actually *counter*productive to investigations of alleged corporate wrongdoing and to the ultimate goal of corporate compliance with the law. Investigations run more smoothly if persons of interest are represented by able counsel. And permitting companies to ensure that their employees have lawyers encourages compliance throughout a company's ranks.

For these reasons, *amici* urge this Court to affirm the district court's decision. The prosecutorial conduct at issue in this case should not be endorsed by this Court. Affirming the district court will help ensure that Department attorneys never again engage in a practice they should never have engaged in to begin with—a practice inconsistent with the Department's traditions and ethics, and with the most basic principles of our legal system.

ARGUMENT

I. THE GOVERNMENT'S CONDUCT IN THIS CASE WAS INCONSISTENT WITH THE DEPARTMENT'S HIGH ETHICAL STANDARDS

The prosecution's conduct in this case—using the threat of indictment to pressure KPMG into limiting and eventually cutting off payment of defendants' legal expenses—was inconsistent with the Department's high ethical standards in at least four related respects.

First, and most straightforwardly, it is plainly inappropriate for DOJ lawyers charged with ensuring the "fair and impartial administration of justice" and "making certain . . . that the rights of individuals are scrupulously protected" to use pressure tactics to *impair* defendants' constitutional right to counsel. U.S. Dep't of Justice, Mission Statement, *supra*; U.S. Attorney Manual §§ 9-27.001, 9-27.110. The right to counsel "has long been recognized as essential to ensure fairness, justice and equality under the law for all Americans."[5] As the Supreme Court has observed, "lawyers in criminal courts are necessities, not luxuries. 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." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Using the threat of indictment to undermine that right is flatly inconsistent with the obligation to ensure that the justice system operates fairly and

[5] *Thompson Memorandum Hearing*, *supra* (written statement of Sen. Patrick Leahy).

that the rights of individuals are protected.[6]

Second, and related, DOJ attorneys should not attempt to facilitate an investigation or gain advantage in litigation by undermining a potential defendant's legal representation. Department attorneys have numerous legitimate tools for developing the facts of their cases. *See infra* at 13-14 (discussing investigative resources available to Department attorneys). Relying instead on interference with legal representation, in addition to violating defendants' constitutional rights, is flatly inconsistent with the DOJ's long-standing commitment to the "spirit of fair play and decency." *Thompson Memorandum Hearing* (statement of Edwin Meese

[6] To *amici*'s knowledge, no court has determined whether the prosecutors formally violated any code of legal ethics by using the tactics at issue in this case. But legal commentators have noted that because such tactics undermine the employees' right to legal counsel and the attorney-client relationship, they do at a minimum "raise[] various ethical considerations." *See, e.g.*, Katherine R. Brody & Chris Tatarowicz, *A Change of Heart for the DOJ: Policy Run Amok or Greater Respect for Ethical Norms?*, 20 Geo. J. Legal Ethics 427, 433 (2007). For example, the Model Rules of Professional Conduct set out "special responsibilities of a prosecutor," one of which is to "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel." Model R. Prof. Conduct 3.8(b) (2002), *available at* http://www.abanet.org/cpr/mrpc/rule_3_8.html. Here, the prosecutors did the opposite, effectively making it more difficult for the accused to obtain counsel, and encouraging KPMG *not* to inform its employees of their right to counsel during the investigation. *See also, e.g.*, American Bar Association, *Prosecution Function Standards* § 3-1.2(b), (c) (3d ed. 1993) (noting that the "prosecutor is an administrator of justice, an advocate, and an officer of the court," whose duty is "to seek justice, not merely to convict"). Whether or not it crossed the line into a formal ethical violation, such conduct plainly cannot be reconciled with the Department's traditional commitment to the highest possible ethical standards.

III) (quoting Attorney General Jackson). Federal prosecutors must be prepared to investigate and try their cases even against well-represented defendants, without resorting to circumvention of the full adversarial process.

Third, and also related, the conduct at issue in this case rests on a fundamental misconception of the role of counsel in our legal system. Both the Thompson Memorandum and the prosecution's conduct in this case appear premised on the notion that advancing legal fees to employees constitutes an attempt to shield culpable employees and obstruct a DOJ investigation. *See, e.g.*, Peter J. Henning, *Targeting Legal Advice*, 54 Am. U. L. Rev. 669, 698-99 (2005) ("This approach views lawyers, who are not subject to the government's coercive power over the corporation, as likely to frustrate investigations."). But that assumption flatly contradicts one of the core premises of our adversarial justice system: that "justice is always best served when all parties to litigation are well-represented by experienced, diligent counsel." *Thompson Memorandum Hearing*, *supra* (statement of Edwin Meese III). The criminal justice system values the adversarial process not simply because it protects the defendant's rights, but also because it "will ultimately advance the public interest in truth and fairness." *Polk County v. Dodson*, 454 U.S. 312, 318 (1981). The prosecution's conduct in this case substantially undermines that "public interest."

Fourth, by assuming that a corporation is shielding "culpable" employees

when it advances their legal fees, the prosecutors in this case inappropriately presumed that the employees who would have received legal fees were guilty of wrongdoing. In fact, it is a bedrock principle of the American justice system that individuals are presumed innocent until proven guilty. *See, e.g.*, *Clark v. Arizona*, 126 S. Ct. 2709, 2729 (2006) ("[t]he first presumption is that a defendant is innocent unless and until the government proves beyond a reasonable doubt each element of the offense charged"); *see also United States v. Wittig*, 333 F. Supp. 2d 1048, 1054 (D. Kan. 2004) (rejecting the notion that "the practice of corporate advancement of fees is . . . unjust" because "in a criminal proceeding, a defendant is always presumed innocent"). Assuming that an employee is "culpable" simply because he or she may need to incur legal fees advanced by an employer offends that core principle.

Moreover, the factual validity of any such assumption may be particularly suspect in contexts like this one. In white-collar cases, there is frequently little doubt about what the persons involved in targeted conduct *did*, but considerable doubt about whether that conduct was actually illegal.[7] As a result, it may be especially difficult to determine early on in an investigation whether a particular

[7] Richard N. Janis, *Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice Is Being Destroyed*, Wash. Lawyer, Mar. 2005, *available at* http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/march_2005/stand.cfm ("often the [targeted] conduct itself may be clear but its legality (or illegality) is not").

employee is guilty of wrongdoing. The prosecutors' conduct here, however, sweeps aside such concerns, treating "any employee who might be involved in misconduct" as culpable "well before the investigation is complete" and the legality of the employee's conduct is determined. Henning, *Targeting Legal Advice*, *supra*, at 698-99.

In all of these respects, the prosecutorial conduct in this case deviated significantly from the Department's tradition of maintaining the highest ethical standards. It is thus hardly surprising that numerous public officials, commentators, and former prosecutors have condemned that conduct as "shocking" and "offensive." *See, e.g.*, Nat'l Ass'n of Criminal Defense Lawyers, *On the Thompson Memo, Terrorist Surveillance, and the Detainee Act*, 30 Champion 55 (2006) (quoting Senator Specter's statement that the Thompson Memorandum and the Government's consideration of "whether corporations agree not to pay counsel fees for people in their employ" is "surprising and shocking"); Joan C. Rogers, *Judge Condemns DOJ Policy of Pressuring Companies Not to Pay Employees' Legal Fees*, 22 ABA/BNA Lawyers' Manual on Professional Conduct: Current Reports 342, 344 (July 2006) (quoting Dick Thornburgh's statement that consideration of fee payment arrangements serves to "disadvantage the employee and increase the likelihood that he or she will plead guilty or cooperate in some way," and condemning it as "offensive" and an "improper exercise[] of

government power"); *Thompson Memorandum Hearing*, *supra* (statement of Edwin Meese III) (condemning the use of fee advancement as part of a prosecutor's charging decision and recommending that "all references in the [Thompson] Memorandum to a company's payment of its employees' legal fees . . . be eliminated"); Letter to the House and Senate Committees on the Judiciary from Stuart M. Gerson; Edwin Meese III; Dick Thornburgh; Carol E. Dinkins; Jamie Gorelick; Walter E. Dellinger III; Theodore B. Olson; Kenneth W. Starr; Seth P. Waxman 2 (July 30, 2007) (calling on Congress to "restore the proper balance between the tools that the government needs to fight corporate crime and the rights of individual and corporate citizens").[8] The conduct at issue here has damaged the Department's reputation. *Amici* hope that rejection of that conduct by the courts will help to clarify that such tactics do not reflect the best traditions of the DOJ, and help restore public confidence in the Department.

II. THE CONDUCT AT ISSUE IS UNNECESSARY TO PROSECUTE CORPORATE CRIME AND UNDERMINES CORPORATE COMPLIANCE WITH THE LAW

The prosecution's conduct in this case was not only inconsistent with the Department's ethical commitments and core values of our criminal justice system, but also unnecessary—and in fact harmful—to the goal of encouraging corporate

[8] Available at http://www.uschamber.com/NR/rdonlyres/ep6egctpijdcqcksrawarupmudf652mq55mfqjwlutrmnfbrfy7htohstznrnido6zli5v55zkkw273zpo32dg2ktuc/AttorneyClientPrivilege7.30.07.pdf.

compliance with law.

A. Consideration of Fee Advancement is Unnecessary to Effective Corporate Prosecution and Determination of Corporate Cooperation

In *amici*'s experience, the tactics employed here are wholly unnecessary to effective investigations and prosecutions of corporate wrongdoing. The prosecutors in this case appear to have believed that Appellees would be more likely to provide them with information (and, presumably, less likely to mount a successful defense in the event of a prosecution) if they were deprived of the advice of experienced and competent counsel of their choice. Even if that were so, *but see infra* at 19-20 (employees who are *not* represented by trusted counsel of choice may be less willing to provide information to prosecutors), the DOJ has at its disposal numerous other tools that enable it to conduct thorough, complete investigations of corporate crime.

With or without the cooperation of employees like Appellees, for instance, DOJ attorneys, in conformity with applicable law, may work with the FBI to use informants and confidential sources, conduct undercover operations, engage in nonconsensual electronic surveillance, use pen registers and trap and trace devices, gain access to stored wire and electronic communications and transactional records, engage in consensual electronic monitoring, and conduct other searches.[9]

[9] Office of the Att'y Gen., Attorney General's Guidelines on General Crimes,

Federal prosecutors can also make effective use of their subpoena power, and may even issue grand jury and trial subpoenas to attorneys for information relating to the representation of clients.[10]

Prosecutors also possess tools that can persuade even the most ably-represented parties to share information during an investigation. Grants of immunity, for example, can be used to encourage disclosure of information. And the possibility of indictment is itself an incentive for corporations to cooperate, even when it is not used to coerce organizations to withhold attorneys' fees from their employees. In short, there is no practical reason whatsoever for Department lawyers to resort to the tactics at issue here. *Cf.* Letter to Alberto Gonzales, Attorney General of the United States, from Griffin B. Bell; Stuart M. Gerson; Dick Thornburgh; Carol E. Dinkins; Jamie Gorelick; George J. Terwilliger III; Walter E. Dellinger III; Theodore B. Olson; Kenneth W. Starr; Seth P. Waxman (Sept. 5, 2006) [hereinafter Letter to Alberto Gonzales] (criticizing the use of requests for waiver of attorney-client privilege and noting that "[p]rosecutors can obtain needed information in ways that do not impinge upon the attorney-client relationship").[11]

Racketeering Enterprise and Domestic Security/Terrorism Investigations (Dec. 1989), http://www.fas.org/irp/agency/doj/fbi/generalcrimea.htm#crimes.

[10] U.S. Attorneys' Manual § 9-13.410 (Dec. 2006), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/13mcrm.htm.

[11] Available at http://www.uschamber.com/NR/rdonlyres/ep6egctpijdcqcksraw

The Thompson Memorandum suggested that prosecutors could use a corporation's fee advancement as a measure of its cooperation with a Department investigation. But as the Department itself has now recognized, a corporation's decision to advance attorneys' fees to its employees is a poor indicator of whether it is genuinely cooperating with the DOJ. *See, e.g.*, *Thompson Memorandum Hearing*, *supra*, at 11 (statement of Paul J. McNulty) (noting that "[t]he payment of legal fees may be fully consistent with the corporation's cooperation," and stating that prosecutors can more appropriately ask whether a company has made "overly broad assertions of corporate representation of its employees, . . . refus[ed] to sanction wrongdoers, . . . fail[ed] to comply with document subpoenas and . . . fail[ed] to preserve documents").[12] As discussed above, construing payment of attorneys' fees as an attempt to "obstruct" a Department investigation fundamentally misconstrues the role of attorneys in our criminal justice system.

Construing fee payment as an obstruction also fundamentally misunderstands *why* corporations advance their employees' legal fees. Such payments do not indicate that corporations are attempting to "circle[] the wagons" and protect culpable employees—indeed, even the Government's brief acknowledges that fee advancement would be evidence of such an attempt only in

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arupmudf652mq55mfqjwlutrmnfbrfy7htohstznrnido6zli5v55zkkw273zpo32dg2ktuc/AttorneyClientPrivilege7.30.07.pdf.

[12] Available at http://www.acc.com/public/attyclientpriv/mcnultytestimonythompsonmemo.pdf.

"rare cases." Gov't Br. at 74.[13] Instead, paying employee legal expenses reflects a legitimate business conclusion that the costs associated with such payments are more than offset by the benefits the corporation realizes as a result. Corporations often *must* agree to advance or indemnify their employees' legal fees if they hope to attract the most qualified employees. *See*, *e.g.*, ABA Report, ABA Task Force on Attorney-Client Privilege, To the House of Delegates (Aug. 2006), ("Organizations legitimately may conclude that [agreements providing for payment of attorneys' fees arising from work-related liability] enable them to attract and retain highly qualified officers and Employees.")[14]; Paul McNulty, Deputy Attorney General, Address to Lawyers for Civil Justice Membership Conference Regarding the Department's Charging Guidelines in Corporate Fraud Prosecutions (Dec. 12, 2006) [hereinafter McNulty, Address to Lawyers] ("Corporations often include indemnification provisions in their charters, bylaws or separate agreements

[13] The Government invokes *United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993), to suggest that a corporation's payment of its employees' legal fees is somehow probative of the extent of a corporation's cooperation. Gov't Br. at 65. That citation is wholly misplaced. In *Locascio*, this Court noted only that payment of an associate's legal fees was "potentially part of the proof of the Gambino criminal enterprise" because it "show[ed] the connections among the participants." *Id.* at 932-33. In this case, in contrast, there is no question regarding the nature of the connection between KPMG and its employees. *Locascio* says nothing about the central issue here; namely, whether a corporation's advancement of its employees' legal fees *itself* suggests that the corporation is not cooperating in good faith with a Government investigation.

[14] Available at http://www.abanet.org/buslaw/attorneyclient/.

to attract skilled employees."); [15] *see also Ridder v. Cityfed Fin. Corp.*, 47 F.3d 85, 87 (3d Cir. 1995) ("The statutory provisions authorizing the advancement of defense costs . . . plainly reflect a legislative determination to avoid deterring qualified persons from accepting responsible positions with financial institutions for fear of incurring liabilities greatly in excess of their means . . . .").

Indeed, corporate law has evolved to reflect the fact that it is often in the best interest of the corporation to advance and pay employee legal fees: over the past 50 years, the Model Business Corporation Act has moved from containing a "short, narrow provision permitting—but not requiring—retrospective indemnification for expenses . . . to an expansive authorization (and, in the case of a wholly successful defense, requirement) of (i) indemnification against judgments—even for gross negligence—settlements, and expenses, [and] (ii) advance for expenses without a pre-trial determination." James J. Hanks, Jr. & Larry P. Scriggins, *Protecting Directors and Officers From Liability—The Influence of the Model Business Corporation Act*, 56 Bus. Law 3 (2000).[16] Given

[15] Available at http://www.usdoj.gov/archive/dag/speeches/2006/dag_speech_061212.htm.

[16] Consistent with these changes in the Model Act, the laws of many states expressly provide that companies may indemnify employees under certain circumstances, and are required to indemnify employees under others. These include the states whose law was relevant to the Appellees here. *See* Cal. Corp. Code § 317 (2007); Del. Code Ann. tit. 8 § 145 (2007); *cf.* N.Y. Bus. Corp. Law §§ 722-23 (2007). Thus, in this case, KPMG was threatened with corporate indictment for paying its employees' legal fees despite the fact that applicable state

this reality, the speculation that fee advancement might represent an effort to "circle the wagons," especially in the absence of any corroborating evidence whatsoever, cannot justify a policy that makes fee advancement potentially critical evidence of non-cooperation.

The Thompson Memorandum also suggested that the ultimate purpose of assessing a corporation's cooperation—including by considering its advancement of attorneys' fees—was to determine whether to indict the corporation itself. But a corporation's advancement of attorneys' fees is generally irrelevant to whether a corporation should be indicted. As Deputy Attorney General McNulty has explained, there are numerous factors other than fee advancement that prosecutors can and should consider when determining whether to indict a company. "One of the big ones is, How pervasive is the criminal conduct? Did [the company] try to stop it? Did [the company] have an effective compliance effort ahead of time to try to keep this from occurring? How far does it go up the ladder? Was the CEO involved in it? Those are the questions that you ask when you'[re] trying to decide [whether] to charge the company or not."[17]

Perhaps for these reasons, the Thompson Memorandum has now been

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law expressly gave it *permission* to pay those fees, and would have *required* payment of those fees if the accused was ultimately successful in defending the action. *See, e.g.*, Cal. Corp. Code § 317(d) (2007); Del. Code Ann. tit. 8 § 145 (2007); *cf.* N.Y. Bus. Corp. § 723 (2007).

[17] *Thompson Memorandum Hearing, supra* (statement of Paul J. McNulty), http://bulk.resource.org/gpo.gov/hearings/109s/34117.txt.

superseded by the McNulty Memorandum, which makes clear that in determining whether to indict a corporation, "[p]rosecutors generally *should not* take into account whether a corporation is advancing legal fees to employees or agents under investigation and indictment." Federal Prosecution of Business Organizations 11 (Dec. 12, 2006) ("McNulty Memorandum") (emphasis added). Further, as an added safeguard against the type of abuses that occurred in this case, prosecutors may now consider the advancement of legal fees only if they first receive approval from the Deputy Attorney General. *Id.* Department officials have also asserted that "the advancement of legal fees has always been a rare consideration in our corporate prosecutions." McNulty, Address to Lawyers, *supra*. Such statements, of course, do not alter the gravity of the conduct at issue in this case. But they do serve to demonstrate that consideration of fee advancement decisions is not necessary to effective corporate prosecution.

B. Consideration of Corporate Fee Advancement Harms the Objectives of Successful Prosecution

Beyond being unnecessary, conduct of the type that occurred in this case actually *harms* DOJ investigations and undermines the ultimate objective of fostering corporate compliance with the law. Government investigations are "generally enhanced when experienced and informed defense counsels represent targeted employees." *Thompson Memorandum Hearing*, *supra* (statement of Paul J. McNulty). Employees who are not represented by counsel (or by experienced

and trusted counsel of their choice) may be more reluctant to divulge information to investigators. They may refuse to agree to reasonable plea deals, or offer false information in the belief that they will benefit by doing so.

The ability of employees to retain lawyers experienced in complicated white-collar cases is no less critical to the proper functioning of the system once an investigation is completed. Absent experienced and able counsel, it becomes more difficult for judges and juries to determine who is responsible for any criminal conduct, and to ensure that such persons are appropriately punished. It is the presence of qualified counsel on *both* sides of a case that produces the most reliable outcomes. *See supra* at 10; *see also*, *e.g.*, *Ridder v. Cityfed Fin. Corp.*, 47 F.3d 85, 87 (3d Cir. 1995) (noting that state laws permitting or requiring corporations to advance employee legal fees "enhance the reliability of litigation-outcomes involving directors and officers of corporations by assuring a level playing field"). Experienced attorneys are best able to ensure that defendants understand their rights and have the opportunity to exercise them. They can most effectively question witnesses and challenge the Government's account of what happened, to ensure that it accurately reflects reality. And they can most effectively present the defendant's version of events, and most effectively argue to a judge disputed points of law.

The conduct the government engaged in here also threatens to produce

unjust outcomes by erroneously identifying individual employees as culpable long before adequate investigations can be completed. If prosecutors routinely look to advancement of legal fees in deciding whether corporations are protecting "culpable employees," then corporations will have an incentive to identify "culpable" employees as early as possible in any internal investigation, and to cut off advancement of legal expenses to those employees.[18] But investigations and prosecutions of white-collar crime are generally highly complex,[19] and it will often be impossible for a corporation to make fully informed and reliable "culpability" determinations during the early stages of an investigation. Indeed, corporations may feel compelled to abandon their internal investigations altogether, simply cutting off legal fees on the basis of prosecutors' preliminary assessments of who is culpable or who is not cooperating fully. Further, these preliminary assessments of culpability may actually play a role in prosecutors' decisions about whom to prosecute.

More broadly, the conduct the Government engaged in here discourages the development of a corporate culture that fosters compliance with the law. Corporate compliance depends critically on the willingness of employees to come

[18] *See* ABA Report, *supra* (discussing the consequences of the Government's consideration of the payment of legal fees as part of its decision whether to cooperate and pointing out that the policy forces the corporation to decide on "culpability" before completing its internal compliance review).

[19] *See* Janis, *supra* ("Although undoubtedly there are some wrongdoers whose misconduct is painfully evident, in the real world life is not so simple.").

forward and report early signs of wrongdoing. But if corporations are forced to make preliminary and often unreliable identifications of "culpable" employees, then employees may fear that coming forward could expose them to an erroneous designation as "culpable"—and leave them without legal fees in the event of a Government investigation. As one former prosecutor has noted, "[b]y pitting employers against employees, the structure of the corporation becomes one of fear, as opposed to a structure that works together as a whole to make sure that there is compliance with company directives." Rogers, *supra*, at 345 (quoting Ellen Podgor, Stetson University law professor, former prosecutor and defense attorney). By fostering this culture of mistrust, the kind of conduct at issue in this case undermines the ultimate goal of corporate compliance with the law.[20]

CONCLUSION

For the foregoing reasons, the prosecutorial conduct at issue in this case should not be condoned. This Court should therefore affirm the district court's decision dismissing Appellees' indictments.

[20] *Cf.* Letter to Alberto Gonzales, *supra* ("Lawyers are indispensable in helping companies and their officials understand and comply with complex laws and act in the entity's best interests. In order to fulfill this important function, lawyers must enjoy the trust and confidence of the board, management, and line operating personnel, so that they may represent the entity effectively and ensure that compliance is maintained (or that noncompliance is quickly remedied).").

Dated: Washington, D.C.
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Dated: January 23, 2008

CERTIFICATE OF SERVICE

I certify that on January 23rd 2008, one original and ten true copies of this brief were sent by Federal Express and one pdf version of this brief was sent via electronic mail to the Clerk, United States Court of Appeals for the Second Circuit, and two true copies of this brief and one pdf version was sent to each of the below recipients by Priority U.S. Mail at the following addresses:

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