Session 9: Understanding Government Power

In this session, we will look at the power of the government. One way that the government operates in a strong way is through criminal prosecutions. The first set of materials focuses on the Enron case and the ultimate destruction of Arthur Andersen, while the second set of materials looks at the issues that arose in connection with the sale of certain tax shelters by KPMG. The next reading is a speech by Deputy Attorney General Lisa O. Monaco on corporate criminal enforcement. We will then switch to the government as market participant taking a look at Operation Warp Speed.

§ 1512. Tampering with a witness, victim, or an informant

*** (b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than ten years, or both.

*** (d) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(e) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

LRC:AW:SB

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

CR H-02-121

- -X

UNITED STATES OF AMERICA,

-against-

ARTHUR ANDERSEN, LLP,

Defendant.

- -X

INDICTMENT

Cr. No. ____________
(T. 18, U.S.C., §§ 1512(b)(2) and 3551 et seq.)

THE GRAND JURY CHARGES:

I. ANDERSEN AND ENRON

1. ARTHUR ANDERSEN, LLP ("ANDERSEN"), is a partnership that performs, among other things, accounting and consulting services for clients that operate businesses throughout the United States and the world. ANDERSEN is one of the so-called "Big Five" accounting firms in the United States. ANDERSEN has its headquarters in Chicago, Illinois, and maintains offices throughout the world, including in Houston, Texas.

2. Enron Corp. ("Enron") was an Oregon corporation with its principal place of business in Houston, Texas. For most of 2001, Enron was considered the seventh largest corporation in the United States based on its reported revenues. In the previous ten years, Enron had evolved from a regional natural gas provider to, among

other things, a trader of natural gas, electricity and other commodities, with retail operations in energy and other products.

3. For the past 16 years, up until it filed for bankruptcy in December 2001, Enron retained ANDERSEN to be its auditor. Enron was one of ANDERSEN's largest clients worldwide, and became ANDERSEN's largest client in ANDERSEN's Gulf Coast region. ANDERSEN earned tens of millions of dollars from Enron in annual auditing and other fees.

4. ANDERSEN performed both internal and external auditing work for Enron mainly in Houston, Texas. ANDERSEN established within Enron's offices in Houston a work space for the ANDERSEN team that had primary responsibility for performing audit work for Enron. In addition to Houston, ANDERSEN personnel performed work for Enron in, among other locations, Chicago, Illinois, Portland, Oregon, and London, England.

II. <u>THE ANTICIPATION OF LITIGATION AGAINST ENRON AND ANDERSEN</u>

5. In the summer and fall of 2001, a series of significant developments led to ANDERSEN's foreseeing imminent civil litigation against, and government investigations of, Enron and ANDERSEN.

6. On or about October 16, 2001, Enron issued a press release announcing a $618 million net loss for the third quarter of 2001. That same day, but not as part of the press release, Enron announced to analysts that it would reduce shareholder equity by

approximately $1.2 billion. The market reacted immediately and the stock price of Enron shares plummeted.

7. The Securities and Exchange Commission ("SEC"), which investigates possible violations of the federal securities laws, opened an inquiry into Enron the very next day, requesting in writing information from Enron.

8. In addition to the negative financial information disclosed by Enron to the public and to analysts on October 16, 2001, ANDERSEN was aware by this time of additional significant facts unknown to the public.

- The approximately $1.2 billion reduction in shareholder equity disclosed to analysts on October 16, 2001, was necessitated by ANDERSEN and Enron having previously improperly categorized hundreds of millions of dollars as an *increase*, rather than a decrease, to Enron shareholder equity.
- The Enron October 16, 2001, press release characterized numerous charges against income for the third quarter as "non-recurring" even though ANDERSEN believed the company did not have a basis for concluding that the charges would in fact be non-recurring. Indeed, ANDERSEN advised Enron against using that term, and documented its objections internally in the event of litigation, but did

not report its objections or otherwise take steps to cure the public statement.

- ANDERSEN was put on direct notice of the allegations of Sherron Watkins, a current Enron employee and former ANDERSEN employee, regarding possible fraud and other improprieties at Enron, and in particular, Enron's use of off-balance-sheet "special purpose entities" that enabled the company to camouflage the true financial condition of the company. Watkins had reported her concerns to a partner at ANDERSEN, who thereafter disseminated them within ANDERSEN, including to the team working on the Enron audit. In addition, the team had received warnings about possible undisclosed side-agreements at Enron.
- The ANDERSEN team handling the Enron audit directly contravened the accounting methodology approved by ANDERSEN's own specialists working in its Professional Standards Group. In opposition to the views of its own experts, the ANDERSEN auditors had advised Enron in the spring of 2001 that it could use a favorable accounting method for its "special purpose entities."
- In 2000, an internal review conducted by senior management within ANDERSEN evaluated the ANDERSEN team assigned to audit Enron and rated the team as only a "2"

on a scale of one to five, with five being the highest rating.

- On or about October 9, 2001, correctly anticipating litigation and government investigations, ANDERSEN, which had an internal department of lawyers for routine legal matters, retained an experienced New York law firm to handle future Enron-related litigation.

III. THE WHOLESALE DESTRUCTION OF DOCUMENTS BY ANDERSEN

9. By Friday, October 19, 2001, Enron alerted the ANDERSEN audit team that the SEC had begun an inquiry regarding the Enron "special purpose entities" and the involvement of Enron's Chief Financial Officer. The next morning, an emergency conference call among high-level ANDERSEN management was convened to address the SEC inquiry. During the call, it was decided that documentation that could assist Enron in responding to the SEC was to be assembled by the ANDERSEN auditors.

10. After spending Monday, October 22, 2001 at Enron, ANDERSEN partners assigned to the Enron engagement team launched on October 23, 2001, a wholesale destruction of documents at ANDERSEN's offices in Houston, Texas. ANDERSEN personnel were called to urgent and mandatory meetings. Instead of being advised to preserve documentation so as to assist Enron and the SEC, ANDERSEN employees on the Enron engagement team were instructed by ANDERSEN partners and others to destroy immediately documentation

relating to Enron, and told to work overtime if necessary to accomplish the destruction. During the next few weeks, an unparalleled initiative was undertaken to shred physical documentation and delete computer files. Tons of paper relating to the Enron audit were promptly shredded as part of the orchestrated document destruction. The shredder at the ANDERSEN office at the Enron building was used virtually constantly and, to handle the overload, dozens of large trunks filled with Enron documents were sent to ANDERSEN's main Houston office to be shredded. A systematic effort was also undertaken and carried out to purge the computer hard-drives and E-mail system of Enron-related files.

11. In addition to shredding and deleting documents in Houston, Texas, instructions were given to ANDERSEN personnel working on Enron audit matters in Portland, Oregon, Chicago, Illinois, and London, England, to make sure that Enron documents were destroyed there as well. Indeed, in London, a coordinated effort by ANDERSEN partners and others, similar to the initiative undertaken in Houston, was put into place to destroy Enron-related documents within days of notice of the SEC inquiry. Enron-related documents also were destroyed by ANDERSEN partners in Chicago.

12. On or about November 8, 2001, the SEC served ANDERSEN with the anticipated subpoena relating to its work for Enron. In response, members of the ANDERSEN team on the Enron audit were

alerted finally that there could be "no more shredding" because the firm had been "officially served" for documents.

THE CHARGE: OBSTRUCTION OF JUSTICE

13. On or about and between October 10, 2001, and November 9, 2001, within the Southern District of Texas and elsewhere, including Chicago, Illinois, Portland, Oregon, and London, England, ANDERSEN, through its partners and others, did knowingly, intentionally and corruptly persuade and attempt to persuade other persons, to wit: ANDERSEN employees, with intent to cause and induce such persons to (a) withhold records, documents and other objects from official proceedings, namely: regulatory and criminal proceedings and investigations, and (b) alter, destroy, mutilate

and conceal objects with intent to impair the objects' integrity and availability for use in such official proceedings.

(Title 18, United States Code, Sections 1512(b)(2) and 3551 *et seq*.)

A TRUE BILL

FOREPERSON

JOSHUA R. HOCHBERG
ACTING UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF TEXAS

LESLIE R. CALDWELL
DIRECTOR, ENRON TASK FORCE

By:
Samuel W. Buell
Andrew Weissmann
Special Attorneys
Department of Justice

United States v. Stein

541 F.3d 130 (2nd Cir. 2008)

DENNIS JACOBS, Chief Judge: The United States appeals from an order of the United States District Court for the Southern District of New York (Kaplan, *J.*), dismissing an indictment against thirteen former partners and employees of the accounting firm KPMG, LLP. Judge Kaplan found that, absent pressure from the government, KPMG would have paid defendants' legal fees and expenses without regard to cost. Based on this and other findings of fact, Judge Kaplan ruled that the government deprived defendants of their right to counsel under the Sixth Amendment by causing KPMG to impose conditions on the advancement of legal fees to defendants, to cap the fees, and ultimately to end payment. *See United States v. Stein,* 435 F.Supp.2d 330, 367-73 (S.D.N.Y. 2006) ("*Stein I*"). Judge Kaplan also ruled that the government deprived defendants of their right to substantive due process under the Fifth Amendment.[1]

We hold that KPMG's adoption and enforcement of a policy under which it conditioned, capped and ultimately ceased advancing legal fees to defendants followed as a direct consequence of the government's overwhelming influence, and that KPMG's conduct therefore amounted to state action. We further hold that the government thus unjustifiably interfered with defendants' relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment, and that the government did not cure the violation. Because no other remedy will return defendants to the status quo ante, we affirm the dismissal of the indictment as to all thirteen defendants. In light of this disposition, we do not reach the district court's Fifth Amendment ruling.

BACKGROUND

The Thompson Memorandum

In January 2003, then-United States Deputy Attorney General Larry D. Thompson promulgated a policy statement, *Principles of Federal Prosecution of Business Organizations* (the "Thompson Memorandum"), which articulated "principles" to govern the Department's discretion in bringing prosecutions against business organizations. The Thompson Memorandum was closely based on a predecessor document issued in 1999 by then-U.S. Deputy Attorney General Eric Holder, *Federal Prosecution of Corporations.* Along with the familiar factors governing charging decisions, the Thompson Memorandum identifies nine additional considerations, including the company's "timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents." Mem. from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), at II. The Memorandum explains that prosecutors should inquire

[1] In later decisions, Judge Kaplan ruled that defendants Richard Smith and Mark Watson's proffer session statements were obtained in violation of their Fifth Amendment privilege against self-incrimination, and that their statements would be suppressed, *see United States v. Stein,* 440 F.Supp.2d 315 (S.D.N.Y. 2006) ("*Stein II*"); that the court had ancillary jurisdiction over Defendants-Appellees' civil suit against KPMG for advancement of fees, *see United States v. Stein,* 452 F.Supp.2d 230 (S.D.N.Y. 2006) ("*Stein III*"), *vacated, Stein v. KPMG, LLP,* 486 F.3d 753 (2d Cir. 2007); and that dismissal of the indictment is the appropriate remedy for those constitutional violations, *see United States v. Stein,* 495 F.Supp.2d 390 (S.D.N.Y. 2007) ("*Stein IV*").

> whether the corporation appears to be protecting its culpable employees and agents [and that] a corporation's promise of support to culpable employees and agents, either *through the advancing of attorneys fees,* through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.

Id. at VI (emphasis added and footnote omitted). A footnote appended to the highlighted phrase explains that because certain states require companies to advance legal fees for their officers, "a corporation's compliance with governing law should not be considered a failure to cooperate." *Id.* at VI n. 4. In December 2006—after the events in this prosecution had transpired—the Department of Justice replaced the Thompson Memorandum with the McNulty Memorandum, under which prosecutors may consider a company's fee advancement policy only where the circumstances indicate that it is "intended to impede a criminal investigation," and even then only with the approval of the Deputy Attorney General. Mem. from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, *Principles of Federal Prosecution of Business Organizations* (Dec. 12, 2006), at VII n. 3.

Commencement of the Federal Investigation

After Senate subcommittee hearings in 2002 concerning KPMG's possible involvement in creating and marketing fraudulent tax shelters, KPMG retained Robert S. Bennett of the law firm Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") to formulate a "cooperative approach" for KPMG to use in dealing with federal authorities. *Stein I,* 435 F.Supp.2d at 339. Bennett's strategy included "a decision to 'clean house'—a determination to ask Jeffrey Stein, Richard Smith, and Jeffrey Eischeid, all senior KPMG partners who had testified before the Senate and all now [Defendants-Appellees] here—to leave their positions as deputy chair and chief operating officer of the firm, vice chair-tax services, and a partner in personal financial planning, respectively." Smith was transferred and Eischeid was put on administrative leave. Stein resigned with arrangements for a three-year $100,000-per-month consultancy, and an agreement that KPMG would pay for Stein's representation in any actions brought against Stein arising from his activities at the firm. KPMG negotiated a contract with Smith that included a similar clause; but that agreement was never executed.

In February 2004, KPMG officials learned that the firm and 20 to 30 of its top partners and employees were subjects of a grand jury investigation of fraudulent tax shelters. On February 18, 2004, KPMG's CEO announced to all partners that the firm was aware of the United States Attorney's Office's ("USAO") investigation and that "[a]ny present or former members of the firm asked to appear will be represented by competent coun[sel] *at the firm's expense.*" *Stein IV,* 495 F.Supp.2d at 407 (first alteration in original and internal quotation marks omitted).

The February 25, 2004 Meeting

In preparation for a meeting with Skadden on February 25, 2004, the prosecutors—including Assistant United States Attorneys ("AUSAs") Shirah Neiman and Justin Weddle—decided to ask whether KPMG would advance legal fees to employees under investigation. Bennett started the meeting by announcing that KPMG had resolved to "clean house," that KPMG "would cooperate fully with the government's investigation," and that its goal was not to protect individual employees but rather to save the firm from being indicted. AUSA Weddle inquired about the firm's plans for advancing fees and about any legal obligation to do so. Later on, AUSA Neiman added that the government would "take into account" the firm's legal obligations to advance fees, but that "the Thompson Memorandum [w]as a point that had to be considered." Bennett then advised that although KPMG was still investigating its legal obligations to advance fees, its "common practice" was to do so. However, Bennett explained, KPMG would not pay legal fees for any partner who refused to cooperate or "took the Fifth," so long as KPMG had the legal authority to do so.

Later in the meeting, AUSA Weddle asked Bennett to ascertain KPMG's legal obligations to advance attorneys' fees. AUSA Neiman added that "misconduct" should not or cannot "be rewarded" under "federal guidelines." One Skadden attorney's notes attributed to AUSA Weddle the prediction that, if KPMG had discretion regarding fees, the government would "look at that under a microscope."

Skadden then reported back to KPMG. In notes of the meeting, a KPMG executive wrote the words "[p]aying legal fees" and "[s]everance" next to "not a sign of cooperation." *Stein IV,* 495 F.Supp.2d at 408.

Communications Between the Prosecutors and KPMG

On March 2, 2004, Bennett told AUSA Weddle that although KPMG believed it had no legal obligation to advance fees, "it would be a big problem" for the firm not to do so given its partnership structure. *Stein I,* 435 F.Supp.2d at 345 (internal quotation marks omitted). But Bennett disclosed KPMG's tentative decision to limit the amount of fees and condition them on employees' cooperation with prosecutors.

Two days later, a Skadden lawyer advised counsel for Defendant-Appellee Carol G. Warley (a former KPMG tax partner) that KPMG would advance legal fees if Warley cooperated with the government and declined to invoke her Fifth Amendment privilege against self-incrimination.

On a March 11 conference call with Skadden, AUSA Weddle recommended that KPMG tell employees that they should be "totally open" with the USAO, "even if that [meant admitting] criminal wrongdoing," explaining that this would give him good material for cross-examination. *Id.* (alteration in original and internal quotation marks omitted). That same day, Skadden wrote to counsel for the KPMG employees who had been identified as subjects of the investigation. *Id.* The letter set forth KPMG's new fees policy ("Fees Policy"), pursuant to which advancement of 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.

Id. at 345-46. The government was copied on this correspondence.

On March 12, KPMG sent a memorandum to certain other employees who had not been identified as subjects, urging them to cooperate with the government, advising them that it might be advantageous for them to exercise their right to counsel, and advising that KPMG would cover employees' "reasonable fees."

The prosecutors expressed by letter their "disappoint[ment] with [the] tone" of this memorandum and its "one-sided presentation of potential issues," and "demanded that

KPMG send out a supplemental memorandum in a form they proposed." The government's alternative language, premised on the "assum[ption] that KPMG truly is committed to fully cooperating with the Government's investigation," Letter of David N. Kelley, United States Attorney, Southern District of New York, March 17, 2004, advised employees that they could "meet with investigators without the assistance of counsel," *Stein I,* 435 F.Supp.2d at 346 (emphasis omitted). KPMG complied, and circulated a memo advising that employees "may deal directly with government representatives without counsel."

At a meeting in late March, Skadden asked the prosecutors to notify Skadden in the event any KPMG employee refused to cooperate. Over the following year, the prosecutors regularly informed Skadden whenever a KPMG employee refused to cooperate fully, such as by refusing to proffer or by proffering incompletely (in the government's view). Skadden, in turn, informed the employees' lawyers that fee advancement would cease unless the employees cooperated. The employees either knuckled under and submitted to interviews, or they were fired and KPMG ceased advancing their fees. For example, Watson and Smith attended proffer sessions after receiving KPMG's March 11 letter announcing the Fees Policy, and after Skadden reiterated to them that fees would be terminated absent cooperation. They did so because (they said, and the district court found) they feared that KPMG would stop advancing attorneys fees, although Watson concedes he attended a first session voluntarily.[3] As Bennett later assured AUSA Weddle: "Whenever your Office 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." Letter of Robert Bennett to United States Attorney's Office, November 2, 2004.

KPMG Avoids Indictment

In an early-March 2005 meeting, then-U.S. Attorney David Kelley told Skadden and top KPMG executives that a non-prosecution agreement was unlikely and that he had reservations about KPMG's level of cooperation: "I've seen a lot better from big companies." Bennett reminded Kelley how KPMG had capped and conditioned its advancement of legal fees. Kelley remained unconvinced.

KPMG moved up the Justice Department's chain of command. At a June 13, 2005 meeting with U.S. Deputy Attorney General James Comey, Bennett stressed KPMG's pressure on employees to cooperate by conditioning legal fees on cooperation; it was, he said, "precedent[ ]setting." KPMG's entreaties were ultimately successful: on August 29, 2005, the firm entered into a deferred prosecution agreement (the "DPA") under which KPMG admitted extensive wrongdoing, paid a $456 million fine, and committed itself to cooperation in any future government investigation or prosecution.

Indictment of Individual Employees

On August 29, 2005—the same day KPMG executed the DPA—the government indicted six of the Defendants-Appellees (along with three other KPMG employees): Jeffrey Stein; Richard Smith; Jeffrey Eischeid; John Lanning, Vice Chairman of Tax Services; Philip Wiesner, a former tax partner; and Mark Watson, a tax partner. A superseding indictment

[3] As discussed above, in a decision that is the subject of the summary order filed today, the district court held that Defendants-Appellees Smith and Watson's proffer statements were obtained in violation of their Fifth Amendment privilege against self-incrimination and that their statements would be suppressed.

filed on October 17, 2005 named ten additional employees, including seven of the Defendants-Appellees: Larry DeLap, a former tax partner in charge of professional practice; Steven Gremminger, a former partner and associate general counsel; former tax partners Gregg Ritchie, Randy Bickham and Carl Hasting; Carol G. Warley; and Richard Rosenthal, a former tax partner and Chief Financial Officer of KPMG.[4] Pursuant to the Fees Policy, KPMG promptly stopped advancing legal fees to the indicted employees who were still receiving them.

Procedural History

On January 12, 2006, the thirteen defendants (among others) moved to dismiss the indictment based on the government's interference with KPMG's advancement of fees. In a submission to the district court, KPMG represented that

> the Thompson memorandum in conjunction with the government's statements relating to payment of legal fees affected KPMG's determination(s) with respect to the advancement of legal fees and other defense costs to present or former partners and employees .... In fact, KPMG is prepared to state that the Thompson memorandum substantially influenced KPMG's decisions with respect to legal fees....

Stein IV, 495 F.Supp.2d at 405 (internal quotation marks and emphasis omitted).

At a hearing on March 30, 2006, Judge Kaplan asked the government whether it was "prepared at this point to commit that [it] has no objection whatsoever to KPMG exercising its free and independent business judgment as to whether to advance defense costs to these defendants and that if it were to elect to do so the government would not in any way consider that in determining whether it had complied with the DPA?" The AUSA 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."

Judge Kaplan ordered discovery and held a three-day evidentiary hearing in May 2006 to ascertain whether the government had contributed to KPMG's adoption of the Fees Policy. The court heard testimony from two prosecutors, one IRS agent, three Skadden attorneys, and one lawyer from KPMG's Office of General Counsel, among others. Numerous documents produced in discovery by both sides were admitted into evidence.

Stein I

Judge Kaplan's opinion and order of June 26, 2006 noted, as the parties had stipulated, that KPMG's past practice was to advance legal fees for employees facing regulatory, civil and criminal investigations without condition or cap. *See Stein I,* 435 F.Supp.2d at 340. Starting from that baseline, Judge Kaplan made the following findings of fact. At the February 25, 2004 meeting, Bennett began by "test[ing] the waters to see whether KPMG could adhere to its practice of paying its employees' legal expenses when litigation loomed [by asking] for [the] government's view on the subject." *Id.* at 341 (footnote omitted). It is not clear what AUSA Neiman intended to convey when she said that "misconduct" should not or cannot "be rewarded" under "federal guidelines"; but her statement "was understood by both KPMG and government representatives as a reminder that payment of legal

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[4] The superseding indictment filed on October 17, 2005 charged 19 defendants in 46 counts for conspiring to defraud the United States and the IRS, tax evasion and obstruction of the internal revenue laws (although not every individual was charged with every offense).

fees by KPMG, beyond any that it might legally be obligated to pay, could well count against KPMG in the government's decision whether to indict the firm." *Id.* at 344 (internal quotation marks omitted). "[W]hile the USAO did not say in so many words that it did not want KPMG to pay legal fees, no one at the meeting could have failed to draw that conclusion." *Id.*

Based on those findings, Judge Kaplan arrived at the following ultimate findings of fact, all of which the government contests on appeal:

> [1] "the Thompson Memorandum caused KPMG to consider departing from its long-standing policy of paying legal fees and expenses of its personnel in all cases and investigations even before it first met with the USAO" and induced KPMG to seek "an indication from the USAO that payment of fees in accordance with its settled practice would not be held against it";
>
> [2] the government made repeated references to the Thompson Memo in an effort to "reinforce[ ] the threat inherent in the Thompson Memorandum";
>
> [3] "the government conducted itself in a manner that evidenced a desire to minimize the involvement of defense attorneys"; and
>
> [4] but for the Thompson Memorandum and the prosecutors' conduct, KPMG would have paid defendants' legal fees and expenses without consideration of cost.

Id. at 352-53.

Against that background, Judge Kaplan ruled that a defendant has a fundamental right under the Fifth Amendment to fairness in the criminal process, including the ability to get and deploy in defense all "resources lawfully available to him or her, free of knowing or reckless government interference," *id.* at 361, and that the government's reasons for infringing that right in this case could not withstand strict scrutiny, *id.* at 362-65. Judge Kaplan also ruled that the same conduct deprived each defendant of the Sixth Amendment right "to choose the lawyer or lawyers he or she desires and to use one's own funds to mount the defense that one wishes to present." *Id.* at 366 (footnote omitted). He reasoned that "the government's law enforcement interests in taking the specific actions in question [do not] sufficiently outweigh the interests of the KPMG Defendants in having the resources needed to defend as they think proper against these charges." *Id.* at 368. "[T]he fact that advancement of legal fees occasionally might be part of an obstruction scheme or indicate a lack of full cooperation by a prospective defendant is insufficient to justify the government's interference with the right of individual criminal defendants to obtain resources lawfully available to them in order to defend themselves...." *Id.* at 369.

Judge Kaplan rejected the government's position that defendants have no right to spend "other people's money" on high-priced defense counsel: "[T]he KPMG Defendants had at least an expectation that their expenses in defending any claims or charges brought against them by reason of their employment by KPMG would be paid by the firm," and "any benefits that would have flowed from that expectation the legal fees at issue now were, in every material sense, their property, not that of a third party." *Id.* at 367. He further determined that defendants need not show how their defense was impaired: the government's interference with their Sixth Amendment "right to be represented as they choose, like a deprivation of the right to counsel of their choice, is complete irrespective of the quality of the representation they receive." *Id.* at 369.

As to remedy, Judge Kaplan conceded that dismissal of the indictment would be inappropriate unless other avenues for obtaining fees from KPMG were first exhausted. To that end, Judge Kaplan invited defendants to file a civil suit against KPMG under the district court's ancillary jurisdiction. The suit was commenced, and Judge Kaplan denied KPMG's motion to dismiss. However, this Court ruled that the district court lacked ancillary jurisdiction over the action.

Stein IV

Judge Kaplan dismissed the indictment against the thirteen defendants on July 16, 2007. ***

III

Judge Kaplan found that "KPMG's decision to cut off all payments of legal fees and expenses to anyone who was indicted and to limit and to condition such payments prior to indictment upon cooperation with the government *was the direct consequence* of the pressure applied by the Thompson Memorandum and the USAO." *Stein I,* 435 F.Supp.2d at 353 (emphasis added); *see also Stein II,* 440 F.Supp.2d at 334 (relying on this finding to conclude that KPMG's conduct was fairly attributable to the State for *Fifth* Amendment purposes). The government protests that KPMG's adoption and enforcement of its Fees Policy was private action, outside the ambit of the Sixth Amendment. ***

KPMG's adoption and enforcement of the Fees Policy amounted to "state action" because KPMG "operate[d] as a willful participant in joint activity" with the government, and because the USAO "significant[ly] encourage[d]" KPMG to withhold legal fees from defendants upon indictment. *Flagg v. Yonkers Sav. & Loan Ass'n,* 396 F.3d 178, 187 (2d Cir. 2005). The government brought home to KPMG that its survival depended on its role in a joint project with the government to advance government prosecutions. The government is therefore legally "responsible for the specific conduct of which the [criminal defendants] complain[ ]." *Blum v. Yaretsky,* 457 U.S. 991, 1004 (1982) (emphasis omitted).

The government argues that "KPMG's decision to condition legal fee payments on cooperation, while undoubtedly influenced by the Thompson Memorandum, was not coerced or directed by the Government." But that argument runs up against the district court's factual finding (which we do not disturb) that the fees decision "was the direct consequence" of the Memorandum and the prosecutors' conduct. Nevertheless, it remains a question of law whether the facts as found by the district court establish state action.

State action is established here as a matter of law because the government forced KPMG to adopt its constricted Fees Policy. The Thompson Memorandum itself—which prosecutors stated would be considered in deciding whether to indict KPMG—emphasizes that cooperation will be assessed in part based upon whether, in advancing counsel fees, "the corporation appears to be protecting its culpable employees and agents." Since defense counsel's objective in a criminal investigation will virtually always be to protect the client, KPMG's risk was that fees for defense counsel would be advanced to someone the government considered culpable. So the only safe course was to allow the government to become (in effect) paymaster.

The prosecutors reinforced this message by inquiring into KPMG's fees obligations, referring to the Thompson Memorandum as "a point that had to be considered," and warning that "misconduct" should not or cannot "be rewarded" under "federal guidelines."

Stein I, 435 F.Supp.2d at 341-42. The government had KPMG's full attention. It is hardly surprising, then, that KPMG decided to condition payment of fees on employees' cooperation with the government and to terminate fees upon indictment: only that policy would allow KPMG to continue advancing fees while minimizing the risk that prosecutors would view such advancement as obstructive. ***

An adversarial relationship does not normally bespeak partnership. But KPMG faced ruin by indictment and reasonably believed it must do everything in its power to avoid it. The government's threat of indictment was easily sufficient to convert its adversary into its agent. KPMG was not in a position to consider coolly the risk of indictment, weigh the potential significance of the other enumerated factors in the Thompson Memorandum, and decide for itself how to proceed.

We therefore conclude that KPMG's adoption and enforcement of the Fees Policy (both before and upon defendants' indictment) amounted to state action. The government may properly be held "responsible for the specific conduct of which the [criminal defendants] complain[ ]," *Blum,* 457 U.S. at 1004 (emphasis omitted), *i.e.,* the deprivation of their Sixth Amendment right to counsel, if the violation is established.

IV

The district court's ruling on the Sixth Amendment was based on the following analysis (set out here in précis). The Sixth Amendment protects "an individual's right to choose the lawyer or lawyers he or she desires," *Stein I,* 435 F.Supp.2d at 366 (citing *Wheat v. United States,* 486 U.S. 153, 164 (1988)), and "to use one's own funds to mount the defense that one wishes to present," *id.* (citing *Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 624 (1989)). The goal is to secure "a defendant's right to spend his own money on a defense." *Id.* at 367. Because defendants reasonably expected to receive legal fees from KPMG, the fees "were, in every material sense, their property." *Id.* The government's interest in retaining discretion to treat as obstruction a company's advancement of legal fees "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." *Id.* at 369. Defendants need not make a "particularized showing" of how their defense was impaired, *id.* at 372, because "[v]irtually everything the defendants do in this case may be influenced by the extent of the resources available to them," such as selection of counsel and "what the KPMG Defendants can pay their lawyers to do," *id.* at 371-72. Therefore, the Sixth Amendment violation "is complete irrespective of the quality of the representation they receive." *Id.* at 369.[10]

[10] In *Stein IV*, Judge Kaplan nevertheless expanded his findings as to Sixth Amendment harms suffered by particular defendants: defendants Gremminger, Hasting and Watson were deprived of their chosen counsel, "lawyers who had represented them as long as KPMG was paying the bills"; and defendant Ritchie was deprived of the services of Cadwalader Wickersham & Taft, "which was to have played an integral role in his defense." 495 F.Supp.2d at 421. In addition:

> All of the [present] KPMG Defendants ... say that KPMG's refusal to pay their post-indictment legal fees has caused them to restrict the activities of their counsel, limited or precluded their attorneys' review of the documents produced by the government in discovery, prevented them from interviewing witnesses, caused them to refrain from retaining expert witnesses, and/or left them without information technology assistance necessary for dealing with the mountains of electronic discovery. The government has not contested these assertions. The Court therefore has no reason to doubt, and hence finds, that all of them have been forced to limit their defenses in the respects claimed for economic reasons and

A

Most of the state action relevant here—the promulgation of the Thompson Memorandum, the prosecutors' communications with KPMG regarding the advancement of fees, KPMG's adoption of a Fees Policy with caps and conditions, and KPMG's repeated threats to employees identified by prosecutors as being uncooperative—pre-dated the indictments of August and October 2005. (Of course, *after* the indictments were filed KPMG ceased advancing fees to all thirteen of the present defendants who were still receiving fees up to that point. As explained in Part III, this was also state action.) So we must determine how this pre-indictment conduct may bear on defendants' Sixth Amendment claim. ***

Although defendants' Sixth Amendment rights attached only upon indictment, the district court properly considered pre-indictment state action that affected defendants post-indictment. When the government acts prior to indictment so as to impair the suspect's relationship with counsel post-indictment, the pre-indictment actions ripen into cognizable Sixth Amendment deprivations upon indictment. As Judge Ellis explained in *United States v. Rosen,* 487 F.Supp.2d 721 (E.D. Va. 2007), "it is entirely plausible that pernicious effects of the pre-indictment interference continued into the post-indictment period, effectively hobbling defendants' Sixth Amendment rights to retain counsel of choice with funds to which they had a right.... [I]f, as alleged, the government coerced [the employer] into halting fee advances on defendants' behalf and the government did so for the purpose of undermining defendants' relationship with counsel once the indictment issued, the government violated defendants' right to expend their own resources towards counsel once the right attached." *Id.* at 734.

Since the government forced KPMG to adopt the constricted Fees Policy—including the provision for terminating fee advancement upon indictment—and then compelled KPMG to enforce it, it was virtually certain that KPMG would terminate defendants' fees upon indictment. We therefore reject the government's argument that its actions (virtually all pre-indictment) are immune from scrutiny under the Sixth Amendment.

B

We now consider "*what* the [Sixth Amendment] right guarantees." *Rothgery,* 128 S.Ct. at 2592 (Alito, *J.,* concurring).

The Sixth Amendment ensures that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. Thus "the Sixth Amendment guarantees the defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 624-25 (1989). "[A]n element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him." *United States v. Gonzalez-Lopez,* 548 U.S. 140, 144 (2006).

> that they would not have been so constrained if KPMG paid their expenses subject only to the usual sort of administrative requirements typically imposed by corporate law departments on outside counsel fees.

Id. at 418-19 (footnote omitted). Judge Kaplan explained that even though many defendants had net assets ranging from $1 million to $5 million, their resources were inadequate "to defend this case as they would have defended it absent the government's actions." *Id.* at 423.

The government must "honor" a defendant's Sixth Amendment right to counsel:

> This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance.... [A]t the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.

Maine v. Moulton, 474 U.S. 159, 170-71 (1985). This is intuitive: the right to counsel in an adversarial legal system would mean little if defense counsel could be controlled by the government or vetoed without good reason. ***

The government, relying on *Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617 (1989), contends that a defendant has no Sixth Amendment right to a defense funded by someone else's money. In that case, the Supreme Court ruled that a defendant's Sixth Amendment right to retain counsel of choice was not violated when the funds he earmarked for defense were seized under a federal forfeiture statute, because title to the forfeitable assets had vested in the United States. *Id.* at 628.

The government focuses on the following passage from *Caplin & Drysdale*:

> Whatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond "the individual's right to spend his own money to obtain the advice and assistance of ... counsel." *Walters v. National Assn. of Radiation Survivors,* 473 U.S. 305, 370 (1985) (Stevens, J., dissenting). *A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice.* A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his ....

Caplin & Drysdale, 491 U.S. at 626 (emphasis added and first omission in original). The holding of *Caplin & Drysdale* is narrow: the Sixth Amendment does not prevent the government from reclaiming its property from a defendant even though the defendant had planned to fund his legal defense with it. It is easy to distinguish the case of an employee who reasonably expects to receive attorneys' fees as a benefit or perquisite of employment, whether or not the expectation arises from a legal entitlement. As has been found here as a matter of fact, these defendants *would* have received fees from KPMG but for the government's interference. Although "there is no Sixth Amendment right for a defendant to obtain counsel using tainted funds, [a defendant] still possesses a qualified Sixth Amendment right to use *wholly legitimate funds* to hire the attorney of his choice." *United States v. Farmer,* 274 F.3d 800, 804 (4th Cir. 2001) (emphasis added).

It is axiomatic that if defendants had already received fee advances from KPMG, the government could not (absent justification) deliberately interfere with the use of that money to fuel their defenses. And the government concedes that it could not prevent a lawyer from furnishing a defense gratis. Presumably, such a lawyer could pay another lawyer to represent the defendant subject, of course, to ethical rules governing third-party payments to counsel. And if the Sixth Amendment prohibits the government from interfering with such arrangements, then surely it also prohibits the government from interfering with financial donations by others, such as family members and neighbors and employers. In a nutshell, the Sixth Amendment protects against unjustified governmental interference with the right to defend oneself using whatever assets one has or might reasonably and lawfully obtain.

The government points out that KPMG's past fee practice was voluntary and subject to change, and that defendants therefore could have had no reasonable expectation of the ongoing advancement of fees. But this argument simply quarrels with Judge Kaplan's finding that absent any state action, KPMG would have paid defendants' legal fees and expenses without regard to cost. Defendants were not necessarily entitled to fee advancement as a matter of law, but the Sixth Amendment prohibits the government from impeding the supply of defense resources (even if voluntary or gratis), absent justification. Therefore, unless the government's interference was justified, it violated the Sixth Amendment. ***

It is also urged that a company may pretend cooperation while "circling the wagons," that payment of legal fees can advance such a strategy, and that the government has a legitimate interest in being able to assess cooperation using the payment of fees as one factor. Even if that can be a legitimate justification, it would not be in play here: prosecutors testified before the district court that they were never concerned that KPMG was "circling the wagons." Moreover, it is unclear how the circling of wagons is much different from the legitimate melding of a joint defense.

The government conceded at oral argument that it is in the government's interest that every defendant receive the best possible representation he or she can obtain. A company that advances legal fees to employees may stymie prosecutors by affording culpable employees with high-quality representation. 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.

Judge Kaplan found that defendants Gremminger, Hasting, Ritchie and Watson were unable to retain the counsel of their choosing as a result of the termination of fee advancements upon indictment. The government does not contest this factual finding, and we will not disturb it. A defendant who is deprived of counsel of choice (without justification) need not show how his or her defense was impacted; such errors are structural and are not subject to harmless-error review. *** Therefore, the government deprived defendants Gremminger, Hasting, Ritchie and Watson of their Sixth Amendment right to counsel of choice.

The remaining defendants—Bickham, DeLap, Eischeid, Lanning, Rosenthal, Smith, Stein, Warley, and Wiesner—do not claim they were deprived of their chosen counsel. Rather, they assert that the government unjustifiably interfered with their relationship with counsel and their ability to defend themselves. In the district court, the government conceded that these defendants are also entitled to dismissal of the indictment, assuming the correctness of *Stein I*. We agree: these defendants can easily demonstrate interference in their relationships with counsel and impairment of their ability to mount a defense based on Judge Kaplan's non-erroneous findings that the post-indictment termination of fees "caused them to restrict the activities of their counsel," and thus to limit the scope of their pre-trial investigation and preparation. Defendants were indicted based on a fairly novel theory of criminal liability; they faced substantial penalties; the relevant facts are scattered throughout over 22 million documents regarding the doings of scores of people; the subject matter is "extremely complex;" technical expertise is needed to figure out and explain what happened; and trial was expected to last between six and eight months. As Judge Kaplan found, these defendants "have been forced to limit their defenses ... for economic reasons and ... they would not have been so constrained if KPMG paid their expenses." We therefore hold that these defendants were also deprived of their right to counsel under the Sixth Amendment.

For the foregoing reasons, we AFFIRM the judgment of the district court dismissing defendants' indictment.

Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement

15 Sept 2022

Good afternoon. Thank you, Dean McKenzie, for the introduction and for hosting us today. I'm happy to be back at NYU, and to see so many friends and former colleagues in the room.

Let me start by acknowledging some of my DOJ colleagues who are here. That includes the U.S. Attorneys for the Southern and Eastern Districts of New York, New Jersey, and Connecticut.

But just as importantly, we're joined in person and on the livestream by line prosecutors, agents, and investigative analysts—the career men and women who do the hard work, day in and day out, to make great cases and hold wrongdoers accountable.

I also want to recognize our federal and state partners who play a critical role in corporate enforcement. And of course, let me also thank Professor Arlen and the NYU Program on Corporate Compliance and Enforcement for arranging this event and for serving as a bridge between the worlds of policymaking and academia.

Addressing corporate crime is not a new subject for the Justice Department. In the aftermath of Watergate, Attorney General Edward Levi was tasked not only with restoring the Department's institutional credibility, but also with rebuilding its corporate enforcement program.

In a 1975 speech, he told prosecutors that there was great demand to be more aggressive against, what he called, "white collared crime." He explained his distaste for that term, saying that it suggested a distinction in law enforcement based upon social class. But, nonetheless, he acknowledged that it was an area that needed to be given "greater emphasis." These words are as true today as they were then.

But Attorney General Levi also said that efforts to fight corporate crime were hampered by a lack of resources, specially trained investigators, and other issues. He answered those complaints as all great Attorneys General do—he said his Deputy Attorney General would take care of it. For at least a half-century, therefore, it has been the responsibility of my predecessors to set corporate criminal policy for the Department, and I follow in their footsteps.

Last October, I announced immediate steps the Justice Department would take to tackle corporate crime.

I also formed the Corporate Crime Advisory Group, a group of DOJ experts tasked with a top-to-bottom review of our corporate enforcement efforts.

To get a wide range of perspectives, we met with a broad group of outside experts, including public interest groups, ethicists, academics, audit committee members, in-house attorneys, former corporate monitors, and members of the business community and defense bar. Many of these people are here today.

Our meetings sparked discussions on individual accountability and corporate responsibility; on predictability and transparency; and on the ways enforcement policies must square with the realities of the modern economy. Every meeting resulted in some idea or insight that was helpful and that we sought to incorporate into our work. Today, you will hear how these new policies reflect this diverse input.

Let me turn now to substance—and the changes the Department is implementing to further strengthen how we prioritize and prosecute corporate crime.

First, I'll reiterate that the Department's number one priority is individual accountability—something the Attorney General and I have made clear since we came back into government. Whether wrongdoers are on the trading floor or in the C-suite, we will hold those who break the law accountable, regardless of their position, status, or seniority.

Second, I'll discuss our approach to companies with a history of misconduct. I previously announced that prosecutors must consider the full range of a company's prior misconduct when determining the appropriate resolution. Today, I will outline additional guidance for evaluating corporate recidivism.

Third, I'll highlight new Department policy on voluntary self-disclosures, including the concrete and positive consequences that will flow from self-disclosure. We expect good companies to step up and own up to misconduct. Voluntary self-disclosure is an indicator of a working compliance program and a healthy corporate culture. Those companies who own up will be appropriately rewarded in the Department's approach to corporate crime.

Fourth, I'll detail when compliance monitors are appropriate and how we can select them equitably and transparently. Today, I am also directing Department prosecutors to monitor those monitors: to ensure they remain on the job, on task, and on budget.

Finally, I'll discuss how the Department will encourage companies to shape financial compensation around promoting compliance and avoiding improperly risky behavior. These steps include rewarding companies that claw back compensation from employees, managers, and executives when misconduct happens. No one should have a financial interest to look the other way or ignore red flags. Corporate wrongdoers—rather than shareholders—should bear the consequences of misconduct.

Taken together, the policies we're announcing today make clear that we won't accept business as usual. With a combination of carrots and sticks—with a mix of incentives and deterrence—we're giving general counsels and chief compliance officers the tools they need to make a business case for responsible corporate behavior. In short, we're empowering companies to do the right thing—and empowering our prosecutors to hold accountable those that don't.

Individual Accountability

Let me start with our top priority for corporate criminal enforcement: going after individuals who commit and profit from corporate crime.

In the last year, the Department of Justice has secured notable trial victories, including convictions of the founder and chief operating officer of Theranos; convictions of J.P. Morgan traders for commodities manipulation; the conviction of a managing director at Goldman Sachs for bribery; and the first-ever conviction of a pharmaceutical CEO for unlawful distribution of controlled substances.

Despite those steps forward, we cannot ignore the data showing overall decline in corporate criminal prosecutions over the last decade. We need to do more and move faster. So, starting today, we will take steps to empower our prosecutors, to clear impediments in their way, and to expedite our investigations of individuals.

To do that, we will require cooperating companies to come forward with important evidence more quickly.

Sometimes we see companies and counsel elect—for strategic reasons—to delay the disclosure of critical documents or information while they consider how to mitigate the damage or investigate on their own. Delayed disclosure undermines efforts to hold individuals accountable. It limits the Department's ability to proactively pursue leads and preserve evidence before it disappears. As time goes on, the lapse of statutes of limitations, dissipation of evidence, and the fading of memories can all undermine a successful prosecution.

In individual prosecutions, speed is of the essence.

Going forward, undue or intentional delay in producing information or documents—particularly those that show individual culpability—will result in the reduction or denial of cooperation credit. Gamesmanship with disclosures and productions will not be tolerated.

If a cooperating company discovers hot documents or evidence, its first reaction should be to notify the prosecutors. This requirement is in addition to prior guidance that corporations must provide all relevant, non-privileged facts about individual misconduct to receive any cooperation credit.

Separately, Department prosecutors will work to complete investigations and seek warranted criminal charges against individuals prior to or at the same time as entering a resolution against a corporation. Sometimes the back-and-forth of resolving with a company can bog down individual prosecutions, since our prosecutors have finite resources.

In cases where it makes sense to resolve a corporate case first, there must be a full investigative plan outlining the remaining work to do on the individual cases and a timeline for completing that work.

Collectively, this new guidance should push prosecutors and corporate counsel alike to feel they are "on the clock" to expedite investigations, particularly as to culpable individuals. While many companies and prosecutors follow these principles now, this guidance sets new expectations about the sequencing of investigations and clarifies the Department's priorities.

History of Misconduct

Now, it's safe to say that no issue garnered more commentary in our discussions than the commitment we made last year to consider the full criminal, civil, and regulatory record of any company when deciding the appropriate resolution.

That decision was driven by the fact that between 10% and 20% of large corporate criminal resolutions have involved repeat offenders.

We received many recommendations about how to contextualize historical misconduct, to develop a full and fair picture of the misconduct and corporate culture under review. We heard about the need to evaluate the regulatory environment that companies operate in, as well as the need to consider the age of the misconduct and subsequent reforms to the company's compliance culture.

In response to that feedback, today, we are releasing additional guidance about how such histories will be evaluated. Now let me emphasize a few points.

First, not all instances of prior misconduct are created equal. For these purposes, the most significant types of prior misconduct will be criminal resolutions here in the United States, as well as prior wrongdoing involving the same personnel or management as the current misconduct. But past actions may not always reflect a company's current culture and commitment to compliance. So, dated conduct will generally be accorded less weight.

And what do we mean by dated? Criminal resolutions that occurred more than 10 years before the conduct currently under investigation, and civil or regulatory resolutions that took place more than five years before the current conduct.

We will also consider the nature and circumstances of the prior misconduct, including whether it shared the same root causes as the present misconduct. Some facts might indicate broader weaknesses in the compliance culture or practices, such as wrongdoing that occurred under the same management team or executive leadership. Other facts might provide important mitigating context.

For example, if a corporation operates in a highly regulated industry, its history should be compared to others similarly situated, to determine if the company is an outlier.

Separately, we do not want to discourage acquisitions that result in reformed and improved compliance structures. We will not treat as recidivists companies with a proven track record of compliance that acquire companies with a history of compliance problems, so long as those problems are promptly and properly addressed post-acquisition.

Finally, I want to be clear that this Department will disfavor multiple, successive non-prosecution or deferred prosecution agreements with the same company. Before a prosecution team extends an offer for a successive NPA or DPA, Department leadership will scrutinize the proposal. That will ensure greater consistency across the Department and a more holistic approach to corporate recidivism.

Companies cannot assume that they are entitled to an NPA or a DPA, particularly when they are frequent flyers. We will not shy away from bringing charges or requiring guilty pleas where facts and circumstances require. If any corporation still thinks criminal resolutions can be priced in as the cost of doing business, we have a message—times have changed.

Voluntary Self-Disclosure

That said, the clearest path for a company to avoid a guilty plea or an indictment is voluntary self-disclosure. The Department is committed to providing incentives to companies that voluntarily self-disclose misconduct to the government. In many cases, voluntary self-disclosure is a sign that the company has developed a compliance program and has fostered a culture to detect misconduct and bring it forward.

Our goal is simple: to reward those companies whose historical investments in compliance enable voluntary self-disclosure and to incentivize other companies to make the same investments going forward.

Voluntary self-disclosure programs, in various Department components, have already been successful. Take, for example, the Antitrust Division's Leniency Program, the Criminal Division's voluntary disclosure program for FCPA violations, and the National Security Division's program for export control and sanctions violations. We now want to expand those policies Department-wide.

We also want to clarify the benefits of promptly coming forward to self-report, so that chief compliance officers, general counsels, and others can make the case in the boardroom that voluntary self-disclosure is a good business decision.

So, for the first time ever, every Department component that prosecutes corporate crime will have a program that incentivizes voluntary self-disclosure. If a component currently lacks a formal, documented policy, it must draft one.

Predictability is critical. These policies must provide clear expectations of what self-disclosure entails. And they must identify the concrete benefits that a self-disclosing company can expect.

I am also announcing common principles that will apply across these voluntary self-disclosure policies. Absent aggravating factors, the Department will not seek a guilty plea when a company has voluntarily self-disclosed, cooperated, and remediated misconduct. In addition, the Department will not require an independent compliance monitor for such a corporation if, at the time of resolution, it also has implemented and tested an effective compliance program.

Simply put, the math is easy: voluntary self-disclosure can save a company hundreds of millions of dollars in fines, penalties, and costs. It can avoid reputational harms that arise from pleading guilty. And it can reduce the risk of collateral consequences like suspension and debarment in relevant industries.

If you look at recent cases, you can see the value proposition. Voluntary self-disclosure cases have resulted in declinations and non-prosecution agreements with no significant criminal penalties. By contrast, recent cases that did not involve self-disclosure have resulted in guilty pleas and billions of dollars in criminal penalties, this year alone. I expect that resolutions over the next few months will reaffirm how much better companies fare when they come forward and self-disclose.

Independent Compliance Monitors

Let me turn to monitors. Over the past year of discussions, we heard a call for more transparency to reduce suspicion and confusion about monitors. Today, we're addressing those concerns.

First, we are releasing new guidance for prosecutors about how to identify the need for a monitor, how to select a monitor, and how to oversee the monitor's work to increase the likelihood of success.

Second, going forward, all monitor selections will be made pursuant to a documented selection process that operates transparently and consistently.

Finally, Department prosecutors will ensure that the scope of every monitorship is tailored to the misconduct and related compliance deficiencies of the resolving company. They will receive regular updates to verify that the monitor stays on task and on budget. We at the Department of Justice are not regulators, nor do we aspire to be. But where we impose a monitor, we recognize our obligations to stay involved and monitor the monitor.

Corporate Culture

As everyone here knows, it all comes back to corporate culture. Having served as both outside counsel and a board member in the past, I know the difficult decisions and trade-offs companies face about how to invest corporate resources, structure compliance programs, and foster the right corporate culture.

In our discussions leading to this announcement, we identified encouraging trends and new ways in which compliance departments are being strengthened and sharpened. But resourcing a compliance department is not enough; it must also be backed by, and integrated into, a corporate culture that rejects wrongdoing for the sake of profit. And companies can foster that culture through their leadership and the choices they make.

To promote that culture, an increasing number of companies are choosing to reflect corporate values in their compensation systems.

On the deterrence side, those companies employ clawback provisions, the escrowing of compensation, and other ways to hold financially accountable individuals who contribute to criminal misconduct. Compensation systems that clearly and effectively impose financial penalties for misconduct can deter risky behavior and foster a culture of compliance.

On the incentive side, companies are building compensation systems that use affirmative metrics and benchmarks to reward compliance-promoting behavior.

Going forward, when prosecutors evaluate the strength of a company's compliance program, they will consider whether its compensation systems reward compliance and impose financial sanctions on employees, executives, or directors whose direct or supervisory actions or omissions contributed to criminal conduct. They will evaluate what companies say and what they do, including whether, after learning of misconduct, a company actually claws back compensation or otherwise imposes financial penalties.

I have asked the Criminal Division to develop further guidance by the end of the year on how to reward corporations that employ clawback or similar arrangements. This will include how to help shift the burden of corporate financial penalties away from shareholders—who frequently play no role in misconduct—onto those more directly responsible.

Conclusion

But we're not done.

We will continue to engage and protect victims—workers, consumers, investors, and others.

We will continue to find ways to improve our approach to corporate crime, such as by enhancing the effectiveness of the federal government's system for debarment and suspension.

We will continue to seek targeted resources for corporate criminal enforcement, including the $250 million we are requesting from Congress for corporate crime initiatives next year.

Today's announcements are fundamentally about individual accountability and corporate responsibility. But they are also about ownership and choice.

Companies should feel empowered to do the right thing—to invest in compliance and culture, and to step up and own up when misconduct occurs. Companies that do so will welcome the announcements today. For those who don't, however, our Department prosecutors will be empowered, too—to hold accountable those who don't follow the law.

Thank you again for having me here today. I look forward to taking some questions.

Explaining Operation Warp Speed

What's the goal?

Operation Warp Speed (OWS) aims to begin delivery of 300 million doses of a safe, effective vaccine for COVID-19 by January 2021, as part of a broader strategy to accelerate the development, manufacturing, and distribution of COVID-19 vaccines, therapeutics, and diagnostics (collectively known as countermeasures).

How will the goal be accomplished?

By investing in and coordinating countermeasure development, OWS will allow countermeasures such as a vaccine to be delivered to patients more rapidly while adhering to standards for safety and efficacy.

Who's working on Operation Warp Speed?

OWS is a partnership among components of the Department of Health and Human Services (HHS), including the Centers for Disease Control and Prevention (CDC), the Food and Drug Administration (FDA), the National Institutes of Health (NIH), and the Biomedical Advanced Research and Development Authority (BARDA), and the Department of Defense (DoD). OWS engages with private firms and other federal agencies, including the Department of Agriculture, the Department of Energy, and the Department of Veterans Affairs. It will coordinate existing HHS-wide efforts, including the NIH's Accelerating COVID-19 Therapeutic Interventions and Vaccines (ACTIV) partnership, NIH's Rapid Acceleration of Diagnostics (RADx) initiative, and work by BARDA.

What's the plan and what's happened so far?

DEVELOPMENT: To accelerate development while maintaining standards for safety and efficacy, OWS has been selecting the most promising countermeasure candidates and providing coordinated government support.

Protocols for the demonstration of safety and efficacy are being aligned, which will allow these harmonized clinical trials to proceed more quickly, and the protocols for the trials will be overseen by the federal government (NIH), as opposed to traditional public-private partnerships, in which pharmaceutical companies decide on their own protocols. Rather than eliminating steps from traditional development timelines, steps will proceed simultaneously, such as starting manufacturing of vaccines and therapeutics at industrial scale well before the demonstration of efficacy and safety as happens normally. This increases the financial risk, but not the product risk.

Select actions to support OWS vaccine and therapeutic development so far include:

- **March 30:** HHS announced $456 million in funds for Johnson & Johnson's (Janssen) candidate vaccine. Phase 1 clinical trials began in Belgium on July 24th and in the U.S on July 27th.
- **April 16:** HHS made up to $483 million in support available for Moderna's candidate vaccine, which began Phase 1 trials on March 16 and received a fast-track designation from FDA. This agreement was expanded on July 26 to include an additional $472 million to support late-stage clinical development, including the expanded Phase 3 study of the company's mRNA vaccine, which began on July 27th.
- **May 21:** HHS announced up to $1.2 billion in support for AstraZeneca's candidate vaccine, developed in conjunction with the University of Oxford. The agreement is to make available at least 300 million doses of the vaccine for the United States, with the first doses delivered as early as October 2020 and Phase 3 clinical studies beginning this summer with approximately 30,000 volunteers in the United States.
- **July 7:** HHS announced $450 million in funds to support the large-scale manufacturing of Regeneron's COVID-19 investigational anti-viral antibody treatment, REGN-COV2. This agreement is the first of a number of OWS awards to support potential therapeutics all the way through to manufacturing. As part of the manufacturing demonstration project, doses of the medicine will be packaged and ready to ship immediately if clinical trials are successful and FDA grants EUA or licensure.
- **July 7:** HHS announced $1.6 billion in funds to support the large-scale manufacturing of Novavax's vaccine candidate. By funding Novavax's manufacturing effort, the federal government will own the 100 million doses expected to result from the demonstration project.
- **July 22:** HHS announced up to $1.95 billion in funds to Pfizer for the large-scale manufacturing and nationwide distribution of 100 million doses of their vaccine candidate. The federal government will own the 100 million doses of vaccine initially produced as a result of this agreement, and Pfizer will deliver the doses in the United States if the product successfully receives FDA EUA or licensure, as outlined in FDA guidance, after completing demonstration of safety and efficacy in a large Phase 3 clinical trial, which began July 27th.
- **July 31**: HHS announced approximately $2 billion in funds to support the advanced development, including clinical trials and large scale manufacturing, of Sanofi and GlaxoSmithKline's (GSK) investigational adjuvanted vaccine. By funding the manufacturing effort, the federal government will own the approximately 100 million doses expected to result from the demonstration project. The adjuvanted vaccine doses could be used in clinical trials or, if the FDA authorizes use, as outlined in agency guidance, the doses would be distributed as part of a COVID-19 vaccination campaign.
- **August 5:** HHS announced approximately $1 billion in funds to support the large-scale manufacturing and delivery of Johnson & Johnson's (Janssen) investigational vaccine candidate. Under the terms of the agreement, the U.S. Government will own the resulting 100 million doses of vaccine, and will have the option to acquire more. The company's investigational vaccine relies on Janssen's recombinant adenovirus technology, AdVac, a technology used to develop and manufacture Janssen's Ebola vaccine with BARDA support; that vaccine received European Commission approval and was used in the Democratic Republic of the Congo (DRC) and Rwanda during the 2018-2020 Ebola outbreak that began in the DRC.

- **August 11:** HHS announced up to $1.5 billion in funds to support the large-scale manufacturing and delivery of Moderna's investigational vaccine candidate. Under the terms of the agreement, the U.S. Government will own the resulting 100 million doses of vaccine, and will have the option to acquire more. The vaccine, called mRNA-1273, has been co-developed by Moderna and scientists from the National Institute of Allergy and Infectious Diseases (NIAID), part of the National Institutes of Health. NIAID has continued to support the vaccine's development including nonclinical studies and clinical trials. Additionally, BARDA has supported phase 2/3 clinical trials, vaccine manufacturing scale up and other development activities for this vaccine. The Phase 3 clinical trial, which began July 27, is the first government-funded Phase 3 clinical trial for a COVID-19 vaccine in the United States.

As announced on May 15, the vaccine development plan is as follows, subject to change as work proceeds:

- **Fourteen** promising candidates have been chosen from the 100+ vaccine candidates currently in development—some of them already in clinical trials with U.S. government support.
- **The 14** vaccine candidates are being narrowed down to about seven candidates, representing the most promising candidates from a range of technology options (nucleic acid, viral vector, protein subunit), which will go through further testing in early-stage clinical trials.
- **Large-scale** randomized trials for the demonstration of safety and efficacy will proceed for the most promising candidates.

MANUFACTURING: The federal government is making investments in the necessary manufacturing capacity at its own risk, giving firms the confidence to invest aggressively in development which will allow faster distribution of an eventual vaccine. Manufacturing capacity for selected candidates will be advanced while they are still in development, rather than scaled up after approval or authorization. Manufacturing capacity developed will be used for whatever vaccine is eventually successful, if possible given the nature of the successful product, regardless of which firms have developed the capacity.

Select actions to support OWS manufacturing efforts so far include:

- **The May 21, April 16, and March 30** HHS agreements with AstraZeneca, Moderna, and Johnson & Johnson respectively include investments in manufacturing capabilities.
- **June 1:** HHS announced a task order with Emergent BioSolutions to advance domestic manufacturing capabilities and capacity for a potential COVID-19 vaccine as well as therapeutics, worth approximately $628 million, using Emergent's BARDA-supported Center for Innovation in Advanced Department and Manufacturing.
- **July 27:** HHS announced a task order with Texas A&M University and FUJIFILM to advance domestic manufacturing capabilities and capacity for a potential COVID-19 vaccine, worth approximately $265 million, using another BARDA-supported CIADM.
- **August 4**: Grand River Aseptic Manufacturing Inc., (GRAM) Grand Rapids, Michigan, was awarded a $160 million firm-fixed-price contract for domestic aseptic fill and finish manufacturing capacity for critical vaccines and therapeutics in response to the COVID-19 pandemic.

DISTRIBUTION: Before the countermeasures are approved or authorized, the program will build the necessary plans and infrastructure for distribution.

HHS plans for a tiered approach to vaccine and therapeutic distribution, which will build on allocation methodology developed as part of pandemic flu planning and be adjusted based on experience from the COVID-19 response so far, data on the virus and its impact on populations and the performance of a given countermeasure, and the needs of the essential workforce. OWS will expand domestic manufacturing and supplies of specialized materials and resources, such as glass vials, that can be necessary for distribution. DoD's involvement will enable faster distribution and administration than would have otherwise been possible.

Select actions to support OWS distribution efforts include:

- **May 12**: DoD and HHS announced a $138 million contract with ApiJect for more than 100 million prefilled syringes for distribution across the United States by year-end 2020, as well as the development of manufacturing capacity for the ultimate production goal of over 500 million prefilled syringes in 2021.
- **June 9:** HHS and DoD announced a joint effort to increase domestic manufacturing capacity for vials that may be needed for vaccines and treatments::
- **June 11**: HHS announced $204 million in funds to Corning to expand the domestic manufacturing capacity to produce approximately 164 million Valor Glass vials per year if needed. Valor Glass provides chemical durability to minimize particulate contamination. The specialized glass allows for rapid filling and capping methods that can increase manufacturing throughput by as much as 50 percent compared with conventional filling lines, which in turn can reduce the overall manufacturing time for vaccines and therapies.
- **June 11**: HHS announced $143 million to SiO2 Materials Science to ramp up capacity to produce the company's glass-coated plastic container, which can be used for drugs and vaccines. The new lines provide the capacity to produce an additional 120 million vials per year if needed.

Who's leading Operation Warp Speed?

HHS Secretary Alex Azar and Defense Secretary Mark Esper oversee OWS, with Dr. Moncef Slaoui designated as chief advisor and General Gustave F. Perna confirmed as the chief operating officer. To allow these OWS leaders to focus on operational work, in the near future the program will be announcing separate points of contact, with deep expertise and involvement in the program, for communication with Congress and the public.

What are you doing to make these products affordable for Americans?

The Administration is committed to providing free or low-cost COVID-19 countermeasures to the American people as fast as possible. Any vaccine or therapeutic doses purchased with US taxpayer dollars will be given to the American people at no cost.

How is Operation Warp Speed being funded?

Congress has directed almost $10 billion to this effort through supplemental funding, including the CARES Act. Congress has also appropriated other flexible funding. The almost $10 billion specifically directed includes more than $6.5 billion designated for countermeasure development through BARDA and $3 billion for NIH research.