

# Executive-Branch Regulation of Criminal Defense Counsel And the Private Contract Limit on Prosecutor Bargaining

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## *Abstract*

*Criminal defendants' right to counsel is regulated by courts, legislatures and, more recently and controversially, by the executive branch. Prosecutors recently have taken a more active role in affecting the power and effectiveness of defense counsel, especially privately retained counsel in white-collar crime cases. Under the Thompson Memo, prosecutors bargain to win waivers of attorney-client privilege and to convince corporate defendants not to pay the legal fees of corporate officers who face separate indictments. These tactics join longer-standing tools to weaken defense representation through forfeiture, Justice Department eavesdropping on attorney-client conversations of defendants in federal custody, and prosecutors' power to veto defendants' choices to share attorneys with other suspects.*

*The organizing concern for regulation of counsel is not simply fairness, but also accuracy and a less noted goal—effectiveness of criminal law enforcement. Defense counsel is best understood not solely in light of defendant's interests but also of systemic ones. That gives the executive branch a stronger claim to competence in regulating counsel. But regulation works best when the regulator is institutionally well suited to the task, and one feature that makes an actor well suited is supervision or some other check by another actor. By those criteria, much executive-branch regulation of defense counsel is acceptable, because prosecutors either need the consent of Congress or the judiciary, or—in the case of privilege waivers—must face well-funded counsel in negotiation. But bargaining to end attorneys' fee payments to some defendants is different. That policy gives prosecutors power unchecked by legislatures and courts or even the capable opposition of a well-funded opponent.*

*The Supreme Court has left little doctrinal basis for restricting prosecutors' bargaining incentives for defendant cooperation. Yet this essay explains how firms themselves, through private contract, can take much of the sting out of prosecutors' abilities to demand nonpayment of attorneys' fees. Further, as they do so, courts are likely to be receptive to a narrow constitutional doctrine that leaves current plea bargaining law in place but still bars prosecutorial incentives for firms to breach duties to pay fees. Courts and defendants can work within Supreme Court doctrine to limit prosecutors by grounding those limits in the protection of contract obligations as much as the right to counsel.*

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## Executive-Branch Regulation of Criminal Defense Counsel And the Private Contract Limit on Prosecutor Bargaining

As is true of most constitutional rights, criminal defendants' right to counsel is not absolute. It is regulated by courts, legislatures and, more recently and controversially, by the executive branch. Some of those actions are well known and uncontroversial, such as when appellate courts define the parameters of the constitutional rights or when judges set standards for admission to practice in local courts. Others are sometimes controversial but similarly well known, such as legislatures setting funding levels (often too low) to pay for indigent defendants' appointed counsel. But the executive branch's capacity to affect access to—and the effectiveness of—defense counsel is both more troublesome and, in scholarly literature, less discussed.<sup>1</sup> Nonetheless, in recent years prosecutors have taken a more active role in affecting the power and effectiveness of defense counsel, especially privately retained counsel in white-collar crime cases.

The federal Justice Department faces a range of objections to its three-year-old policy, in the so-called Thompson Memo,<sup>2</sup> that undercuts private counsel in white-collar crime cases in two ways. First, prosecutors often make the severity of charging decisions against the firm itself contingent on the firm waiving attorney-client and work-product privileges, which lowers barriers to the government's investigation of the firm. A range of industry groups, defense attorneys and the American Bar Association have objected to this policy,<sup>3</sup> and a House Judiciary subcommittee held hearings on the policy in March 2006.<sup>4</sup> The next month the federal Sentencing Commission abandoned a similar two-year-old guidelines provision making sentence reductions contingent on privilege waivers.<sup>5</sup>

Second, federal prosecutors encourage (some say coerce) corporate defendants not to pay the legal fees of corporate officers who face separate indictments by making leniency for the firm contingent on nonpayment. Defendants in the pending KPMG tax fraud case<sup>6</sup> recently won a challenge to that policy; a federal district court held prosecutors violated the due process clause and the Sixth Amendment counsel clause.<sup>7</sup>

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<sup>1</sup> But see Tamar R. Birkhead, *The Conviction of Lynne Stewart and the Uncertain Future of the Right to Defend*, 43 *Am. Crim. L. Rev.* 1 (2006); Peter J. Henning, *Targeting Legal Advice*, 54 *Am. U.L. Rev.* 669 (2005).

<sup>2</sup> See Larry D. Thompson, *Memo: Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003) (hereafter "Thompson Memo") available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm), reprinted in *United States Attorneys' Manual*, tit. 9, *Crim. Resource Manual*, §§ 161-62.

<sup>3</sup> The ABA House of Delegates adopted a resolution in August 2005 opposing prosecutorial policies that seek waivers of attorney-client and work-product privileges. On the ABA's involvement, see <http://www.abanet.org/poladv/acprivilege.htm>

<sup>4</sup> For testimony from the March 7, 2006 hearing before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security, see <http://judiciary.house.gov/oversight.aspx?ID=222> (web cast of hearing and written statements of witnesses Associate Attorney General Robert McCallum, former Attorney General Richard Thornburgh, U.S. Chamber of Commerce official and others).

<sup>5</sup> On April 2, 2006, the commission removed the privilege-waiver amendment from U.S. Sentencing Guidelines 8C2.5 and submitted the change for congressional review; it will take effect November 1, 2006 without congressional action.

<sup>6</sup> See *United States v. Stein*, S1 05 Crim. 0888, 2006 WL 1735260 (S.D.N.Y. June 26, 2006).

<sup>7</sup> *Id.*

Targeting firms' payments of attorneys' fee to officers is a variation of a strategy prosecutors have pursued for years through forfeiture statutes, under which prosecutors restrain assets defendants need to pay defense counsel. This strategy too has moved beyond drug and organized-crime cases to corporate and white-collar crime cases.<sup>8</sup>

Separately, the Justice Department been successful in defending its policy of breaching attorney-client privilege in certain cases of defendants held in federal custody; when national security or risk of serious crime requires it, government officials will eavesdrop on private attorney-client communications.<sup>9</sup> Additionally, with the aid of trial judges, prosecutors have long had other, indirect means for limiting defendant's choice of counsel. They can urge local courts may enforce narrow standards for admission of attorneys<sup>10</sup> and object to defendants' willingness to waive an attorney's conflict of interest, thereby denying a defendant the attorney he most prefers.<sup>11</sup>

In Part I of this essay, I sketch government's abilities to regulate the various components of defense counsel practice as a basis for assessing executive-branch policies to undermine counsel. I suggest that the organizing concern for regulation of counsel is not simply fairness, but also accuracy and a less noted goal—effectiveness of criminal law enforcement. The parameters of defendants' constitutional rights, the Supreme Court wrote a recent case, are crafted in light of “the adverse impact ... upon the Government's interests” including “the Government's interest in securing those guilty pleas that are factually justified ... [and] the efficient administration of justice.”<sup>12</sup> Defense counsel is best understood not solely in light of defendant's interests but also of systemic ones. On this view, contrary to much boilerplate language in the case law and scholarly literature on counsel rights, debates about defense counsel are not solely about the resources necessary for attorneys to serve clients' interests and achieve a fair process, which is the framework for much right-to-counsel litigation. Nor are they about party autonomy or the lawyer's self-conception and discretion in the tension between clients' interests and public ones, as it is in professional responsibility debates.<sup>13</sup> Instead, the view that best explains defense counsel regulation is a largely instrumental one that balances adjudication accuracy and law enforcement effectiveness against fairness and defendants' self-interest.

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<sup>8</sup> In a recent corporate fraud case, prosecutors convinced the trial judge to restrain attorneys' fee payments by the corporation to two of its top officers, who were charged with fraud offenses, on grounds that the firm's payments were traceable to the officers' fraud. *United States v. Wittig*, No. 03-40142-JAR, 2004 WL 1490406 (D. Kan. June 30, 2004) (allowing firm to give defendant-officers funds for attorneys' fees but enjoining defendants from transferring those funds fees to their attorneys); Memorandum and Order Granting Government's Motion to Reinstate Restraining Order, *United States v. Wittig*, No. 03-40142-JAR, May 23, 2005 (after mistrial and re-indictment, reinstating restraining order on attorneys' fees payments by firm and placing funds for attorneys' fees in escrow). For an overview of the Wittig case disputes over payments for attorneys' fees, see Robert G. Morvillo & Robert J. Anello, *Criminal-Case Compensation Of Fees: Not A Defendant's Right?*, N.Y.L.J. (June 7, 2005).

<sup>9</sup> See 28 C.F.R. § 501.3(d) (2005) (Bureau of Prisons “special administrative measures” for “prevention of acts of violence and terrorism” that allow monitoring of attorney-client communications with there is “reasonable suspicion” those communications will “further or facilitate acts of terrorism”).

<sup>10</sup> For an example, see *United States v. Gonzales-Lopez*, No. 05-352 (June 26, 2006).

<sup>11</sup> For an example, see *Wheat v. United States*, 486 U.S. 153 (1989).

<sup>12</sup> *United States v. Ruiz*, 536 U.S. 622, 631 (2002) (noting “due process considerations” require balancing defendants' interests against “adverse impact ... on the Government's interests.”).

<sup>13</sup> See, e.g., William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (1998).

With those interests at stake instead of merely defendant-oriented fairness, the executive branch has a stronger claim to competence in regulating counsel. Part II explores various government means to regulate defense counsel in relation to accuracy and enforcement objectives. Prosecutors bring some unique abilities to the table that the Court has recognized and deferred to, especially knowledge of law enforcement needs and management of litigation burdens. But regulation works best when the regulator is institutionally well suited to the task, and one feature that makes an actor well suited is supervision or counterbalance by another actor. By those criteria, much executive-branch regulation (or infringement) of the right to counsel is acceptable. Rulemaking procedures, for example, make the Justice Department's policy of breaching inmates' lawyer-client confidentiality appropriate in light of the relatively limited degree of the invasion. Freezing a defendant's assets, through forfeiture, that he needs to hire counsel depends on legislative authorization and judicial approval of that prosecutorial initiative. Demands for privilege waivers, following the Thompson Memo policy, fit a different model: the check on prosecutors there is defense counsel, who can choose not to waive those entitlements. Prosecutors can make non-waiver extremely—some say unfairly—costly by threats of charging severity, but prosecutors' ability to do so fits the largely unrestrained bargaining power the Court has granted for them, and firms at least have counsel to help them make hard choices. The most problematic form of executive pressure on defense attorneys is the other Thompson Memo policy, incentives for nonpayment of other suspects' legal costs. That policy gives prosecutors unchecked power: legislatures and courts do not meaningfully regulate bargaining, and nonpayment of attorneys' fees eliminates the remaining check of capable defense counsel. Prosecutors then face a much-diminished litigation opponent in the most costly, complex types of cases.

Despite a recent district court decision finding that prosecutorial tactic unconstitutional, the Supreme Court has left little doctrinal basis for restricting prosecutors' bargaining incentives for defendant cooperation. Part III explains why then suggests how firms themselves, through *private contract*, can take much of the sting out of prosecutors' abilities to demand nonpayment of attorneys' fees. Further, as they do so, courts are likely to be receptive to a narrow constitutional doctrine that bars prosecutorial incentives for firms to breach duties to pay fees, because that doctrine would be grounded in protecting contract obligations as much as the right to counsel.

#### I.

The Counsel Clause grants two legal entitlements. The first, which tracks the Clause's original intent, allows defendants to hire counsel. The second grants indigent defendants publicly financed counsel. Both versions of the counsel entitlement leave open questions about government power to limit counsel because, like other entitlements, this one is comprised of several components, each of which can be regulated differently. The counsel entitlement (again, like others),<sup>14</sup> can be defined by two different variables: eligibility criteria and benefit levels. The Supreme Court has clearly defined the former in constitutional law. Anyone charged with a crime is eligible to hire private counsel. Those unable to hire counsel are eligible for publicly financed lawyers there is any risk of incarceration<sup>15</sup> and in all felony cases, regardless of the prospect of incarceration.<sup>16</sup>

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<sup>14</sup> See David A. Super, *The Political Economy of Entitlement*, 104 *Colum. L. Rev.* 633 (2004).

<sup>15</sup> Even if it is a suspended sentence. See *Alabama v. Shelton* (2003).

The benefit levels of this right, however, are not well defined by constitutional doctrine, so its real content is mostly defined by other players. Recall that the Department of Justice eavesdrops on communications between lawyers and their clients who are in federal detention, effectively denying some defendants attorney-client privilege. Lower courts have approved the practice when the Department asserts the defendant is particularly dangerous—especially if they have suspected ties to terrorism—and the attorney might be conduit for communication with collaborators. Prosecutors bargain case-by-case for broader privilege waivers. That weakens defense counsel by, *inter alia*, removing a significant litigation tool for information control. Under the Thompson Memo, such waivers by corporate defendants are commonly a condition for civil settlement of potentially criminal charges, for deferred prosecution agreements or for plea bargain discounts.<sup>17</sup>

Other components of the entitlement are defined by legislatures with input from local trial courts and prosecutors. On the indigent side, legislatures' funding levels are the primary mechanism to define the content of counsel benefit, and they are routinely capped, often at inadequate levels.<sup>18</sup> Obviously, minimal funding for attorneys' fees gives lawyers incentives to invest less effort in cases than if fees were greater. Legislatures together with trial courts further control appointed lawyers' investigative capacity by limiting funds for expert and investigator assistance and evidence analysis. Under *Ake v. Oklahoma*,<sup>19</sup> defendants who are entitled to appointed counsel are entitled to expert assistance only for "significant factors" in the trial.<sup>20</sup> Trial judges make that judgment (though legislatures may provide statutory guidance).<sup>21</sup> And legislatures or local governments allocate funds but typically leave their distribution to trial judges. Tight budgets force trial judges, who budget administration is monitored,<sup>22</sup> to ration

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<sup>16</sup> See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to appointed counsel in felony cases); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (right to counsel in misdemeanor cases); *Scott v. Illinois*, 440 U.S. 367 (1979) (no right to counsel in misdemeanor cases if defendant faces no term of imprisonment).

<sup>17</sup> For a detailed account of prosecutorial pressure for both waiver and nonpayment of legal fees that resulted in a deferred prosecution agreement, see *United States v. Stein*, S1 05 Crim. 0888, 2006 WL 1735260 (S.D.N.Y. June 26, 2006).

<sup>18</sup> Studies of inadequate public defense funding are seemingly perennial and ubiquitous. For a sample of several, see those produced for various jurisdictions by the Spangenberg Group at <http://www.spangenberggroup.com/>.

For simplicity's sake, I will usually refer to legislatures as the funders of indigent defense. More precisely, however, in many states legislatures delegate to localities the task of funding appointed counsel, or they designate a locally based funding source, such as revenue from the jurisdiction's criminal fines. See Ronald Wright and Wayne Logan, *The Political Economy of Up-Front Fees for Indigent Criminal Defense Counsel*, 47 *William & Mary L. Rev.* 2045 (2006).

<sup>19</sup> *Ake v. Oklahoma*, 470 U.S. 68 (1985).

<sup>20</sup> *Id.* at 83.

<sup>21</sup> *Caldwell v. Mississippi* approved a statute that required a finding of reasonableness before defendants received funds for assistance to support the attorney. *Caldwell v. Mississippi*, 472 U.S. 320, 323 n. 1 (1985) (holding that denying an investigator, a fingerprint expert, and a ballistics expert to a defendant under a state law predicated access to such expert assistance on a finding of reasonableness was not unconstitutional).

<sup>22</sup> See, e.g., Spangenberg Report, *supra* note \_\_, at 67 (superior court judge in a large urban county states "[a]s far as experts are concerned, I am as cheap as possible. This is a Chevy operation, not a Mercedes operation. We are under extreme pressure from the county to hold our expenses down."); *id.* at 69 (chief superior court judge in a rural circuit reports "that he feels acute pressure from the counties to cut back on expenditures on counsel, experts and investigators").

scarce resources; judges often establish norms for permissible defense attorney investigative efforts.<sup>23</sup>

Interestingly and more subtly, something similar is true for retained counsel. All defendants can hire counsel, but the government has some means to limit defendants' resources for doing so, to bar choices for particular attorneys, and to restrict attorneys' capabilities, such as the privilege to have confidential communications with clients. The primary example of the last is the regulation permitting monitoring of client communications while in federal detention (which affects appointed counsel as well.<sup>24</sup> Courts can limit choices for a specific lawyer through their discretion in granting *pro hac vice* motions, motions to change counsel, and by supervising attorneys' conflicts of interest.<sup>25</sup> Trial courts enjoy "substantial discretion to limit the exercise of the right to counsel of choice when insistence upon it would substantially disadvantage the government or interfere with the ethical and orderly administration of justice."<sup>26</sup>

One of the two most effective tools for limiting resources for private counsel is forfeiture. At Congress's urging, prosecutors use broad forfeiture statutes to gain pretrial restraint of assets that defendants need pay defense lawyers.<sup>27</sup> Those assets must be from proceeds of crime, although prosecutors have convinced courts to encumber even fee

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<sup>23</sup> In Georgia, a 2003 study found

even attorneys who feel that an investigator or expert would help in their cases are reluctant to file motions securing investigative help a) because it will be a waste of time, as such requests are routinely denied and/or b) because it might annoy judges. In Clayton County, attorneys told us that even in death penalty cases to get approval for investigators was akin to "pulling teeth."

See Spangenberg Report, *supra* note 1, at 65; see also *id.* at 65 (judges in one Georgia county openly admit to unconstitutional rationing: they grant experts and investigators only in capital cases, despite *Ake* doctrine).

Sometimes attorneys will learn not to apply for funds despite having a plausible claim for them. Others continue to apply in the face of likely denial. See, e.g., Spangenberg Report, *supra* note 1, at 67 (appointed attorney in one Georgia county reports that "out of the 20 times he has applied for an expert he has never received an expert). Courts can sometimes gain lawyers' cooperation in efficient adherence to the norm, such as through implicit penalties for defendants who demand *Ake* funds and lose. See Darryl K. Brown, Criminal Procedure Entitlements, Professionalism, and Lawyering Norms, 61 Ohio State L.J. 801, 828-31 (2000). Comparable signaling to ration other costly rights, such as jury trials, is well documented. See Milton Heumann, Plea Bargaining: The Experience of Prosecutors, Judges and Defense Attorneys 143 (1975) (recounting a trial judge insisting any defendant "deserves to be penalized for the trial" and consuming court resources unless "he has got a reasonable position" for insisting on one); Roy B. Fleming, et al., The Craft of Justice at 110-118-19 (similar data documenting trial judges' views of "illegitimate" trials); see also *In re Inquiry Concerning Judge Darmon*, 487 So.2d 1, 3 (Fla. 1985) (removing a trial from office for, among other things, telling defendants on the record that they would incur sentence enhancements for insisting jury trials or defense attorneys in certain cases).

<sup>24</sup> See 28 C.F.R. § 501.3(d) (2005).

<sup>25</sup> See *Wheat v. United States*, 486 U.S. 153 (1989); *United States v. Gonzales-Lopez*, No. 05-352 (June 26, 2006) (describing permissible limits on defendants' preference for private attorneys). See generally *Glasser v. United States*, 315 U.S. 60, 70 (1942) (right to counsel includes the right to be represented by counsel of one's choice and the right to a preparation period sufficient to insure a minimal level of quality of counsel).

<sup>26</sup> *United States v. Diozzi*, 807 F.2d 10, 12 (1<sup>st</sup> Cir. 1986). See also *Wheat v. United States*, 486 U.S. 153, 163 (1989) (trial courts must be accorded "broad latitude" in deciding defendants' motions for substitution for counsel).

<sup>27</sup> See, e.g., 21 U.S.C. § 853. All three branches play a role in this policy: Congress enacted forfeiture statutes, the Supreme Court approved their use to deny defendants resources for counsel and trial courts decide forfeiture actions, and prosecutors decide to implement them in particular cases.

payments that firms contractually owe to officers on the theory that officers' fraud on the firm led to that fee indemnification entitlement.<sup>28</sup> The other, newer tool to reduce private defense funding is the Thompson Memo policy, under which prosecutors bargain to cut off lawfully acquired sources of payment for private defense counsel by giving corporate firms strong incentives not to indemnify expenses of defense attorneys for individual officers of the firm who face separate risks of indictment.<sup>29</sup>

Note the parallel of these practices with *Ake* doctrine and indigent defense funding. In each case, the government attempts to regulate the amount of resources a defendant can devote to a case, and it does so on an implicit conclusion about the amount of resources necessary for an appropriate adjudication. There are important differences, to be sure. In particular, it is prosecutors who strive to limit defense resources in the private-counsel context, while courts and legislatures do so for indigent defendants. Still, these practices, and other government limits on defense counsel, share a common motivation to address an unavoidable problem. Defendants have incentives to over-litigate cases. The minority of innocent ones *should* make every effort vindicate their innocence. The system ideally would permit that. But it does not, because guilty defendants—whether street-crime offenders or corporations—would frequently over-litigate as well, in efforts to push off the day of reckoning or to generate a “false negative,” an acquittal or dismissal despite their factual guilt.

In the context of public defense, legislatures' dilemma is easy to see. They must allocate enough funds to support a fair process that generate accurate results most of the time. But they cannot give defendants all they would like, not only because legislatures work within budget limits but because the resulting over-litigation would hinder conviction of the guilty. Indigent funding inevitably depends on a calculus about how much money is needed for fairness and accuracy in the form of preventing “false positives”—meaning wrongful convictions—versus what amount is so much that it generates wrongful acquittals (the other form of inaccuracy) or otherwise hinders law enforcement. No government actor is well positioned to make that judgment, yet the judgment is inevitable. And prosecutors try to further refine this cost savings case by case, through incentives for quicker pleas based on less pretrial litigation.<sup>30</sup>

The less noticed point is that the same balancing act is necessary in the context of private counsel. Government cannot set pay rates for private counsel, but it has other means to limit their resources and capabilities, and it aims to do so for the same reasons. Wealthy defendants are fully capable of over-litigating to forestall enforcement efforts. Corporate cases are expensive for prosecutors to pursue in the first place: investigations

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<sup>28</sup> Prosecutors briefly succeeded with this argument last year in the prosecution of officers of the Westar corporation, although the district court later allowed the firm to pay the attorney-fee funds into an escrow account pending the outcome of the forfeiture action. See Morvillo & Anello, *supra* note \_\_ (describing Westar litigation); *United States v. Wittig*, No. 03-40142-JAR, 2004 WL 1490406 (D. Kan. June 30, 2004) (allowing firm to give defendant-officers funds for attorneys' fees but enjoining defendants from transferring those funds fees to their attorneys).

<sup>29</sup> A lower court is now considering a challenge to this Department practice, based on the argument that the executive is interfering with the individual defendants' right to counsel.

<sup>30</sup> For an example, see *United States v. Ruiz*, 536 U.S. 622 (2002). In that case, the Court approved a key component of “fast track” plea bargaining—waiver of the constitutional right to impeachment evidence on government witnesses. In this “fast track” setting, developed to handle high volumes of illegal immigration cases in border districts, prosecutors strive for larger cost savings by convincing defendants to plead guilty quickly, with a minimum of pretrial investigation or litigation.

require great commitments of time and expertise. And, unlike the context of typical street crimes, defense lawyers are involved early in the investigative stage and have real ability to slow investigations, in part because defendants possess and control most of the relevant information. Sometimes defendant wealth means cases will be well litigated and thereby avoid wrongful or excessive convictions. (And wrongful convictions are a plausible problem in complex crimes, because of fuzzy lines between criminal conduct, civil wrongs, and permissible action.)<sup>31</sup> Other times it means defendants can hinder enforcement and force unmerited acquittals, decisions not to prosecute, or overly favorable settlements.<sup>32</sup>

With those concerns in mind, and motivated also by a litigant's natural tendency to seek advantage over an adversary, prosecutors often seek to restrict defendants' legal resources. They use forfeiture to cut defendant resources,<sup>33</sup> and they seek waivers of privileges, attorney-fee payments or other entitlements such as discovery needed to litigate thoroughly. They are tempted to use those tools because prosecutors often have enough information (or think they do) about defendant's conduct to make confident judgments on wrongdoing; they know what efficiencies will be gained from defendant's cooperation, and have some sense of the risks of "false negatives" from zealous defense litigation. Nonetheless, the problem is that a party adversary is poorly situated to determine how much ability her opponent should have to fight back, and also to make unchecked judgments about guilt.<sup>34</sup> They may seek those incentives to lower costs in well-grounded cases or to gain tactical advantage regardless of the case's merits.

In the abstract, defense resources should be scant when they hurt accuracy and ample when they aid it. Yet just as legislatures cannot sort innocent defendants from guilty ones and generously fund only the former, prosecutors and judges cannot sort rich defendants—especially at the early stages of investigations, when facts are scant—in order apply their range of defense-constraining strategies only to the guilty. Nonetheless, calibrating defense attorneys' resources in order to balance interests in accuracy, fairness and effective enforcement is inevitable. In some forms, it is normatively appropriate. But legislatures and prosecutors both have reasons to get the balance wrong independent

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<sup>31</sup> See, e.g., Lynnley Browning, *KPMG Defendants' Unity Starts to Fray at the Edges*, N.Y. Times, June 30, 2006 (noting "the KPMG case ... [hinges] on the complicated and vague tax code, ... is dauntingly complex, and no court has ever ruled the tax shelters in question illegal").

<sup>32</sup> For a study describing recent deferred-prosecution and non-prosecution agreements in corporate cases, see *Crime Without Conviction: The Rise of Deferred and Non-Prosecution Agreements* (Corporate Crime Reporter 2006), available at <http://corporatecrimereporter.com/deferredreport.htm>.

<sup>33</sup> Cf. Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 Harv. L. Rev. 670, 710 (1992) (arguing that whether reducing defendants' funds to pay attorneys through forfeiture is a good idea depends "on whether it increases or decreases accuracy").

<sup>34</sup> Difficult questions of guilt are an oft-expressed concern in complex cases, such as the Enron and KPMG prosecutions, in which prosecution theories of liability may be novel. See, e.g., Lynnley Browning, *KPMG Defendants' Unity Starts to Fray at the Edges*, N.Y. Times, June 30, 2006 (noting "the KPMG case ... [hinges] on the complicated and vague tax code, ... is dauntingly complex, and no court has ever ruled the tax shelters in question illegal"). But even routine criminal cases with relatively simple bodies of evidence, such as eyewitness accounts, can nonetheless present levels of uncertainty that make prosecutors' conclusions about facts contestable. See Robert P. Burns, *Fallacies on Fallacies: A Reply*, 3 Int'l Commentaries on Evid. 1, 3 (issue 1, art. 4) (2006) (discussing criminal evidence that is "simple and powerful and much too often unreliable," leaving defendants to "undermine this simple and strong evidence by an accumulation of circumstantial and, sometimes, expert evidence"), available at <http://www.bepress.com/ice/vol3/iss1/art4>.



of the information deficit about guilt or innocence. Legislatures face political pressure to fund indigent defense at levels lower than need for a reliable commitment to accuracy (in part because wrongful convictions can go undetected). Prosecutors make their judgments through the lens of a partisan adversary seeking tactical advantage. As things stand now, prosecutors enjoy at least as much freedom from judicial supervision as legislatures do. Whether legislatures' deficiencies can be solved is problem for another day. But, despite the Supreme Court's grant of broad bargaining power to prosecutors, there are means to check the most worrisome efforts of prosecutors to constrain defense counsel.

## II.

Consider in greater detail why defense counsel pose a problem for mediating the competing interests of fairness, accuracy and effective enforcement. A traditional approach, which underlies early counsel cases, provides a strong basis for criticizing many of these defense-limiting policies. The premise of the adversarial process is that truth-finding emerges from the competitive marshalling, inspection and interpretation of evidence.<sup>35</sup> When both parties gather relevant evidence and scrutinize the opponent's evidence, the fact-finder will have a solid basis for making an accurate decision. On this view, the stronger defense counsel is the better, for the most part; it is rare that the defense would so overwhelm government resources as to skew outcomes.<sup>36</sup> (The one context in which this is likely to happen is corporate crime cases—cases that were not on the Court's mind in deciding the early right-to-counsel cases, but cases that the Thompson Memo exclusively targets.) Put this way, the issue is setting the *minimum* in defense resources to assure fairness and accuracy.

This was the premise of the early right to appointed-counsel cases, starting with *Powell v. Alabama*, which first justified a right to appointed counsel on grounds that defense attorneys are necessary for accurate adjudication. Without defense lawyers, "though he be not guilty, [a defendant] faces the danger of conviction," perhaps from "irrelevant" or "incompetent evidence" or the inability to present his "perfect defense."<sup>37</sup> In *Powell*, as well as *Gideon v. Wainwright*<sup>38</sup> and later counsel cases, systemic interests and defendants' did not conflict; both are served by the presence of counsel. On this view, the sorts of infringements on a counsel's capabilities described above look suspicious; they look like risks to *public* interests in accurate fact-finding as well as to the defendant's self-interest.

But more counsel does not always mean more accuracy. Hold aside defense attorneys' tactics of impeaching reliable evidence or otherwise misleading to serve a client's interest. The classic right-to-counsel cases like *Powell* and *Gideon* were characterized by two features that courts (and prosecutors) did not have to address until decades later, when criminal law became a common tool to address complex organized and corporate crime in addition to traditional street crime. First, granting counsel in these

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<sup>35</sup> *Polk County v. Dodson*, 454 U.S. 312, 318 (1984) ("The system assumes that adversarial testing will ultimately assist the public interest in truth and fairness."); *Herring v. New York*, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

<sup>36</sup> David Luban, *Are Criminal Defenders Different?*, 91 *Mich. L. Rev.* 1729 (1993).

<sup>37</sup> See *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (describing prosecutors' resource advantages and its affect on outcomes).

<sup>38</sup> 372 U.S. 335 (1963).

cases presented no prospect that the defense team would be so capable as to unduly hinder the prosecution; state resources would still exceed the defendant's. Second, these early cases did not present the challenge of counsel's involvement in the pre-indictment, *investigative* stage of criminal law enforcement. The Sixth Amendment right to counsel does not attach until charging, at which point investigation is well under way if not complete.<sup>39</sup> When these two factors change, defendant and systemic interests diverge. And the story of regulating right to counsel in recent decades can be told as one of adjusting features of defense representation to minimize their impact on adjudicative accuracy and effective law enforcement.

Defense counsel play a different and more potent role in complex crime cases, whether the target is a legitimate corporate firm or organized criminal groups. Investigations of complex crime often occur over substantial periods of time, and they usually require much information from the defendants themselves. Corporations typically possess the documents, employee testimony and other evidence the government needs to build a case for indictment. The government usually needs cooperation of insiders. What makes these sorts of cases different from *Gideon* and *Powell* is not just that critical information is controlled by defendants. It is that defendants often (and in corporate crime cases, virtually always) have pre-existing, on-going relationships with legal counsel—sometimes, counsel who can match the government's litigation resources. Represented defendants present much greater information barriers to law enforcement. Unlike unrepresented street-crime suspects who often make incriminating statements after arrest, suspects with counsel are savvier about knowing when their non-cooperation can frustrate a prosecution and are much less likely to cooperate without extracting some compensation in the form of non-prosecution agreements, plea deals, immunity or other favorable settlement terms.

Pam Karlan, in an important article fifteen years ago, described a series of doctrines that work to diminish the advantages of defendants with ongoing counsel relationships, or what she called “relational representation.”<sup>40</sup> Nearly all corporate crime suspects and many organized crime offenders have ongoing representation during investigations and earlier, during their wrongful conduct.<sup>41</sup> That contrasts with typical

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<sup>39</sup> The Sixth Amendment counsel right does not clearly attach until the filing of formal criminal charges or another initiation of formal adversarial proceedings. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (right attaches at initiation of adversarial proceedings, normally marked by “formal charge, preliminary hearing, indictment, information or arraignment”); see also *Moore v. Illinois*, 434 U.S. 220, 231-32 (1977) (right to counsel attaches at initial appearance before a magistrate). Prior to *Moore* and *Kirby*, the Court defined the sixth amendment counsel right as attaching at all “critical stages” of criminal proceedings, meaning “at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.” *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). See also *Escobedo*, 378 U.S. 478, 490-91 (1964). The brighter lines of *Moore* and *Kirby* probably supplant the more general standard of *Escobedo v. Illinois*, 378 U.S. 478 (1964), which defined the Sixth Amendment right to counsel as attaching when an “investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect.” *Id.* at 490. See Charles H. Whitebread & Christopher Slobogin, *Criminal Procedure* § 16.03, at 365 (1986); *id.* § 16.08, at 409 (suggesting *Escobedo* was supplanted by *Miranda*). See also *United States v. Gouveia*, 467 U.S. 180 (1984) (right to counsel at “critical” stage when “accused [is] confronted . . . by the procedural system, or by his expert adversary . . . in a situation where the results of the confrontation might well settle the accused's fate. . .”).

<sup>40</sup> See Karlan, *supra* note \_\_\_, at 672-73.

<sup>41</sup> See Bruce A. Green, *Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest*, 16 *Am. J. Crim. L.* 323, 358 n.119 (1989) (describing how some attorneys

street-crime defendants, who mostly have “discrete representation,” meaning lawyers who are hired or appointed only for a specific case, usually after the government charges. This expanded representation in complex cases, through private ordering, prompted the Court to tailor some counsel doctrines in ways that give the government a greater capacity to limit defendants’ advantages from early, sophisticated representation.

One of defendants’ advantages in this setting is a greater ability to frustrate government efforts to win defendants’ cooperation, often through a variation of the prisoners’ dilemma<sup>42</sup>—the scenario in which all suspects are better off if none cooperate but any one of them gains an advantage in being the first to confess in the event their compatriots do not stay silent. When multiple suspects are represented by the same counsel, they can better avoid yielding to a prisoner’s dilemma disadvantageously. Common counsel can help suspects share information and coordinate strategy, increasing the odds that none is cooperating to the detriment of others. If effective, this coordination, together with other defendant strategies, stymies prosecutions; suspects when the dilemma game, and the guilty may go unpunished.<sup>43</sup>

Some doctrines give the government tools to disrupt defendants’ relationships with particular attorneys. *Wheat v. United States* helps prosecutors disrupt the coordination role of attorneys who represent two or more defendants in the same enterprise. Attorneys in that setting face conflicts of interest; the interest of one client (perhaps testifying against others) may conflict with those of another. But clients might nonetheless consent to that conflict if they want the attorney for other reasons—either because she’s exceptionally skilled, or because she helps defendants coordinate strategies in their common interest. *Wheat* effectively gives prosecutors a veto over defendants’ decisions to waive such conflicts of interest and thus limits the ability to share a lawyer.<sup>44</sup> The government thereby blocks a defendant’s choice to retain a specific attorney.

In corporate cases, different parties rarely share the same lawyer. They do, however share the same “benefactor.” The firm pays for its own counsel as well as attorneys for its employees’ counsel. Especially when firms have discretion to make those payments for others’ legal representation, it gains an ability to coordinate and even coerce cooperation among defendants to frustrate—or aid—government investigators, and to closely monitor their behavior in the process. A firm may, for example, pay for attorneys only for agents who cooperate with the government, because thereby the firm

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become virtual “house counsel” for criminal enterprises); Bruce A. Green, “Through a Glass Darkly”: How the Court Sees Motions to Disqualify Criminal Defense Lawyers, 89 Colum. L. Rev. 1201, 1227 n.116 (1989) (discussing how both organized crime families and corporations may retain attorneys to represent their employees).

<sup>42</sup> Karlan, *supra* note \_\_ at 691, 694-96; William J. Stuntz, Waiving Rights in Criminal Procedure, 75 Va. L. Rev. 761, 797-801 (1989) (discussing *Wheat* and common counsel as a way for defendants to avoid prisoners’ dilemmas).

<sup>43</sup> It bears emphasis that, in reality, firms as entities often cooperate early and extensively against individual officers; there seems to be few efforts to maintain “prisoner” coordination once government investigations commence. Stated reasons of the firm’s agents are typically that that simply they want to do the right thing. It may also be, however, that firms, as an entity, seek advantage by “pushing liability downward” onto individual officers, see William S. Laufer, Corporate Liability, Risk Shifting, and the Paradox. of Compliance, 52 Vand. L. Rev. 1343 (1999), or that those speaking for the firm at this stage—frequently, directors and attorneys—have little personally at risk and so have little reason not to offer the firm’s cooperation against individual agents in exchange for lenient treatment of the entity.

<sup>44</sup> *Wheat v. United States*, 486 U.S. 153, 159-60 (1989).

gains an advantage—the government may then prosecute those individuals instead of the firm and reward the firm’s cooperation.<sup>45</sup> Or, a firm could do the opposite and pay legal fees only for agents who support the firm’s strategy of non-cooperation in an effort to “circling the wagons” and deny the government sufficient evidence to build a case.<sup>46</sup> Whatever the choice, firms as benefactors create the same problem for the government that a shared attorney among co-defendants does: it improves, and provides an enforcement mechanism for, coordination among defendants.

KPMG, the focus of a recent complex tax fraud case, is a typical of a firm with an arrangement for payment of employees’ attorneys’ fees that gives the firm this type of coordinating power.<sup>47</sup> And at the government’s urging, KPMG leveraged its power as benefactor. It agreed to pay fees only for employees who cooperated with the government.<sup>48</sup> KPMG monitored its agents’ legal strategies<sup>49</sup> and, when some tried to act self-interestedly, threatened payment cut-offs for non-cooperators.

The Thompson Memo policy, by encouraging firms to leverage their benefactor status for the government’s advantage, seeks to disrupt defendants’ coordination advantage to resist prisoners’ dilemmas. It also undercuts the advantage of well-funded counsel generally.<sup>50</sup> Even without the power to coordinate defendants and witnesses, good attorneys aim to control information disclosure.<sup>51</sup> They seek to keep incriminating evidence from the government unless it can be traded for some advantage—leniency or non-prosecution. The job, and effect, of good defense lawyering often is to frustrate investigations or shape them toward favorable outcomes for their clients.

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<sup>45</sup> Again, KPMG was typical in this regard. It used payment of employees’ legal fees to encourage their cooperation with the government, then convinced the government not to indict the firm. See Stein, slip op. at 22-27. See also Thompson Memo, supra note 2 (describing factors in decisions to charge individuals versus firms).

<sup>46</sup> Corporate non-cooperation is not unheard of. The Securities and Exchange Commission in March 2006 fined Merrill Lynch \$2.5 million for obstructing an SEC investigation by, among other things, withholding email records. See Kevin Burke, SEC Fines Merrill \$2.5 million in Settlement Over Obstruction Charges, Registered Rep, March 6, 2006, available at <http://registeredrep.com/news/sec-fines-merrill/index.html>; Deni Connor, Merrill Lynch Fine for Unrecoverable Emails, Network World, March 17, 2006, at <http://www.networkworld.com/weblogs/storage/011527.html>.

<sup>47</sup> Technically, KPMG is a partnership rather than a corporation, and some whose fees it covered are partners rather than employees. See *United States v. Stein*, S1 05 Crim. 0888, 2006 WL 1735260 (S.D.N.Y. June 26, 2006). But for simplicity’s sake I will often ignore this distinction, which does not matter for present purposes.

<sup>48</sup> See *United States v. Stein*, slip op., at 13, 18 & 22 (recounting KPMG’s policy to pay legal fees only for partners and employees who cooperated with the government).

<sup>49</sup> See Stein, slip op. at 22 (describing how, when the government notified KPMG of an agent’s non-cooperation, KPMG would notify an agent’s counsel that legal fee payments would cease in ten days unless the agent resumes cooperation with prosecutors).

<sup>50</sup> It is hard to generalize about corporate defendants’ actual behavior in prisoners’ dilemmas. Prosecutors cite “circling the wagons” behavior in some cases, meaning parties try to resist the investigation by coordinating their non-cooperation. But clearly firms often cooperate. That may be a function of professional culture among lawyers and officers who view their conduct as law-abiding (at least in ambiguous cases); it may be that firms routinely see advantage *for the firm* in cooperating by disclosing evidence that gives the government evidence against individual defendants; or it may occur mostly in cases in which firms recognize that the government likely already has evidence for a successful prosecution and so they cooperate to seek leniency as the least-bad option left.

<sup>51</sup> See generally Kenneth Mann, *Defending White Collar Crime* 103-80 (1985) (describing corporate defendants’ strategies of information control during criminal litigation).

The government targets well-funded defense counsel another way—through its ability to restrain or confiscate defendants’ assets under forfeiture statutes if those assets derive from criminal proceeds.<sup>52</sup> The Supreme Court in *Caplin & Drysdale* found no Sixth Amendment problem with forfeiture of funds needed to pay counsel. The Court recognized the difference that the quality of defense counsel can make but implied that diminishing defendants’ legal resources was a public good: “a major purpose motivating congressional adoption and continued refinement of the RICO and CCE forfeiture provisions has been the desire to lessen the economic power of organized crime and drug enterprises. This includes the *use of such economic power to retain private counsel.*”<sup>53</sup> The Court endorsed the lower court’s recognition of a “compelling public interest in stripping criminals ... of their undeserved economic power ... [including] the ability to command high-priced legal talent.”<sup>54</sup>

That language is telling. The Court recognized not only that counsel fees correlate with counsel quality and that counsel quality makes a difference in outcomes, but that high-quality counsel sometimes *hinders* systemic goals in accuracy and effective law enforcement. Lower courts now routinely approve forfeitures that deny defendants funds to hire their counsel of choice (or that seize funds already paid to attorneys).<sup>55</sup> Courts, Congress and prosecutors all recognize that a well-funded defense can conflict with enforcement interests. Forfeiture is a means to regulate funding for privately retained counsel in ways analogous to how legislatures and trial courts calibrate allocation of public funds for publicly funded counsel. The recent fraud prosecutions of two Westar executives are examples. Using criminal forfeiture statutes, the government repeatedly sought, and eventually won, restraint of attorneys’ fees that the corporation owed the individual defendants.<sup>56</sup>

The rationale of undue economic power is convenient for justifying forfeitures, where defendants’ wealth is ill-gotten. But the limit on that rationale is hard to contain. *Any* economic power, ill-gotten or not, poses the same challenge to public goals of accuracy and enforcement. It is not the illegal origins of the economic power that frustrates those goals; it is the economic power itself. Zealous defense counsel can always hinder as well as help accuracy. Thus courts, legislatures and prosecutors seek

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<sup>52</sup> *United States v. Monsanto*, 491 U.S. 600 (1989); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 630 (1989).

<sup>53</sup> *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 630 (1989) (emphasis added).

<sup>54</sup> *Id.* at 630, quoting *In re Forfeiture Hearing* as to *Caplin & Drysdale, Chartered*, 837 F.2d 637, 649 (4<sup>th</sup> Cir. 1988).

<sup>55</sup> For a recent survey of such cases, see Brian Fork, Note, *The Federal Seizure of Attorneys’ Fees in Criminal Forfeiture Actions and the Threat to the American System of Criminal Defense*, 83 N.C.L. Rev. 205 (2004).

<sup>56</sup> See *United States v. Wittig*, No. 03-40142-JAR, 2004 WL 1490406 (D. Kan. June 30, 2004) (allowing firm to give defendant-officers funds for attorneys’ fees but enjoining defendants from transferring those funds fees to their attorneys); Memorandum and Order Granting Government’s Motion to Reinstate Restraining Order, *United States v. Wittig*, No. 03-40142-JAR, May 23, 2005 (after mistrial and re-indictment, reinstating restraining order on attorneys’ fees payments by firm and placing funds for attorneys’ fees in escrow). Prosecutors also restrained assets of Enron defendants, though with little apparent effect on their abilities to obtain elite defense representation. See Carrie Johnson, *After Enron Trial, Defense Team is Stuck with the Tab*, Wash. Post, June 16, 2006 (describing assets of Jeffrey Skilling restrained by government forfeiture efforts).

ways to calibrate counsel resources so that defense attorneys aid accuracy without excessively frustrating accurate enforcement.

In this light we can understand the two policies in the Thompson Memo. The first policy gives corporate defendants strong incentives to waive attorney-client and work-product privileges for both the firm and, to the extent it can, individual agents. Those waivers significantly limit firms' twin advantages of well-financed, early-stage representation and of controlling critical evidence the government needs for an effective investigation. And the policy is directed at precisely those goals: the government asks for privilege waivers only to the degree needed to investigate the suspected conduct; prosecutors do not, under the Memo policy, demand waiver of the privileges with respect to work attorneys do representing their clients in the pending charges.

The second policy is more hotly disputed. Federal prosecutors threaten to pursue harsh charges for firms that protect "culpable employees and agents ... through the advancing of attorneys' fees."<sup>57</sup> Their strategic purpose is the one the Supreme Court has impliedly endorsed—limiting advantages that economic power gives to criminal defendants, especially in contexts in which that power is likely to frustrate public goals of accuracy and effective enforcement.<sup>58</sup> But it is one that prosecutors pursue without legislative authorization or judicial supervision, and one that can remove defense-counsel opposition to prosecutors as well.

In *United States v. Stein*, a federal district court recently held unconstitutional prosecutors' pressure on KPMG to deny attorneys' fees to employees, on the rationale that prosecutorial bargaining was unconstitutional "government interference" with a defendant's right to obtain "defense resources lawfully available to him" and thus violated due process rights to fairness and the Sixth Amendment right to counsel.<sup>59</sup> Despite broad language throughout Supreme Court case law about the importance of defense counsel to fundamental fairness, that decision is on shaky constitutional ground. The Supreme Court has never limited prosecutors' power to offer harsh incentives in the form of lawful charging decisions. Affirming the district court's broad fairness rationale<sup>60</sup> would risk rewriting the Court's doctrine that gives prosecutors unfettered bargaining discretion—a move that is probably advisable as a policy matter<sup>61</sup> but unlikely to happen soon.

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<sup>57</sup> See Thompson Memo, *supra* note 2.

<sup>58</sup> Associate Attorney General Thompson made this point surprisingly clear by defending the policy that bears his name in language that echoes the *Caplin & Drysdale* rationale. He argued that suspects "don't need fancy legal representation" if they believe they did not act with criminal intent. See Laurie P. Cohen, In the Crossfire: Prosecutors' Tough New Tactics Turn Firms Against Employees, Wall. St. J., June 4, 2004. (reporting Larry Thompson's statement.).

<sup>59</sup> See *Stein*, slip. op. at 45-47, 82-83.

<sup>60</sup> As one example of court's broad rationale, it found the constitutional "right to fairness" means "the government may not both prosecute a defendant and then seek to influence the manner in which he or she defends the case," slip op. at 39-41, a generalization in some tension with approval of forfeiture of attorney fees, defendants' inability to waive an attorney's conflict of interest, and prosecutorial pressure to waive constitutional rights to discovery. The court's rationale that "the government's interference ... limited what the KPMG Defendants can pay their lawyers to do," slip op. at 64, is also in some tension with rationales behind forfeiture of attorneys' fees.

<sup>61</sup> For one argument it should, see William J. Stuntz, *Bordenkircher v. Hayes*: Plea Bargaining and the Decline of the Rule of Law, in *Criminal Procedure Stories* 351 (Carol S. Steiker ed. 2006).

Yet appellate courts, as well as firms, may be receptive to a way to limit this powerful prosecutorial tool to diminish defense counsel. Part of their motivation should be courts' desire for a role in the calibration prosecutors now make and the *Stein* court properly examined: what level of resources do defendants need to make this prosecution a reliable as well as fair adjudication?<sup>62</sup> Prosecutors make a similar judgment in seeking attorney fee forfeiture, but with legislative and judicial input. Here, by bargaining for legal fee cut-offs, they do so much the same without another branch's input. Another part should come from recognizing that defense lawyers provide the only remaining structural check to prosecutors formerly provided by trials (a point I develop in the final Part).<sup>63</sup> Regardless of what courts do, firms certainly want to limit prosecutors' ability to bargain over fee indemnification. It turns out firms have an effective tool, in *private contract*, to stop this prosecutorial pressure. And courts could easily support those contractual responses with a narrow constitutional rule that does not imply wider limits on well established bargaining power.

### III.

The Supreme Court has made clear that plea bargaining is “not only an essential part of the process but a highly desirable part” and that it presumes prosecutors bargain for proper reasons.<sup>64</sup> With this view, the Court has done all it can to facilitate bargaining. Prosecutors can threaten any charge and sentence, no matter how severe or unusual, in order to induce defendants to waive their rights. (And with America's expansive criminal codes and the industrialized world's most severe set of sentencing laws, legal-but-harsh threats are easy to make).<sup>65</sup> *Bordenkircher v. Hayes*<sup>66</sup> makes clear that no threat of harsh prosecution, no matter how disproportionate to defendant's wrongdoing nor how vindictively imposed in response to defendant's insistence on constitutional rights, will make a prosecutor's bargaining tactics unconstitutional. (In *Bordenkircher*, when Paul Hayes declined a plea offer for a five-year sentence for stealing an \$88 check when he had two prior felonies on his record, the prosecutor charged and convicted him under a three-strikes law that sent him to prison for life without parole.)<sup>67</sup>

On the other side, the Court has given defendants things to trade—constitutional and statutory rights.<sup>68</sup> The Court has never held a constitutional right non-waivable by defendants, though some lower courts occasionally have with regard to a very few

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<sup>62</sup> See *Stein*, slip op. at 48-49 (noting, in a case with 6 million document pages and trial expected to last several months, preparing and trying such a case “requires substantial resources,” and achieving cut-off of legal fees “would impact defendants' ability to present the defense”).

<sup>63</sup> See infra Part X. See generally Stephanos Bibas, *Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463 (2004).

<sup>64</sup> *Santobello v. New York*, 404 U.S. 257 (1971).

<sup>65</sup> See generally, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505 (2001). The Eighth Amendment's Cruel and Unusual Punishment Clause imposes no real limit on the severity of sentences legislatures may enact. See *Harmelin v. Michigan*, 501 U.S. 957 (1991) (mandatory life-without-parole not cruel and unusual for possession of 650 grams of cocaine); *Rummel v. Estelle*, 445 U.S. 263 (1980) (upholding life-with-parole sentence third nonviolent felony of minor theft); but see *Solem v. Helm*, 463 U.S. 277 (1983) (overturning life-without-parole sentence for third, nonviolent theft conviction).

<sup>66</sup> 434 U.S. 357 (1978).

<sup>67</sup> For a detailed account of *Bordenkircher*, see Stuntz, *supra* note \_\_\_\_.

<sup>68</sup> See *United States v. Mezzanatto*, 513 U.S. 196 (1995) (allowing defendant to waive protections of criminal procedure rule).

entitlements.<sup>69</sup> Clearly—because it is the definition of a guilty plea—defendants can waive all trial rights. But they can also waive most other entitlements, including constitutional rights to appeal and to receive discovery from the government.<sup>70</sup> Defendants can also respond to government incentives with cooperation, such as information disclosure (which often entails a waiver of a right not to disclose), testimony or more elaborate acts, such as under-cover contact with other suspects.

Plea bargaining doctrine leaves little basis for barring Thompson Memo tactics. Aggressive prosecutorial bargaining for either privilege waivers or cooperation in the form of refusing to pay counsel fees for others looks more like typical if harsh bargaining than unconstitutional denial of counsel. Note neither tactic denies attorneys to defendants. Privilege waivers allow firms to retain counsel, but without the advantage of confidentiality in their communications and work product. Convincing a firm not to pay officers' legal fees merely denies other suspects ample private resources for hiring the preferred counsel and litigation support.<sup>71</sup> When prosecutors coerce that nonpayment, they disrupt the primary form of private ordering that funds white-collar cases. Those are cases in which expenses will be especially high, and so suspects may face unpleasant options of exhausting personal wealth or reaching a plea deal after little defense-side litigation.

Nonetheless, parties still have *some* counsel, and the limits on counsel were achieved by party agreement, albeit under harsh (though common) bargaining incentives. That's the larger problem for any constitutional argument against Thompson Memo tactics. Limits on counsel are achieved by negotiated agreements. To bar the Thompson Memo incentives, a court will have to hold, for the first time, that prosecutors' threats to pursue lawful charges are unconstitutional. The district court decision in *Stein* notwithstanding, the Supreme Court has fashioned little in the way of constitutional doctrine to restrain prosecutors' hardball tactics to force waivers and pleas from

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<sup>69</sup> See Nancy King, *Priceless Process*, 47 U.C.L.A. L. Rev. 113 (1999). See, e.g., *Lanier v. State*, 635 So.2d 813 (Miss. 1994) (defendant cannot waive his right not to be sentenced above the statutory maximum punishment). More often, it seems, courts will approve bargains even with illegal or unauthorized terms. See Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 Tulane L. Rev. 695 (2001) (describing courts' widespread approval of bargains with "unethical, or even illegal" terms).

<sup>70</sup> *United States v. Ruiz*, 536 U.S. 622 (2002) (prosecutor can condition a plea bargain offer on defendant's waiver of her constitutional right, under *Brady v. Maryland*, 373 U.S. 83 (1963), to discovery of impeachment evidence against government witnesses); *United States v. Michelsen*, 141 F.3d 867 (8th Cir. 1998) (affirming defendant's broad waiver of appellate rights); *United States v. Schuman*, 127 F.3d 815, 817 (9th Cir. 1997) (finding that the defendant had waived "any right to appeal or collaterally attack the conviction and sentence"); *United States v. Guevara*, 941 F.2d 1299 (4<sup>th</sup> Cir. 1991) (defendant can waive right to appeal sentence as part of a plea bargain). See also *United States v. Mezzanatto*, 513 U.S. 196, 204 (1995) (upholding the waiver of a court rule and an evidence rule that bar the admissibility of statements made during plea negotiations). Cf. *United States v. Olano*, 507 U.S. 725, 733 (1993) ("Whether a particular right is waivable;...whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.").

<sup>71</sup> This latter agreement offers a twist without analogy in other plea bargaining exchanges: the defendants who lose counsel resources are not the ones yielding to government incentives. The firm agrees to cooperate by ending payments, but the officers suffer diminished counsel resources. Individual defendants are not waiving counsel funds. The better analogy is that one suspect suffers because another cooperates with the government, although the cooperation takes a novel form—cutting another suspect's legal resources rather than providing evidence against him.



defendants. Hard bargaining is problematic, but the problem is not unique to the Thompson Memo policy. It is a defining feature of the law of plea bargaining.

The problem is that prosecutors' threats can be so severe as to convince rational *innocent* defendants to plea, or guilty defendants to plead to more than they should. If a defendant thinks he is not guilty but still estimates he has a one-in-four chance of being convicted and getting life-without-parole after trial, a plea for five years—Hayes' choice in *Bordenkircher*—may look like the lesser of two injustices.<sup>72</sup> For corporations and their agents, the choices can be comparably stark: firms lose their commercial viability when merely *indicted* on certain forms of white-collar charges;<sup>73</sup> witness accounting firm Arthur Andersen's demise before its trial (which yielded a conviction that was later overturned).<sup>74</sup> Officers face personal financial ruin merely through bearing the costs of defending a federal corporate crime charge, holding aside any sentencing consequences.<sup>75</sup>

Prosecutors have the power to induce rational defendants not only to waive rights they would prefer to exercise, but to waive them in the face of insubstantial charges *and* to circumvent processes that may uncover their meritlessness.<sup>76</sup> And the process itself—six- or seven-figure defense costs, fatal reputational loss for firms (plus long pretrial detention and other collateral consequences for street-crime suspects)—may exact as much pain as formal punishment.<sup>77</sup> This means defendants are sometimes making decisions about waiving process based on factors other than the merits of the case, i.e., on collateral consequences, on litigation costs, and on risk aversion to the odds of high after-trial penalties (familiar concerns as well in civil litigation).<sup>78</sup>

The Supreme Court has had basically two routes to lessen this dynamic, but it has taken neither. Prosecutors face no limits on the severity of their charges or amount of their plea discounts,<sup>79</sup> and defendants face no limits on what terms they can bargain away. (To put the latter point differently, no features of adjudication process are mandatory.) Further, the Court has endorsed forfeiture of defendant assets even when needed to pay attorney fees. In light of that, it is hard to see the unconstitutionality of the Thompson Memo pressure for privilege waivers or nonpayment of attorneys' fees: prosecutors are simply threatening to file well-grounded charges if defendants do not

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<sup>72</sup> Stuntz at 372. For a fuller development of this point, see Oren Bar-Gil & Oren Gazal, *Plea Bargains Only for the Guilty*, 49 *J. L. & Econ.* 353 (2006).

<sup>73</sup> See *United States v. Stein*, at 11-18 (noting KPMG's fear of indictment in light of the precedent of Arthur Andersen).

<sup>74</sup> See *Arthur Andersen v. United States*, 544 U.S. 696; 125 S. Ct. 2129 (2005).

<sup>75</sup> As one example of how high legal fees can go for individual defendants charged in large corporate crime cases, Enron's former CEO ran up about \$40 million in legal fees, \$17 million of which was covered by insurance. See Carrie Johnson, *After Enron Trial, Defense Team is Stuck with the Tab*, *Wash. Post*, June 16, 2006.

<sup>76</sup> The district court in *Stein* seemed, like Captain Renault in *Casablanca*, "shocked, shocked" to discover that prosecutors would like to interview witnesses without counsel, would insist on closely monitoring defendant's cooperation during the term of a deferred prosecution agreement, and that defendants experience prosecutorial charging threats as "the proverbial gun to its head." See *United States v. Stein*, slip op. at 2, 26-34.

<sup>77</sup> See, e.g., Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 *J. Legal Stud.* 833 (1994).

<sup>78</sup> See generally Bibas, *supra* note 63.

<sup>79</sup> For a proposal for such a limit, see William J. Stuntz, *Bordenkircher v. Hayes: Plea Bargaining and the Decline of the Rule of Law*, in *Criminal Procedure Stories* 351, 372-74 (Carol S. Steiker ed. 2006).

waive privileges or stop advancing legal fees to officers. Other defendants are still free to hire counsel with whatever other resources they possess.

It seems, then, that for the Supreme Court to recognize constitutional limits on Thompson Memo tactics, it would have to do the unlikely: revise much of the doctrine that gives parties broad leeway in plea bargaining. That is the implication of the district court holding in the KPMG case, *Stein*; the court found prosecutors' bargaining simply unfair under the due process clause.<sup>80</sup>

Yet appellate courts have an alternative for a much narrower constitutional rule to limit much of prosecutors' ability to coerce firms into nonpayment of attorneys' fees. Interestingly, the key is that private firms must first play the primary role in reducing the government's leverage over them. Although it is not explicit in the Thompson Memo, under that policy prosecutors pressure firms not to make *discretionary* attorneys' fee payments, but they do not demand that firms breach contractual obligations.<sup>81</sup> Not all firms benefit from this distinction, however, because corporations and partnerships currently vary in their contractual arrangements for indemnifying officers' attorneys' fees. Some firms have no explicit contractual obligations to indemnify their employees' attorneys' fees, and so all such payments are discretionary (though often customary) with the firm. This was the case with KPMG, and it was this discretionary nature of its payments to employees that gave prosecutors an opening to bargain over those payments. (In KPMG's case, its longstanding practice of advancing fees might create an implied contract obligation).<sup>82</sup> In many firms, however, corporate bylaws require payment of officers' attorneys' fees. This was the case with Westar corporation, which had to advance even the legal fees of officers accused of defrauding the corporation. In still other cases, firms take on an obligation to pay legal fees in employment contracts. Further, some states impose a statutory duty on firms to pay officers' attorney fees (though many, including Delaware, do not).<sup>83</sup> Finally, firms often purchase "D&O" insurance that covers attorneys' fees for directors and officers facing litigation arising from their work for the firm. Through that last arrangement, the *firm* does not pay legal fees at all; the insurer does.

When firms have explicit contractual duties to pay, whether through bylaws, employment contracts or statute, cutting off fees would require a contract (or statutory) breach—something even aggressive prosecutors apparently do not demand. Much of what defendants fear in the way of prosecutorial pressure to halt fee payments to employees, then, could be solved simply by contract.<sup>84</sup> Moreover, even if prosecutors subsequently grow bold enough to demand that firms to breach contracts or corporate

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<sup>80</sup> Stein, slip op. at 82-83.

<sup>81</sup> This was well documented in the KPMG case. See *id.*, slip op. at 17.

<sup>82</sup> *Id.*, slip op. at 9, 38 & n.117.

<sup>83</sup> See Del. Rev. Uniform Limited Partnership Act § 17-108 (authorizing partners to agree to indemnify one another); *Morgan v. Grace*, C.A. No. 20430, 2003 Del. Ch. Lexis 113, at \*9 (Del. Ch. Oct. 29, 2003) (interpreting section 17-108 to permit agreements to advance counsel fees). See generally 3A William Meade Fletcher, *Fletcher Cyclopaedia of the Law of Private Corporations* § 1344.10 at 556-57 (2002 rev. vol.) (citing and describing different versions of state statutes on corporations' and partnerships' indemnification of attorneys' fees for employees or partners).

<sup>84</sup> To be sure, firms have considerations other than the prospect of facing federal indictment that go into decisions on how to structure contract terms with employees. But concern about prosecutors' practice is not sufficiently widespread that firms are likely to weigh this factor heavily in making those contract choices.

bylaws, courts will have an easier way to bar *that* prosecutorial tactic than they would following *Stein* and imposing broad-reaching fairness limits on prosecutorial bargaining tactics.

Lower courts have already taken steps toward this approach when they have addressed prosecutorial efforts to hinder corporate payment of attorneys' fees through forfeiture. Even when funds for attorneys' fees are forfeitable by individual defendants, courts enforce firms' contractual duties to pay them (although defendants must place them in escrow pending the forfeiture judgment).<sup>85</sup> Judicial respect for contractual obligations provides a narrow theory for the Supreme Court to restrain prosecutors' demands for fee cut-offs without undermining the wide bargaining discretion it otherwise gives prosecutors. The key is the standard due process analysis, even though the Court has been distinctly unreceptive to due process and Sixth Amendment arguments that *forfeiture* actions should be limited when defendants need the disputed assets to pay for counsel.<sup>86</sup> (One reason for that deference is that forfeiture has broad legislative authorization.) Under due process doctrine, courts typically balance three factors: the private interest, the probable value of the proposed doctrinal safeguard, and the adverse impact upon the governments' interests.<sup>87</sup> Lower courts, in other due process contexts, have weighed defendants' ability to pay counsel of choice as a significant private interest,<sup>88</sup> in addition to disfavoring firms' breach of their contractual duties to pay. Putting those points together, courts are more likely to find a weighty private interest when that interest is not only the need to pay counsel, but respect for obligations arising in private contracts. With the private interest so defined, the due process rule—that prosecutors could not offer incentives for defendants to breach contracts to advance attorneys' fees of other defendants—should have little “adverse impact” on prosecutors' otherwise wide-ranging ability to offer hard incentives for cooperation and settlement.

It is far from clear, of course, the Supreme Court would ultimately endorse this analysis. Its well-established record of not regulating prosecutors' bargaining practices, its concern about defendants' economic power frustrating government enforcement objectives, and its lack of concern for de-funding counsel through forfeiture, all point the other way. But the Court's solicitousness this term, in *United States v. Gonzales-Lopez*,<sup>89</sup>

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<sup>85</sup> In the trial of two executives convicted of defrauding Westar corporation, the court ordered the firm the attorneys' fees it owed under its bylaws into an escrow account, to preserve those for later forfeiture determination. See *United States v. Wittig*, 333 F.Supp.2d 1048 (D. Kan. 2004); *United States v. Wittig*, 2005 WL 1227914 (D.Kan.) (May 23, 2005). The trial court in *United States v. Stein*, the KPMG tax case, barred prosecutorial interference with KPMG's payments to individual defendants without finding it had a contract duty to do so, although it stressed KPMG had statutory *authority* to cover legal fees and “quite possibl[y]” an implied contract duty to do so. See *United States v. Stein*, slip op. at 37-39.

<sup>86</sup> Cite cases.

<sup>87</sup> See, e.g., *United States v. Ruiz*, 536 U.S. 622, 631 (2002); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) (applying Mathews in civil forfeiture context); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>88</sup> See, e.g., *United States v. Jones*, 160 F.3d 641, 646 (10<sup>th</sup> Cir. 1998) (in holding that defendant has a due process right to a post-restraint hearing on government's forfeiture action, court described defendant's qualified right to counsel as “important” and one that, if denied, would “work a permanent deprivation”).

<sup>89</sup> No. 05-352 (June 26, 2006) (reversing conviction of defendant because trial court violated defendant's Sixth Amendment right to counsel when it refused to allow defendant to retain counsel of his choice by denying defendant's motion to change counsel and denying attorney's request for admission to practice *pro hac vice*).

for a defendant's ability to hire counsel of his choice might indicate a willingness to protect that same interest in other ways, especially when Congress has not provided the means to undercut it, as it has with forfeiture. Importantly, the contract interest strengthens the argument for a due process restriction while also limiting such a doctrine to a narrow application—bargaining over obligatory counsel-fee payments. That would leave prosecutors free to continue to bargain for other concessions with Draconian, *Bordenkircher*-type threats, as well as to pursue limits on counsel funding through forfeiture actions.

Further, if firms make obligatory rather than discretionary payment of attorneys' fees their standard practice, courts would have additional public policy reason to protect those payments from prosecutorial bargaining pressure. Nondiscretionary duties to pay legal fees *reduce firms' power as benefactors* who coordinate all suspects' actions in an effort to resist or direct the government's investigation. In taking on contractual duties to advance fees (or arranging for payment through insurance policies), firms lose some power over individual defendants that they could leverage to the government's disadvantage. (Recall KPMG, with discretion to pay its partners' legal fees, made payments contingent on the partners' legal strategies and monitored individuals' ongoing interactions with investigators.) In this way, prosecutors still gain—defendants have less ability to coordinate resistance to prisoners' dilemmas and other investigative strategies—even though they face individual defendants with fully funded counsel.

Finally, the political economy of this approach should give it some *sub rosa* appeal to the Court. Forfeiture is most frequently employed in drug and organized-crime cases (although its use in corporate cases is not uncommon), while insurance and other contract agreements for attorneys' fees are overwhelmingly restricted to the context of legitimate firms. By protecting attorneys' fees paid through contracts more than it does fees paid from forfeitable assets, the Court should recognize that its combined body of law would target the enforcement-frustrating economic power of traditional drug and organized-crime defendants much more than white-collar defendants in legitimate corporations. Even so, the government would continue to possess significant sets of other investigation, litigation and bargaining options to pursue both groups.<sup>90</sup>

#### IV. Conclusion

Providing corporate defendants a safe harbor for contractually defined defense attorney fees keeps executive-branch regulation of defense counsel within reasonable parameters. Prosecutors retain powerful tools to adjust defense counsel's capabilities. With legislative mandate, they reduce attorney fee funds through forfeiture. With transparent rule-making procedures, the commit limited invasions of detained defendants' attorney-client confidentiality.<sup>91</sup> Facing the opposition of fully funded defense counsel,

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<sup>90</sup> See John C. Jeffries & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 *Hastings L.J.* 1095 (1995) (describing advantages of federal criminal law and criminal procedure rules for pursuing large scale, organized-crime offenders). As another example of tools to impose liability in tough cases, see accounts of prosecution under the many federal false statements statutes, to which prosecutors often can turn when proof of other substantive charges is difficult. Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 *Colum. L. Rev.* 583, 590-91 (2005).

<sup>91</sup> For a description of the rule-making process in the context of this policy, see Birkhead, *supra* note 1, at 28-29.

they can bargain with firms for waivers of attorney-client and work-product privileges just as they have long bargained for other defense waivers to reach plea agreements. Each of those avenues for prosecutors to encroach of defense representation faces a meaningful check—Congress, rule-making procedures, or sophisticated defense-lawyer opposition.

Not so with prosecutors' pressure on firms to de-fund employees' defense representation. Note the odd posture of this negotiation: the parties losing counsel are not waiving it in exchange for prosecutorial concessions. The party cutting off attorneys' fees to others, in exchange for leniency, have well-funded counsel guiding them through the negotiation. In this way, prosecutors de-fund individual defendants' legal teams without either check by another government actor or by defense counsel whose client pays the full, direct consequences for the concession. That gives prosecutors, who already have the powerful tool of unregulated charging power to drive bargains, too much power to eliminate their litigation opponents any check by another public or private actor.

That is important because of the *structural* role defense attorneys play in contemporary litigation, especially in plea bargaining. Defense counsel is now the *only* real structural commitment to accurate and fair outcomes. In the early decades of the republic, lack of defense counsel was not unusual, but other familiar features of criminal adjudication were not only common but mandatory. In particular, trials were much more common. While plea bargains grew steadily in the nineteenth century (as did the appearance of defense counsel),<sup>92</sup> it was not clear even at the end of the nineteenth century that defendants were constitutionally allowed to waive jury trials.<sup>93</sup> In a plausible sense, trials *substituted* for counsel. Both are means to check the government. Instead of defendants having professional lawyers to inspect the government's case and marshal independent arguments or evidence, the government had to present its evidence to an independent fact-finder, to whom defendants could submit evidence as well.<sup>94</sup> Juries and judges were greater checks on the government in many cases through those early decades than defense counsel. But with the rise of counsel, that changed. In the twentieth century, the Court made all key procedural components—trials, discovery, compulsion and confrontation of witnesses—waivable and shifted to explicit encouragement of plea bargaining. Defendants with counsel were presumed to be capable of protecting *systemic* interests in accuracy by acting in their self-interest and consenting to pleas only when the government's evidence would prevail at trial.<sup>95</sup> Adjudication shifted from a public process to one of private negotiation (more than ninety percent of cases are now resolved without trial) on the premise that defense counsel provided safeguards for public interests as well as defendant interests.

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<sup>92</sup> See George Fletcher, *Plea Bargaining's Triumph* (2003).

<sup>93</sup> See King, *supra* note 69, at 120-27

<sup>94</sup> This is much like the English criminal trial system through the eighteenth century, when defense counsel were *forbidden* but defendants compelled to speak. See John Langbein, *The Origins of the Adversary Criminal Trial* (2003).

<sup>95</sup> See generally King, *supra* note 69 (arguing defendants should be able to waive most rights because they have counsel to negotiate dispositions, replacing the need for mandatory processes). The Court noted in *United States v. Patton*, 281 U.S. 276, 306-08 (1930) that absence of counsel was a rationale for making jury trials non-waivable and, because that rationale has "ceased to exist," defendants could now waive juries. Juries are not "part of the frame of government" but instead were designed "primarily for the protection of the accused . . . which he may forego at his election." *Id.* at 299.

The capacity of defense counsel to fulfill that role in the bulk of criminal litigation, which is handled by appointed counsel in state courts, is perennially in question due to under-funding of public defenders. And prosecutors have plausible arguments that, in corporate crime litigation, counsel is effectively *too* strong to serve public interests in accuracy and effective law enforcement. Forfeiture and privilege waivers are tactical responses to that concern. (Eavesdropping on client communications largely targets another set of risks—future violence and terrorism rather than investigation obstruction.) Limiting prosecutors’ ability to bargain over defense funding only to those cases in which third-party fee payments are not mandated by contract provides rough but effective rule to keep prosecutors from overreaching in ways that pose risks to public interests as well as private ones. It gives corporate defendants and their employees a range of options (insurance, contract, corporate bylaws) for providing litigation fees that prosecutors cannot reach. There is an odd implication to this doctrinal choice: courts seem more willing to protect contract obligations encroachment by public officials than they to the constitutional right to counsel. But it is a path that not only gives firms and officers a means to virtually nullify the most troublesome policy of the Thompson Memo; it also accommodates the Court’s doctrines on forfeiture of attorneys’ fees and prosecutorial bargaining power that, though controversial and problematic, are unlikely to see revision anytime soon.