Practice

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United States v. Stein: The Second Circuit Affirms!

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Defendants facing a criminal prosecution should be entitled to use whatever financial resources are legally available to them, without government interference. Prosecutors are entitled to strike hard blows, but they must be fair. On occasion, the government may stray when pursuing its version of "justice." The influence and power of the government should not be utilized to gain an unfair litigation advantage in a manner possibly designed to pressure a defendant to plead guilty or be faced with the financial inability to obtain fair representation. We should be proud to live in a country where federal judges—appointed for life—take strong, sometimes unpopular positions because it is the fundamentally right position. When those positions are affirmed on appeal, we should thank our predecessors for drafting the Constitution in a manner that has long recognized the importance of individual rights, liberties and due process.

On July 16, 2007, the U.S. District Court for the Southern District of New York (Kaplan, J.), issued an order dismissing an indictment against 13 former partners and employees of KPMG, LLP. At issue in the indictment and a superceding indictment are the actions of former KPMG partners and others in connection with the promotion and implementation of allegedly abusive tax shelters. Judge Kaplan found that, absent pressure from the government, KPMG would have paid the defendants' legal fees and expenses without regard to cost. Based on this and other findings of fact, Judge Kaplan ruled that the government deprived these defendants of their right to counsel under the Sixth Amendment by causing KPMG to impose conditions on the advancement of their legal fees, to cap the fees, and ultimately to end payment.[1] Judge Kaplan also ruled that the government deprived these defendants of

their right to substantive due process under the Fifth Amendment.[2]

Judge Kaplan further ruled that the proffer session statements of two defendants were obtained in violation of their Fifth Amendment privilege against self-incrimination, and that their statements should be suppressed[3]; that the court had ancillary jurisdiction over Defendants-Appellees' civil suit against KPMG for advancement of fees[4], vacated, *Stein v. KPMG, LLP*[5]; and that dismissal of the indictment as to these defendants is the appropriate remedy for those constitutional violations.[6]

The government subsequently appealed the dismissal of the indictment to the Second Circuit Court of Appeals. On August 28, 2008, the Second Circuit Court of Appeals held 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." Further, "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*, [the Second Circuit] affirm[ed] the dismissal of the indictment as to all thirteen defendants." In light of the foregoing disposition, the Second Circuit did not reach the district court's Fifth Amendment ruling.

The Second Circuit opinion does not represent validation of the technical aspects of the underlying listed transactions. It represents the exercise of the power of the government in a manner the Second Circuit deemed to violate the Sixth Amendment right to counsel for these defendants.

The Thompson Memorandum and Revised Principles of Federal Prosecution of Business Organizations

In January 2003, then–U.S. 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 how federal prosecutors investigate, charge and prosecute corporate crimes. 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.[7]

Along with various factors governing charging decisions, the Thompson Memorandum identified nine additional considerations, including the corporation's "timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents."[8] The Thompson Memorandum explained that prosecutors should inquire "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.[9]

In December 2006—after the events in the foregoing KPMG 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.[10]

The release of the Second Circuit's decision on August 28, 2008, coincided with Deputy Attorney General Mark Filip's announcement that, effective immediately, the Department of Justice has made important changes to its corporate charging guidelines for federal prosecutors throughout the country. "The changes that the Department announces today are in keeping with the long-standing tradition of refining the Department's policy guidance in light of lessons learned from our prosecutions, as well as comments from others in the criminal justice system, the judiciary, and the broader legal community," said Deputy Attorney General Filip.

The new guidance revised the Department's Principles of Federal Prosecution of Business Organizations (the "Principles") to clearly state that a prosecutor "may not" consider the corporation's decision to advance legal fees and expenses to employees in evaluating a corporation's cooperation with a DOJ investigation. Specifically, "prosecutors should not take into account whether a corporation is advancing

or reimbursing attorneys' fees or providing counsel to employees, officers, or directors under investigation or indictment. Likewise, prosecutors may not request that a corporation refrain from taking such action." Also, the mere participation in a joint defense agreement shall not render a corporation ineligible for cooperation credit. Further, prosecutors may not consider whether a corporation has sanctioned or retained culpable employees in evaluating whether to assign cooperation credit to the corporation.

> Some will continue to assert that the government's conduct is not sufficiently "shocking to the conscience" to justify dismissal of the indictments as a constitutional violation.

The revised Principles announced on August 28, 2008, have been committed for the first time to the U.S. Attorneys Manual, which is binding on all federal prosecutors within the Department of Justice. These charging guidelines have previously been set forth in a series of internal DOJ policy memoranda, each of which has generally been referred to by the name of the Deputy Attorney General that promulgated the guidelines. Accordingly, the predecessors to the revised Principles have been referred to as the Holder, Thompson and McNulty Memoranda.

Commencement of the Underlying KPMG Federal Investigation

The Second Circuit opinion detailed many facts supporting its affirmation of the district courts dismissal of the indictment on the basis that the government unjustifiably interfered with these defendants' relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment. The factual findings are important to gain a better understanding of what occurred and how the actions of KPMG, a private entity, can be deemed to constitute "state action" leading to a determination of a violation of the Sixth Amendment. Accordingly, to comprehend what occurred during the underlying investigation and its post-indictment impact on these defendants, much of the following is derived directly from the Second Circuit's opinion of August 28, 2008.

After Senate subcommittee hearings in 2002 concerning KPMG's possible involvement in creating and marketing allegedly abusive tax shelters, KPMG retained Robert S. Bennett of Skadden to formulate a "cooperative approach" for KPMG to use in dealing with federal authorities.[11] According to the Second Circuit, 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 [Defendants-Appellees in the prosecution]—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."[12] Smith was transferred and Eischeid was put on administrative leave.[13] 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.[14] KPMG negotiated a contract with Smith that included a similar clause; but that agreement was never executed.[15]

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.[16] Following a longstanding practice of the firm, KPMG's CEO announced to all partners on February 18, 2004, 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."[17]

The February 25, 2004, Meeting

In preparation for a meeting with Skadden on February 25, 2004, the prosecutors—Assistant United States Attorneys (AUSAs)—inquired as to whether KPMG would advance legal fees to employees under investigation.[18] 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.[19] An AUSA then inquired about the firm's plans for advancing fees and about any legal obligation to do so.[20] Later, an AUSA 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."[21] Mr. Bennett then advised that although KPMG was still investigating its legal obligations to advance fees, its "common practice" was to do so.[22] 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.[23]

Later in the meeting, an AUSA asked Bennett to ascertain KPMG's legal obligations to advance attorneys' fees. Another AUSA added that "misconduct" should not or cannot "be rewarded" under "federal guidelines."[24] A Skadden attorney's notes attributed to an AUSA the prediction that, if KPMG had discretion regarding fees, the government would "look at that under a microscope."[25] (Emphasis omitted.) Skadden then reported back to KPMG. In the notes of the meeting, a KPMG executive wrote the words "[p]aying legal fees" and "[s]everance" next to "not a sign of cooperation."[26] It must be remembered that KPMG's first priority was to avoid being indicted.

Communications Between the Prosecutors and KPMG

On March 2, 2004, Bennett told an AUSA 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.[27] However, Bennett disclosed KPMG's tentative decision to limit the amount of fees and condition them on employees' cooperation with prosecutors.[28] 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.[29]

On a March 11, 2004, conference call with Skadden, an AUSA recommended that KPMG tell employees that they should be "totally open" with the government investigators, "even if that [meant admitting] criminal wrongdoing," explaining that this would give him good material for cross-examination.[30] That same day, Skadden wrote to counsel for the KPMG employees who had been identified as subjects of the investigation.[31] 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.[32] Interestingly, the government was copied on this correspondence.[33]

On March 12, 2004, 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."[34] By letter, the prosecutors expressed 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."[35] 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, U.S. Attorney, Southern District of New York, March 17, 2004], advised employees that they could "meet with investigators without the assistance of counsel,"[36] KPMG complied, and circulated a memo advising that KPMG employees "may deal directly with government representatives without counsel."[37]

At a meeting in late March 2004, Skadden asked the prosecutors to notify Skadden in the event any KPMG employee refused to cooperate.[38] 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).[39] Skadden, in turn, informed the employees' lawyers that fee advancement would cease unless the employees cooperated.[40] 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, 2004, 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.[41] As Bennett later assured the AUSAs: "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."[42]

KPMG Avoids Indictment

In an early March 2005 meeting, then–U.S. Attorney David Kelley told Skadden and top KPMG executives that a nonprosecution 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."[43] KPMG's entreaties were ultimately successful: on August 29, 2005, KPMG 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.[44] "The cooperation provisions of the DPA ... require KPMG to comply with demands by the USAO ... [or else face] the risk that the government will declare that KPMG breached the DPA and prosecute the criminal information to verdict."[45]

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) including the KPMG Vice Chairman of Tax Services. A superseding indictment filed on October 17, 2005, named 10 additional KPMG employees, including a former tax partner in charge of professional practice, a former Associate General Counsel and a former Chief Financial Officer. The superseding indictment charged a total of 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). Pursuant to the Fees Policy, KPMG promptly stopped advancing legal fees to the indicted employees who were still receiving them.[46]

Procedural History

On January 12, 2006, the 13 defendants (among others) moved to dismiss the indictment based on the government's interference with KPMG's advancement of fees. According to the district court, "[a]ll defendants previously employed by KPMG joined in the motion."[47] 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. ..."[48]

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.[49] Judge Kaplan made various findings of fact, including that the statement by an AUSA at the February 25, 2004, meeting that "misconduct" should not or cannot "be rewarded" under "federal guidelines" "was understood by both

KPMG and government representatives as a reminder that payment of legal 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."[50] "[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."[51]

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

- "[T]he 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."
- The government made repeated references to the Thompson Memorandum in an effort to "reinforce the threat inherent in the Thompson Memorandum."
- "[T]he government conducted itself in a manner that evidenced a desire to minimize the involvement of defense attorneys."
- But for the Thompson Memorandum and the prosecutors' conduct, KPMG would have paid defendants' legal fees and expenses without consideration of cost.[52]

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,"[53] and that the government's reasons for infringing that right in this case could not withstand strict scrutiny.[54] 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."[55] 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."[56] "[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 ... ."[57]

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."[58] 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."[59]

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.[60] Accordingly, Judge Kaplan invited defendants to file a civil suit against KPMG under the district court's ancillary jurisdiction.[61] The suit was commenced, and Judge Kaplan denied KPMG's motion to dismiss.[62] However, the Second Circuit ruled that the district court lacked ancillary jurisdiction over that action.[63]

Stein IV

Judge Kaplan dismissed the indictment against the 13 defendants on July 16, 2007.[64] He reinforced the ruling in *Stein I* that the government violated defendants' right to substantive due process by holding that the prosecutors' conduct also "independently shock[s] the conscience."[65] Judge Kaplan concluded that no remedy other than dismissal of the indictment would put defendants in the position they would have occupied absent the government's misconduct.[66] The government appealed the dismissal of the indictment.

The Second Circuit Affirms

On appeal, the government challenged various factual findings of the Judge Kaplan. On August 28, 2008, the Second Circuit affirmed the dismissal of the indictment by determining the following:

- "Judge Kaplan's finding withstands scrutiny."
- "Nor can we disturb Judge Kaplan's finding that 'the government conducted itself in a manner that evidenced a desire to minimize the involvement of defense attorneys."[67]
- "Finally, we cannot say that the district court's ultimate finding of fact—that absent the Thompson Memorandum and the prosecutors' conduct KPMG would have advanced fees without condition or cap—was clearly erroneous." (Noting that the government itself stipulated in *Stein I* that KPMG had a "longstanding voluntary practice" of advancing and paying employees' legal fees "without regard to economic costs or considerations" and "without a preset cap or condition of cooperation with the government ... in any civil, criminal or regulatory proceeding" arising from activities within the scope of employment.[68])
- Lastly, "we cannot disturb Judge Kaplan's factual findings, including his finding that, but for the Thompson Memorandum and the prosecutors' conduct, KPMG would have advanced legal fees without condition or cap."

> If prosecuted, defendants should be able to use all lawfully available resources without government interference.

The appropriate remedy for a constitutional violation is "one that as much as possible restores the defendant to the circumstances that would have existed had there been no constitutional error."[69] Since the district court determined that, absent governmental interference, KPMG would have advanced unlimited legal fees unconditionally, only the unconditional, unlimited advancement of legal fees would restore defendants to the status quo ante. The government's in-court statement and the ensuing 16-month delay were not enough. If there was a Sixth Amendment violation, dismissal of the indictment would be required. The government asserted that KPMG's adoption and enforcement of its Fees Policy was "private action," outside the ambit of the Sixth Amendment.

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."[70]

Actions of a private entity are attributable to the State if "there is a sufficiently close nexus between the State and the challenged action of the ... entity so that the action of the latter may be fairly treated as that of the State itself."[71] The "close nexus" test is not satisfied when the state "[m]ere[ly] approv[es] of or acquiesce[s] in the initiatives" of the private entity[72] or when an entity is merely subject to governmental regulation.[73] "The purpose of the [close-nexus requirement] is to assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains."[74] Such responsibility is normally found when the State "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[75]

The government argued that KPMG simply took actions in the shadow of the Thompson Memorandum, an internal DOJ advisory document containing multiple factors and caveats; the government's approval of KPMG's Fees Policy did not render the government responsible for KPMG's actions enforcing it; even if the government had specifically required KPMG to adopt a policy that penalized noncooperation, state action would still have been lacking because KPMG would have retained the power to apply the policy; and although the prosecutors repeatedly informed KPMG when employees were not cooperating, they did so at KPMG's behest, without knowing how KPMG would react.

The Second Circuit disagreed with the government and determined that 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.[76] The government continually made sure KPMG knew that its survival depended on its role in a "joint project with the government to advance government prosecutions."

To ensure that KPMG's new Fees Policy was enforced, prosecutors became "entwined in the ... control" of KPMG.[77] They intervened in KPMG's decision making, expressing their "disappoint[ment] with [the] tone" of

KPMG's first advisory memorandum[78] and declaring that "[t]hese problems must be remedied" by a proposed supplemental memorandum specifying that employees could meet with the government without being burdened by counsel. Prosecutors also "made plain" their "strong preference" as to what the firm should do, and their "desire to share the fruits of such intrusions." They did so by regularly "reporting to KPMG the identities of employees who refused to make statements in circumstances in which the USAO knew full well that KPMG would pressure them to talk to prosecutors."[79]

The Second Circuit noted that "[t]he 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."

The government unjustifiably interfered with the defendant's relationship with counsel and their ability to defend themselves. In *Stein IV*, Judge Kaplan noted that some of the defendants could easily demonstrate interference in their relationships with counsel and impairment of their ability to mount a defense based on 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.[80] 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[81]; the subject matter is "extremely complex"[82]; technical expertise is needed to figure out and explain what happened; and trial was expected to last between six and eight months.[83] Judge Kaplan found that 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."[84]

The government prosecutors steered KPMG toward their preferred fee advancement policy and then supervised its application in individual cases. The government's pre-indictment conduct was of a kind that would have post-indictment effects of Sixth Amendment significance. The Second Circuit determined that such "overt" and "significant encouragement" supports the conclusion that KPMG's conduct is properly attributed to the State and affirmed the dismissal of the indictment as to the 13 defendants.

Summary

Some will continue to assert that the government's conduct is not sufficiently "shocking to the conscience" to justify dismissal of the indictments as a constitutional violation. At one point during the investigation, an AUSA told Bennett that the AUSA had "had a bad experience in the past with a company conditioning payments on a person's cooperation, where the company did not define cooperation as 'tell the truth' the way we [the prosecutors] define it." The "truth" is not to be defined by the government. This country has many courthouses fully capable of discerning the truth, as it is rather than as some would prefer it to appear.

In addition to risking that individuals caught in a criminal investigation may be coerced to waive their Constitutional rights, the government's prior policies and practices created a risk that witnesses may be pressured to tailor their testimony to meet the government's theories, or face the consequences of being deemed "non-cooperative." All would prefer to be a "cooperating witness" rather than a "subject" or, worse, a "target." Throughout the KPMG investigation, and other investigations of this era, there is heightened motivation for witnesses, however well-intended, to align their description of events with the prosecution's theories, and thereby to be viewed as cooperative.

We must presume that everyone will tell the truth. However, if the government is seeking the "truth, the way we define it" we should be thankful that our predecessors designed the Constitution to be capable of protecting individual rights and a judicial system capable of enforcing such constitutional rights. Justice depends on a fair, impartial process in determining those who should appropriately face prosecution and those who should not. If prosecuted, defendants should be able to use all lawfully available resources without government interference.

Judge Kaplan and the Second Circuit recognized that maintaining the integrity of our prosecutorial system is far more important than prosecuting individual defendants in what the government initially termed as the most significant criminal tax prosecution in the history of our country. Individual rights, liberties and due process represent the cornerstone of a civilized society—a society that will not support excessive government interference intended to gain an unfair litigation advantage in a criminal prosecution.

ENDNOTES

[1] *See U.S. v. Stein*, 435 FSupp2d 330, 367–73 (S.D.N.Y. 2006) ("*Stein I*").
[2] *Id.*, at 360–65.
[3] *See U.S. v. Stein*, 440 FSupp2d 315 (S.D.N.Y. 2006) ("*Stein II*").
[4] *See U.S. v. Stein*, 452 FSupp2d 230 (S.D.N.Y. 2006) ("*Stein III*").
[5] *Stein v. KPMG, LLP*, 486 F3d 753 (2d Cir. 2007).
[6] *See U.S. v. Stein*, 495 FSupp2d 390 (S.D.N.Y. 2007) ("*Stein IV*").
[7] *See Stein I, supra* note 1, at 336–37.
[8] Memorandum from Larry D. Thompson, Deputy Attorney General U.S. Department of Justice, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003) (the "Thompson Memorandum"), at II.
[9] *Id.*, at VI.
[10] Memorandum from Paul J. McNulty, Deputy Attorney General, U.S. Department of Justice, *Principles of Federal Prosecution of Business Organizations* (Dec. 12, 2006) (the "McNulty Memorandum"), at VII, note 3.
[11] *Stein I, supra* note 1, at 339.
[12] *Id.*
[13] *Id.*, at 339, note 22.
[14] *Id.*, at 339.
[15] *Stein IV, supra* note 6, at 408.
[16] *Stein I, supra* note 1, at 341.
[17] *Stein IV, supra* note 6, at 407.
[18] *Stein I, supra* note 1, at 341.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*, at 342.
[23] *Id.*
[24] *Id.*
[25] *Id.*, at 344.
[26] *Stein IV, supra* note 6, at 408.
[27] *Stein I, supra* note 1, at 345.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*, at 345–46.
[33] *Id.*, at 345.
[34] *Id.*, at 346, note 62.
[35] *Id.*, at 346.
[36] *Stein I, supra* note 1, at 346.
[37] *Id.*
[38] *Id.*, at 347.
[39] *Id.*
[40] *Id.*
[41] *See Stein II, supra* note 3.
[42] Letter of Robert Bennett to U.S. Attorney's Office, November 2, 2004; *see, e.g., Stein II*, supra note 3, at 323 (describing KPMG's termination of Defendant-Appellant Warley after she invoked her Fifth Amendment privilege against self-incrimination).
[43] *Stein I, supra* note 1, at 349.
[44] *Id.*, at 349–50.
[45] *Stein I, supra* note 1, at 350.
[46] *Id.*, at 350.
[47] *Stein I, supra* note 1, at 36, note 5.
[48] *Stein IV, supra* note 6, at 405.
[49] *See Stein I, supra* note 1, at 340.
[50] *Id.*, at 344.
[51] *Id.*
[52] *Stein I, supra* note 1, at 352–53.
[53] *Stein I, supra* note 1, at 361.
[54] *Id.*, at 362–65.
[55] *Id.*, at 366.
[56] *Id.*, at 368.
[57] *Id.*, at 369.
[58] *Stein I, supra* note 1, at 367.
[59] *Id.*, at 369.
[60] *Stein I*, at 373–80.
[61] *Id.*, at 377–80, 382.
[62] *Stein III, supra* note 4.
[63] *Stein v. KPMG, LLP*, 486 F3d 753 (2d Cir. 2007).
[64] *Stein IV, supra* note 6, at 427.
[65] *Id.*, at 412–15.
[66] *Id.*, at 419–28.
[67] *Stein I, supra* note 1, at 353 (noting that "prosecutors repeatedly used Skadden to threaten to withhold legal fees from employees who refused to proffer—even if defense counsel had recommended that an employee invoke the Fifth Amendment privilege").
[68] *Id.*, at 340.
[69] *U.S. v. Carmichael*, 216 F3d 224, at 227.
[70] *Stein I, supra* note 1, at 353; *see also Stein II, supra* note 3, at 334 (relying on this finding to conclude that KPMG's conduct was fairly attributable to the State for Fifth Amendment purposes).
[71] *Jackson v. Metro. Edison Co.*, 419 US 345, at 351 (1974).
[72] *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 US 522, at 547 (1987).
[73] *See Jackson, supra* note 71, at 350, note 7.
[74] *Blum v. Yaretsky*, 457 US 991, at 1004 (1982).
[75] *Id.*
[76] *Flagg v Yonkers Savings & Loan Assn.*, 396 F3d 178, at 187.
[77] *Id.*, at 187.
[78] *Stein I, supra* note 1, at 346.
[79] *Stein II, supra* note 3, at 337.
[80] *Id.*, at 418.
[81] *Id.*, at 417.
[82] *Id.*, at 418.
[83] *Id.*, at 418.
[84] *Id.*, at 419.