

CORPORATE CRIME

VOLUME TWO

CORPORATE CRIME:
AN INTRODUCTION TO
THE LAW AND ITS
ENFORCEMENT
VOLUME TWO

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Author's Note

This text was developed over the course of a decade or so of teaching from and editing self-created materials. It emerged from the ground up, out of one instructor's particular approach to preparing upper-level law students, most of whom head to jobs in "Biglaw" or the federal government, for entering the field of corporate enforcement and defense.

The course from which these materials emerged earns four credits and is designed to be demanding and cover many difficult topics. This book is meant to allow its author to use it to continue that particular approach, while providing a low-cost bound book for future students who take the course. Due to the confines of the self-publishing platform, this could be accomplished only by producing a two-volume text.

Those interested in using these materials in their own related courses, or to learn about aspects of the field, are welcome to draw from the materials in part and selectively. Each individual chapter is available for free in pdf at buelloncorporatecrime.com. That site will develop to include other materials, such as syllabus suggestions and sample exam problems.

Many thanks to the hundreds of students over the years who have tolerated these materials as they have been improved and refined, with their invaluable feedback. Special and deep gratitude to Lauren Smith and Sarah Lowe, for their essential roles in shepherding a loose pile of course materials into the first edition of the published text. Thanks to Jacob Kornhauser for assistance with the second edition, Jean Wilson-Stayton for help with the third and fourth editions, and Julia Searby for work on the fifth edition.

Corporate crime is now one of the largest and most important fields in American law. Relative to its importance to practice and policy, it remains under-covered in law school curricula and in scholarship. It is hoped that this project, which will be updated frequently, will over the longer term serve as a path to more mature and settled treatments of the subject that inevitably will follow. In the meantime, errata, comments, and suggestions are most welcome. Please send them to buell@law.duke.edu.

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8. OBSTRUCTION OF JUSTICE

Nearly every case of corporate crime includes the potential for obstruction of justice charges because (1) the federal statutes cover a very wide range of conduct; and (2) there is a near universal human impulse to avoid punishment, which almost always yields (in spite of the best efforts of skilled counsel!) some lying and covering up during the investigative process. Prosecutors indeed bring such charges in many corporate crime cases, for reasons we will discuss. The statutory scheme is, unfortunately, convoluted and has created a host of interpretive issues for the federal courts, especially on questions of mens rea.

As in other areas of the corporate crime field, however, the line-drawing problems do not come only from statutory drafting. It is once again hard for the law to find crisp distinctions—in this instance between undesirable conduct that perverts legal process and regular adversary behavior. Notice how each case in this chapter deals in some way with that basic line-drawing problem.

A. Selected Federal Obstruction of Justice Statutes

The obstruction laws are situated in Title 18 of the U.S. Code. Section 1503, successor to the first federal obstruction law, includes the famous “omnibus” clause (in bold below) that has long been the go-to provision for prosecuting obstruction in federal court. But § 1503 has some limitations.

Section 1505 is § 1503’s counterpart for agency and congressional proceedings. (And thus has similar limitations.)

Section 1512 is for problems of “witness tampering” and covers a more specific series of behaviors. But notice how § 1512’s coverage goes well beyond witness tampering and includes several things that §§ 1503 and 1505 would not cover. Pay careful attention to the definitional provisions in § 1515 that apply to § 1512.

Finally, § 1519 is an extremely broad anti-evidence destruction statute, enacted in the wake of the Enron scandal.

As with the FCPA statutes, it pays to make a summary chart for these obstruction statutes. They give prosecutors a menu to choose from, and often more than one may apply in a particular case. The statutes differ principally on these dimensions: (1) the conduct that they cover (e.g., document destruction only or also false statements?); (2) mens rea (e.g., knowledge of exactly what and/or intent to do precisely what are required for conviction?); and (3) temporal or jurisdictional application (e.g., does the statute apply only after judicial proceedings have commenced or also during an investigation?).

Particularly important terms in the statutes are highlighted in bold.

18 U.S.C. § 1503. Influencing or injuring officer or juror generally.

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or **corruptly** or by threats or force, or by any threatening letter or communication, **influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice**, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is—

- (1) in the case of a killing, the punishment provided in sections 1111 and 1112;
- (2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and
- (3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

18 U.S.C. § 1505. Obstruction of proceedings before departments, agencies, and committees.

Whoever **corruptly**, or by threats or force, or by any threatening letter or communication **influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States**, or the due and proper exercise of the power of inquiry under which any **inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress**—Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

18 U.S.C. § 1512. Tampering with a witness, victim, or an informant.

(a) (1) Whoever kills or attempts to kill another person, with intent to—

- (A) prevent the attendance or testimony of any person in an official proceeding;
- (B) prevent the production of a record, document, or other object, in an official proceeding; or
- (C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to—

- (A) influence, delay, or prevent the testimony of any person in an official proceeding;
- (B) cause or induce any person to—
 - (i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
 - (ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;
 - (iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
 - (iv) be absent from an official proceeding to which that person has been summoned by legal process;
- (C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(3) The punishment for an offense under this subsection is—

- (A) in the case of a killing, the punishment provided in sections 1111 and 1112;
- (B) in the case of—
 - (i) an attempt to murder; or

- (ii) the use or attempted use of physical force against any person;
imprisonment for not more than 30 years; and
- (C) in the case of the threat of use of physical force against any person,
imprisonment for not more than 20 years.
- (b) Whoever knowingly uses intimidation, threatens, or **corruptly persuades** another person, or attempts to do so, or **engages in misleading conduct toward another person**, with intent to—
 - (1) influence, delay, or prevent the testimony of any person in an official proceeding;
 - (2) cause or induce any person to—
 - (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
 - (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;
 - (C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
 - (D) be absent from an official proceeding to which such person has been summoned by legal process; or
 - (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release, parole, or release pending judicial proceedings;shall be fined under this title or imprisoned not more than 20 years, or both.
- (c) Whoever **corruptly**—
 - (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
 - (2) **otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,**shall be fined under this title or imprisoned not more than 20 years, or both.
- (d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—
 - (1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or imprisoned not more than 3 years, or both.

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

(f) For the purposes of this section—

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

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

(g) In a prosecution for an offense under this section, **no state of mind need be proved with respect to the circumstance—**

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant. . . .

18 U.S.C. § 1515. Definitions for certain provisions; general provision.

(a) As used in sections 1512 and 1513 of this title and in this section—

(1) the term “**official proceeding**” means—

(A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;

- (B) a proceeding before the Congress;
 - (C) a proceeding before a Federal Government agency which is authorized by law;
or
 - (D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce;
- (2) the term “physical force” means physical action against another, and includes confinement;
- (3) the term “misleading conduct” means—
- (A) knowingly making a false statement;
 - (B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;
 - (C) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;
 - (D) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or
 - (E) knowingly using a trick, scheme, or device with intent to mislead;
- (4) the term “law enforcement officer” means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant—
- (A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or
 - (B) serving as a probation or pretrial services officer under this title;
- (5) the term “bodily injury” means—
- (A) a cut, abrasion, bruise, burn, or disfigurement;
 - (B) physical pain;
 - (C) illness;
 - (D) impairment of the function of a bodily member, organ, or mental faculty; or

(E) any other injury to the body, no matter how temporary; and

(6) the term “corruptly persuades” does not include conduct which would be misleading conduct but for a lack of a state of mind.

(b) **As used in section 1505, the term “corruptly” means** acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

(c) This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.

18 U.S.C. § 1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of **any matter within the jurisdiction of any department or agency of the United States** or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both. . . .

When considering a particular matter or problem, *never* make the mistake of relying solely on a statutory summary as a substitute for rereading the applicable statutory language. That said, to summarize, on the basis of both the statutory text and some of the interpretive decisions included in this chapter, see the chart on the following page:

Statutory Summary Chart

Statute	Conduct (Actus Reus)	Mens Rea	Proceedings Covered	Temporal Limitations
§ 1503 § 1505	Any obstructive effort (“omnibus” clauses).	“Corruptly” (see case law, including “nexus” requirement).	Judicial, including grand jury, under 1503. Congressional or administrative if “official” (formal), under 1505.	Proceeding must be pending, which means formally instituted.
§ 1512(a) § 1512(b)	Various forms of violent and nonviolent witness tampering (with varying penalty levels).	Intent to obstruct government. If the witness tampering involves only “persuasion,” actor must also be “conscious of wrongdoing.”	“Official” (formal) federal proceeding, in any of the three branches of government.	Anticipatory obstruction covered. Proceeding need not be pending or about to be instituted, but there must be nexus to specific potential proceeding.
§ 1512(c)	All obstruction (“impede”) involving records, documents, or objects.	“Corruptly” (see case law, including “nexus” requirement).	“Official” (formal) federal proceeding, in any of the three branches of government.	Anticipatory obstruction covered. Proceeding need not be pending or about to be instituted, but there must be nexus to specific potential proceeding.
§ 1519	All tampering with regard to any evidence of white collar crime.	Knowingly (as to the tampering) plus intent to impede the government.	Any “matter” (including informal investigations), within the jurisdiction of the federal government.	None on the face of the statute, but courts likely will say some “nexus” to a specific actual or potential investigation required.

B. Elements and Examples: Section 1503 and the “Omnibus” Clause

The following case is the major Supreme Court decision on § 1503. The “nexus” idea discussed here is critical to the concept of obstruction and potentially to the interpretation of all the federal obstruction statutes.

UNITED STATES v. AGUILAR, 515 U.S. 593 (1995)

Chief Justice REHNQUIST delivered the opinion of the Court.

A jury convicted United States District Judge Robert Aguilar of one count of illegally disclosing a wiretap in violation of 18 U.S.C. § 2232(c), and of one count of endeavoring to obstruct the due administration of justice in violation of § 1503. . . . We granted certiorari to resolve a conflict among the Federal Circuits over whether § 1503 punishes false statements made to potential grand jury witnesses. . . .

Many facts remain disputed by the parties. Both parties appear to agree, however, that a motion for postconviction relief filed by one Michael Rudy Tham represents the starting point from which events bearing on this case unfolded. Tham was an officer of the International Brotherhood of Teamsters, and was convicted of embezzling funds from the local affiliate of that organization. In July 1987, he filed a motion under 28 U.S.C. § 2255 to have his conviction set aside. The motion was assigned to Judge Stanley Weigel. Tham, seeking to enhance the odds that his petition would be granted, asked Edward Solomon and Abraham Chalupowitz, a.k.a. Abe Chapman, to assist him by capitalizing on their respective acquaintances with another judge in the Northern District of California, respondent Aguilar. Respondent knew Chapman as a distant relation by marriage and knew Solomon from law school. Solomon and Chapman met with respondent to discuss Tham's case, as a result of which respondent spoke with Judge Weigel about the matter.

Independent of the embezzlement conviction, the Federal Bureau of Investigation (FBI) identified Tham as a suspect in an investigation of labor racketeering. On April 20, 1987, the FBI applied for authorization to install a wiretap on Tham's business phones. Chapman appeared on the application as a potential interceptee. . . . The 30-day wiretap expired by law . . . but Chief Judge Peckham maintained the secrecy of the wiretap under § 2518(8)(d) after a showing of good cause. During the course of the racketeering investigation, the FBI learned of the meetings between Chapman and respondent. The FBI informed Chief Judge Peckham, who, concerned with appearances of impropriety, advised respondent in August 1987 that Chapman might be connected with criminal elements because Chapman's name had appeared on a wiretap authorization.

Five months after respondent learned that Chapman had been named in a wiretap authorization, he noticed a man observing his home during a visit by Chapman. He alerted his nephew to this fact and conveyed the message (with an intent that his nephew relay the information to Chapman) that Chapman's phone was being wiretapped. . . .

Two months after the disclosure to his nephew, a grand jury began to investigate an alleged conspiracy to influence the outcome of Tham's habeas case. Two FBI agents questioned respondent. During the interview, respondent lied about his participation in the Tham case and his knowledge of the wiretap. The grand jury returned an indictment; a jury convicted Aguilar of one count of disclosing a wiretap, 18 U.S.C. § 2232(c), and one count of endeavoring to obstruct the due administration of justice, § 1503. . . .

[T]he "Omnibus Clause" serves as a catchall, prohibiting persons from endeavoring to influence, obstruct, or impede the due administration of justice. The latter clause, it can be seen, is far more general in scope than the earlier clauses of the statute. Respondent was charged with a violation of the Omnibus Clause, to wit: with "corruptly endeavor[ing] to influence, obstruct, and impede the . . . grand jury investigation."

The first case from this Court construing the predecessor statute to § 1503 was *Pettibone v. United States*. There we held that "a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or

had notice that justice was being administered in such court.” The Court reasoned that a person lacking knowledge of a pending proceeding necessarily lacked the evil intent to obstruct. . . . The action taken by the accused must be with an intent to influence judicial or grand jury proceedings; it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the court’s or grand jury’s authority. *United States v. Brown*. Some courts have phrased this showing as a “nexus” requirement—that the act must have a relationship in time, causation, or logic with the judicial proceedings. *United States v. Wood*. In other words, the endeavor must have the “natural and probable effect” of interfering with the due administration of justice. *Wood*. This is not to say that the defendant’s actions need be successful; an “endeavor” suffices. *United States v. Russell*. But as in *Pettibone*, if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct.

Although respondent urges various broader grounds for affirmance, we find it unnecessary to address them because we think the “nexus” requirement developed in the decisions of the Courts of Appeals is a correct construction of § 1503. We have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, *Dowling v. United States*, and out of concern that “a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed,” *McBoyle v. United States*. We do not believe that uttering false statements to an investigating agent—and that seems to be all that was proved here—who might or might not testify before a grand jury is sufficient to make out a violation of the catchall provision of § 1503.

The Government did not show here that the agents acted as an arm of the grand jury, or indeed that the grand jury had even summoned the testimony of these particular agents. The Government argues that respondent “understood that his false statements would be provided to the grand jury” and that he made the statements with the intent to thwart the grand jury investigation and not just the FBI investigation. . . .

[T]he evidence goes no further than showing that respondent testified falsely to an investigating agent. Such conduct, we believe, falls on the other side of the statutory line from that of one who delivers false documents or testimony to the grand jury itself. Conduct of the latter sort all but assures that the grand jury will consider the material in its deliberations. But what use will be made of false testimony given to an investigating agent who has not been subpoenaed or otherwise directed to appear before the grand jury is far more speculative. We think it cannot be said to have the “natural and probable effect” of interfering with the due administration of justice.

Justice SCALIA criticizes our treatment of the statutory language for reading the word “endeavor” out of it, inasmuch as it excludes defendants who have an evil purpose but use means that would “only unnaturally and improbably be successful.” This criticism is unwarranted. Our reading of the statute gives the term “endeavor” a useful function to

fulfill: It makes conduct punishable where the defendant acts with an intent to obstruct justice, and in a manner that is likely to obstruct justice, but is foiled in some way. Were a defendant with the requisite intent to lie to a subpoenaed witness who is ultimately not called to testify, or who testifies but does not transmit the defendant's version of the story, the defendant has endeavored to obstruct, but has not actually obstructed, justice. Under our approach, a jury could find such defendant guilty.

Justice SCALIA also apparently believes that *any* act, done with the intent to "obstruct . . . the due administration of justice," is sufficient to impose criminal liability. Under the dissent's theory, a man could be found guilty under § 1503 if he knew of a pending investigation and lied to his wife about his whereabouts at the time of the crime, thinking that an FBI agent might decide to interview her and that she might in turn be influenced in her statement to the agent by her husband's false account of his whereabouts. The intent to obstruct justice is indeed present, but the man's culpability is a good deal less clear from the statute than we usually require in order to impose criminal liability. . . .

The following case involves a federal tax obstruction statute, 26 U.S.C. § 7212. However, its discussion of the meaning of the phrase "due administration of justice" is relevant to our understanding of §§ 1503 and 1505.

MARINELLO v. UNITED STATES, 138 S. Ct. 1101 (2018)

BREYER, J.:

A clause in § 7212(a) of the Internal Revenue Code makes it a felony "corruptly or by force" to "endeavo[r] to obstruct or imped[e] the due administration of this title." 26 U.S.C. § 7212(a). The question here concerns the breadth of that statutory phrase. Does it cover virtually all governmental efforts to collect taxes? Or does it have a narrower scope? In our view, "due administration of [the Tax Code]" does not cover routine administrative procedures that are near-universally applied to all taxpayers, such as the ordinary processing of income tax returns. Rather, the clause as a whole refers to specific interference with targeted governmental tax-related proceedings, such as a particular investigation or audit.

The Internal Revenue Code provision at issue, § 7212(a), has two substantive clauses. The first clause, which we shall call the "Officer Clause," forbids

"corruptly or by force or threats of force (including any threatening letter or communication) endeavor[ing] to intimidate or impede any *officer or employee* of the United States acting in an official capacity under [the Internal Revenue Code]."

The second clause, which we shall call the "Omnibus Clause," forbids

"corruptly or by force or threats of force (including any threatening letter or communication) obstruct[ing] or imped[ing], or endeavor[ing]

to obstruct or impede, *the due administration* of [the Internal Revenue Code].” . . .

Between 2004 and 2009, the Internal Revenue Service (IRS) opened, then closed, then reopened an investigation into the tax activities of Carlo Marinello, the petitioner here. In 2012 the Government indicted Marinello, charging him with violations of several criminal tax statutes including the Omnibus Clause. In respect to the Omnibus Clause the Government claimed that Marinello had engaged in at least one of eight different specified activities, including “failing to maintain corporate books and records,” “failing to provide” his tax accountant “with complete and accurate” tax “information,” “destroying . . . business records,” “hiding income,” and “paying employees . . . with cash.”

Before the jury retired to consider the charges, the judge instructed it that, to convict Marinello of violating the Omnibus Clause, it must find unanimously that he engaged in at least one of the eight practices just mentioned, that the jurors need not agree on which one, and that he did so “corruptly,” meaning “with the intent to secure an unlawful advantage or benefit, either for [himself] or for another.” The judge, however, did not instruct the jury that it must find that Marinello knew he was under investigation and intended corruptly to interfere with that investigation. The jury subsequently convicted Marinello on all counts. . . .

As to Congress’ intent, the literal language of the statute is neutral. The statutory words “obstruct or impede” are broad. They can refer to anything that “block[s],” “make[s] difficult,” or “hinder[s].” Black’s Law Dictionary (10th ed. 2014) (obstruct); Webster’s New International Dictionary (Webster’s) (2d ed. 1954) (impede); (obstruct); accord, 5 Oxford English Dictionary (1933) (impede); (obstruct). But the verbs “obstruct” and “impede” suggest an object—the taxpayer must hinder a particular person or thing. Here, the object is the “due administration of this title.” The word “administration” can be read literally to refer to every “[a]ct or process of administering” including every act of “managing” or “conduct[ing]” any “office,” or “performing the executive duties of” any “institution, business, or the like.” Webster’s 34. But the whole phrase—the due administration of the Tax Code—is best viewed, like the due administration of justice, as referring to only some of those acts or to some separable parts of an institution or business. *Cf. Aguilar* (concluding false statements made to an investigating agent, rather than a grand jury, do not support a conviction for obstruction of justice).

Here statutory context confirms that the text refers to specific, targeted acts of administration. The Omnibus Clause appears in the middle of a statutory sentence that refers specifically to efforts to “intimidate or impede *any officer or employee of the United States* acting in an official capacity.” 26 U.S.C. § 7212(a). The first part of the sentence also refers to “force or threats of force,” which the statute elsewhere defines as “threats of bodily harm to the *officer or employee of the United States or to a member of his family*.” The following subsection refers to the “forcibl[e] rescu[e]” of “any *property* after it shall have been seized under” the Internal Revenue Code. § 7212(b) (emphasis

added). Subsections (a) and (b) thus refer to corrupt or forceful actions taken against individual identifiable persons or property. And, in that context the Omnibus Clause logically serves as a “catchall” in respect to the obstructive conduct the subsection sets forth, not as a “catchall” for every violation that interferes with what the Government describes as the “continuous, ubiquitous, and universally known” administration of the Internal Revenue Code. . . .

A broad interpretation would also risk the lack of fair warning and related kinds of unfairness that led this Court in *Aguilar* to “exercise” interpretive “restraint.” *see also Yates*; *Arthur Andersen LLP v. United States*. Interpreted broadly, the provision could apply to a person who pays a babysitter \$41 per week in cash without withholding taxes, *see* 26 C.F.R. § 31.3102–1(a)(2017); IRS, Publication 926, (2018), leaves a large cash tip in a restaurant, fails to keep donation receipts from every charity to which he or she contributes, or fails to provide every record to an accountant. Such an individual may sometimes believe that, in doing so, he is running the risk of having violated an IRS rule, but we sincerely doubt he would believe he is facing a potential felony prosecution for tax obstruction. Had Congress intended that outcome, it would have spoken with more clarity than it did in § 7212(a).

The Government argues that the need to show the defendant’s obstructive conduct was done “corruptly” will cure any overbreadth problem. But we do not see how. The Government asserts that “corruptly” means acting with “the specific intent to obtain an unlawful advantage” for the defendant or another. Yet, practically speaking, we struggle to imagine a scenario where a taxpayer would “willfully” violate the Tax Code (the *mens rea* requirement of various tax crimes, including misdemeanors, *see, e.g.*, 26 U.S.C. §§ 7203, 7204, 7207) without intending someone to obtain an unlawful advantage. *See Cheek v. United States* (“Willfulness . . . requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty”). A taxpayer may know with a fair degree of certainty that her babysitter will not declare a cash payment as income—and, if so, a jury could readily find that the taxpayer acted to obtain an unlawful benefit for another. For the same reason, we find unconvincing the dissent’s argument that the distinction between “willfully” and “corruptly”—at least as defined by the Government—reflects any meaningful difference in culpability. . . .

In sum, we follow the approach we have taken in similar cases in interpreting § 7212(a)’s Omnibus Clause. To be sure, the language and history of the provision at issue here differ somewhat from that of other obstruction provisions we have considered in the past. *See Aguilar* (interpreting a statute prohibiting the obstruction of “the due administration of justice”); *Arthur Andersen* (interpreting a statute prohibiting the destruction of an object with intent to impair its integrity or availability for use in an official proceeding); *Yates* (interpreting a statute prohibiting the destruction, concealment, or covering up of any “record, document, or tangible object with the intent to” obstruct the “investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States”). The Government and

the dissent urge us to ignore these precedents because of those differences. The dissent points out, for example, that the predecessor to the obstruction statute we interpreted in *Aguilar*, 18 U.S.C. § 1503, prohibited influencing, intimidating, or impeding “any witness or officer in any court of the United States” or endeavoring “to obstruct or impede the due administration of justice therein.” *Pettibone v. United States*. But Congress subsequently deleted the word “therein,” leaving only a broadly worded prohibition against obstruction of “the due administration of justice.” Congress then used that same amended formulation when it enacted § 7212, prohibiting the “obstruction of the due administration” of the Tax Code. Given this similarity, it is helpful to consider how we have interpreted § 1503 and other obstruction statutes in considering § 7212. The language of some and the underlying principles of all these cases are similar. We consequently find these precedents—though not controlling—highly instructive for use as a guide toward a proper resolution of the issue now before us. *See Smith v. City of Jackson*.

We conclude that, to secure a conviction under the Omnibus Clause, the Government must show (among other things) that there is a “nexus” between the defendant’s conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action. That nexus requires a “relationship in time, causation, or logic with the [administrative] proceeding.” *Aguilar* (citing *Wood*). By “particular administrative proceeding” we do not mean every act carried out by IRS employees in the course of their “continuous, ubiquitous, and universally known” administration of the Tax Code. While we need not here exhaustively itemize the types of administrative conduct that fall within the scope of the statute, that conduct does not include routine, day-to-day work carried out in the ordinary course by the IRS, such as the review of tax returns. The Government contends the processing of tax returns is part of the administration of the Internal Revenue Code and any corrupt effort to interfere with that task can therefore serve as the basis of an obstruction conviction. But the same could have been said of the defendant’s effort to mislead the investigating agent in *Aguilar*. The agent’s investigation was, at least in some broad sense, a part of the administration of justice. But we nevertheless held the defendant’s conduct did not support an obstruction charge. In light of our decision in *Aguilar*, we find it appropriate to construe § 7212’s Omnibus Clause more narrowly than the Government proposes. Just because a taxpayer knows that the IRS will review her tax return every year does not transform every violation of the Tax Code into an obstruction charge.

In addition to satisfying this nexus requirement, the Government must show that the proceeding was pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant. *See Arthur Andersen* (requiring the Government to prove a proceeding was foreseeable in order to convict a defendant for persuading others to shred documents to prevent their “use in an official proceeding”). It is not enough for the Government to claim that the defendant knew the IRS may catch on to his unlawful scheme eventually. To use a maritime analogy, the proceeding must at least be in the offing.

The following case illustrates the outer limits of the kind of conduct that could be prosecuted under § 1503's "omnibus" clause. As you read it, think about the potential lines between obstruction and regular litigation, and the role of lawyers in obstruction cases.

UNITED STATES v. CUETO, 151 F.3d 620 (7th Cir. 1998)

BAUER, Circuit Judge:

Thomas Venezia owned B & H Vending/Ace Music Corporation ("B & H"), a vending and amusement business, and operated an illegal video gambling business through a pattern of racketeering activities and illegal gambling payouts, in violation of state and federal anti-gambling and racketeering laws. Venezia hired Amiel Cueto, an attorney, to represent him as well as to defend the tavern owners associated with B & H in the event of any arrests and/or criminal charges for their participation in the illegal gambling operation. In March of 1995, Venezia and B & H were indicted on federal racketeering charges, in addition to other related charges including illegal gambling. Throughout the investigation and prior to Venezia's indictment, Cueto served as Venezia's lawyer and advisor. Cueto was not Venezia's attorney of record during the trial; nonetheless, the record indicates that Venezia continued to rely on Cueto's advice throughout the prosecution of the racketeering case.

On December 2, 1995, Venezia and B & H were convicted of racketeering, illegal gambling, and conspiracy arising out of the operation of the illegal gambling business. *United States v. B & H Vending/Ace Music Corp. & Thomas Venezia, et al.* Seven months later, another federal grand jury returned a second indictment naming Cueto, Venezia, and Robert Romanik, a local public official and investigator who worked for Cueto and Venezia. They were charged with, *inter alia*: (1) conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and (2) obstruction of justice, in violation of the omnibus clause of 18 U.S.C. § 1503, for their conduct throughout the investigation of Venezia and his illegal gambling operation and the indictment and prosecution of the racketeering case. This second indictment is the impetus for the current appeal.

To understand the context of the instant indictment, convictions, and appeal, we examine the nature and scope of Cueto's relationship with Venezia, his association with the illegal gambling operation, and his involvement in the investigation, indictment, and prosecution of Venezia, the illegal gambling operation, and the racketeering enterprise. In 1987, Venezia purchased a vending and amusement business, later known as B & H, which operated an illegal video gambling business for about eight years. B & H supplied video poker games to local bars in the metropolitan area of East St. Louis, Illinois, including a Veterans of Foreign Wars Post ("VFW") on Scott Air Force Base, and the tavern owners agreed to make illegal gambling payouts to its customers. State agents believed the video games were being used for illegal gambling purposes, and beginning in 1992, the Illinois Liquor Control Commission ("ILCC") and the State Police initiated

a joint investigation in St. Clair County, which targeted illegal gambling operations in Southern Illinois.

The ILCC has broad investigatory powers to supervise liquor licensees, and ILCC Agent Bonds Robinson worked on the task force and investigated the gambling operations in cooperation with the state police. Initially, Robinson worked in a non-undercover capacity as part of the state investigation to determine, in the course of routine liquor inspections, whether any establishment was making illegal gambling payouts. Agents of the ILCC began to strictly enforce the gambling regulations and frequently visited the taverns to ensure compliance. Eventually, the FBI became interested in the state's investigation, and ultimately decided to use Robinson in a federal investigation of illegal gambling operations in St. Clair County, particularly Venezia's gambling operation. At some later point, Robinson assumed an undercover role for the FBI as a corrupt liquor agent in an attempt to gather evidence against Venezia and B & H. Soon thereafter, the state police raided the VFW Post, seized B & H's video poker games, and arrested two VFW employees for maintaining an illegal gambling establishment. After the raid, Venezia and B & H supplied additional video games to the VFW, which continued to provide its customers with illegal gambling payouts.

In an attempt to gather evidence, Robinson, who was present at the VFW raid, indicated that Venezia could avoid further interruptions of his illegal gambling operation if he were to offer a bribe to discourage the investigation and the interference, and he suggested to Venezia that they meet. Venezia consulted with Cueto, who instructed Venezia to meet with Tom Daley, one of his law partners at the time. In an attempt to portray Robinson as a dishonest agent, Daley reported to the ILCC that Robinson had solicited a bribe at the VFW. A meeting was then scheduled between Venezia and Robinson, who met at B & H corporate headquarters. Robinson taped the conversation at the FBI's request, and the tape was introduced into evidence in the racketeering case and at Cueto's trial. Soon after the meeting, the VFW was raided again; B & H video poker games were seized, and two employees were arrested. The ILCC issued an administrative violation to the VFW as well as a warning to remove the illegal gambling machines, otherwise, its liquor license would be revoked. Again, Venezia consulted with Cueto about the raids, the criminal charges, and the prosecutions, and they discussed available options and courses of action.

First, Cueto and Venezia drafted a letter, detailing Robinson's alleged "corrupt" conduct and accusing him of soliciting bribes, and delivered it to St. Clair County State's Attorney Robert Haida. Cueto also filed a complaint in state court against Robinson, in which Cueto alleged that Robinson was a corrupt agent. *See Venezia v. Robinson*. Cueto obtained a court order that required Robinson to appear for a hearing in *People v. Moore*, one of the gambling prosecutions arising from the VFW raid. Pursuant to the order, Robinson appeared in state court, and Cueto immediately served him with a subpoena, which required him to appear in court within fifteen minutes for an injunction hearing in *Venezia v. Robinson*. Cueto had prepared a petition, requesting either a temporary restraining order or a preliminary and permanent injunction against alleged extortion and

other vexation to prevent Robinson from interfering with the operation of Venezia's business. Robinson had not seen a copy of the complaint, had not been served with process, and was not represented by counsel.

At the hearing, Robinson's requests for an attorney were denied, and the state court judge permitted Cueto to question Robinson about the FBI's investigation (which at that point was still a covert operation) and the evidence it had obtained in the course of the investigation. Without permitting Robinson to put on a defense and without articulating any findings of fact or conclusions of law, the state court entered a preliminary injunction against Robinson, which indefinitely enjoined him from interfering with Venezia's business operations. Venezia then returned to the VFW, as well as other taverns affiliated with the gambling operation, to advise them that a state court judge had entered an injunction against Robinson and that he could no longer interfere with their establishments and the illegal gambling operation.

Notwithstanding the injunction and pursuant to instructions from the Director of ILCC to continue his routine liquor inspections, Robinson visited another establishment associated with B & H's gambling operation and discovered that the tavern owner was providing illegal gambling payouts on some of the video machines. Thereafter, Dorothy McCaw was arrested for operating and maintaining an illegal gambling establishment, and she signed a written confession for her participation in illegal gambling activities. Upon learning of the inspection and arrest, Venezia contacted Cueto, who arranged for Venezia and Romanik, the third individual charged in the instant indictment, to obtain another statement from McCaw. Cueto then drafted a letter to the ILCC, State's Attorney Haida, the Office of the United States Attorney for the Southern District of Illinois, and the FBI, claiming that his client was suffering damage as a result of Robinson's "unlawful" interference with the operation of Venezia's business and threatened that if the conduct continued, he would file suit against the ILCC, in addition to Robinson, for damages incurred. Without McCaw's knowledge, Cueto attached to that letter the statement she had given to Venezia and Romanik, which supported Cueto's allegations of interference. Cueto also filed a rule to show cause in state court, which described Robinson's violations of the injunction and requested the court to find him in contempt; McCaw's statement also was attached to the rule to show cause, again without her knowledge. . . .

During the investigation, the record indicates that Cueto and Venezia developed more than a professional attorney-client relationship, entering into various financial transactions and business deals, some of which involved secret partnerships. A few examples include: (1) they purchased unimproved real estate, developed the real estate, built and managed a topless nightclub (Club Exposed), which operated some of B & H's illegal gambling machines; (2) Venezia and Cueto incorporated Millennium III, an asbestos removal company, and applied for and obtained a \$600,000 line of credit to complete the purchase acquisition; and (3) Venezia purchased Cueto's office building and moved B & H corporate headquarters into it. The record demonstrates that in order to obtain financing, Venezia reported B & H as a principal asset on his financial

statements and loan applications to establish the necessary credit he and Cueto needed to become joint borrowers on various loans. Moreover, the record indicates that the lender in the Millennium purchase relied upon Venezia's financial statement in its decision to loan the money for the acquisition.

About the time the Millennium purchase was finalized, state police and Robinson arrested George Vogt, a B & H customer, for gambling. At a hearing in the state's prosecution of Vogt, Robinson testified and Cueto cross-examined him. After the hearing, Cueto again approached State's Attorney Haida, provided him with the transcripts from the *Vogt* hearing, and urged Haida to indict Robinson for perjury. Thereafter, Haida commenced an investigation of Robinson's activities. Nothing came of Cueto's allegations of perjury, and the investigation ended without any charges being filed.

The investigation of Venezia and B & H began in early 1992, and the events discussed above occurred over a period of approximately three years. We briefly mentioned some of the initial business and financial dealings between Venezia and Cueto, but . . . we think it unnecessary to specifically discuss every financial transaction contained in the record except to point out that together Venezia and Cueto participated in various business transactions, in which millions of dollars exchanged hands to finance the purchases of various real estate interests and construction costs relating to various development projects, including certain gambling operations. The indictment specifically charged that Club Exposed, the nightclub owned by Venezia and Cueto, Millennium III, as well as other business transactions in which they were involved, depended upon the continued operation of B & H and the illegal gambling business to secure and to cover the various loans and debts they incurred in their financial ventures.

Even after Cueto became a business partner of Venezia, . . . he continued to give Venezia legal advice. Although Cueto was not an attorney of record, he participated in the preparation of Venezia's defense in the racketeering prosecution. Cueto continued to urge State's Attorney Haida to indict Robinson for perjury. He also contacted Congressman Jerry Costello, who owned an equal one-third partnership interest in a gambling development project with Cueto and Venezia, and asked the Congressman to contact Haida and to offer him a seat on the judiciary in exchange for Haida's recommendation that Cueto be appointed as the next State's Attorney. Cueto also began to publish a newspaper, the *East Side Review*, and authored an article in which he indicated that in the next election he intended to run for St. Clair County State's Attorney, and in the event he was elected, he would prosecute Robinson.

In August of 1994, the government empaneled a grand jury to examine the evidence obtained in the FBI's investigation of Venezia and B & H, and the grand jury also initiated its own investigation of these allegations. In response, Cueto prepared and filed various motions to hinder the investigation and to discharge the grand jury, all of which were denied. Notwithstanding the defense tactics and delays, the grand jury indicted

Venezia, among others; he was prosecuted, and ultimately, convicted for operating an illegal gambling enterprise, in addition to other related convictions. . . .

After a jury trial, Cueto was convicted of the charges in Counts 1, 2, 6, and 7 and the district court ordered him to serve a prison term of 87 months, to be followed by two years of supervised release, and imposed monetary penalties. . . .

Cueto asserts several arguments with respect to his convictions on Counts 2, 6, and 7 for obstruction of justice, contending that the omnibus clause of § 1503 is unconstitutionally vague as applied to the conduct charged in the indictment . . . Cueto argues that “much of what lawyers *do*—are attempts to influence the justice system,” and that the omnibus clause of § 1503 was not intended to apply to the type of conduct charged in the indictment. . . .

“[I]n determining the scope of a statute, one is to look first at its language. If the language is unambiguous, ordinarily it is to be regarded as conclusive unless there is ‘a clearly expressed legislative intent to the contrary.’” *Dickerson v. New Banner Institute, Inc.* (quoting *Consumer Product Safety Comm’n v. GTE Sylvania, Inc.*). The omnibus clause of § 1503 is a catch-all provision . . . intended to ensure that criminals could not circumvent the statute’s purpose “by devising novel and creative schemes that would interfere with the administration of justice but would nonetheless fall outside the scope of § 1503’s specific prohibitions.” . . .

Cueto also contends that the vagueness problems are exacerbated by this court’s broad construction of the term “corruptly,” arguing that it fails to provide meaningful and adequate notice as to what conduct is proscribed by the statute. The Seventh Circuit has approved a jury instruction which articulates a definition for the term “corruptly”:

Corruptly means to act with the purpose of obstructing justice. The United States is not required to prove that the defendant’s only or even main purpose was to obstruct the due administration of justice. The government only has to establish that the defendant should have reasonably seen that the natural and probable consequences of his acts was the obstruction of justice. Intent may be inferred from all of the surrounding facts and circumstances. Any act, by any party, whether lawful or unlawful on its face, may violate Section 1503, if performed with a corrupt motive.

The mere fact that a term “covers a broad spectrum of conduct” does not render it vague, and the requirement that a statute must give fair notice as to what conduct is proscribed “cannot be used as a shield by one who is already bent on serious wrongdoing.” *Griffin*.

There is little case authority directly on point to consider whether an attorney acting in his professional capacity could be criminally liable under the omnibus clause of § 1503 for traditional litigation-related conduct that results in an obstruction of justice. “Correct application of Section 1503 thus requires, in a very real sense, that the factfinder

discern—by direct evidence or from inference—the motive which led an individual to perform particular actions. . . . ‘Intent may make any otherwise innocent act criminal, if it is a step in a plot.’” *United States v. Cintolo*. . . . Otherwise lawful conduct, even acts undertaken by an attorney in the course of representing a client, can transgress § 1503 if employed with the corrupt intent to accomplish that which the statute forbids. . . .

The government’s theory of prosecution is predicated on the fact that Cueto held a personal financial interest in protecting the illegal gambling enterprise, which formed the requisite corrupt intent for his conduct to qualify as violations of the statute. Cueto focuses entirely on the legality of his conduct, and not the requisite criminal intent proscribed by § 1503. It is undisputed that an attorney may use any *lawful* means to defend his client, and there is no risk of criminal liability if those means employed by the attorney in his endeavors to represent his client remain within the scope of lawful conduct. However, it is the corrupt endeavor to protect the illegal gambling operation and to safeguard his own financial interest, which motivated Cueto’s otherwise legal conduct, that separates his conduct from that which is legal.

Even though courts may be hesitant, with good reason and caution, to include traditional litigation-related conduct within the scope of § 1503, the omnibus clause has been interpreted broadly in accordance with congressional intent to promote the due administration of justice and to prevent the miscarriage of justice, and an individual’s status as an attorney engaged in litigation-related conduct does not provide protection from prosecution for criminal conduct. . . . More so than an ordinary individual, an attorney, in particular a criminal defense attorney, has a sophisticated understanding of the type of conduct that constitutes criminal violations of the law. There is a discernable difference between an honest lawyer who unintentionally submits a false statement to the court and an attorney with specific corrupt intentions who files papers in bad faith knowing that they contain false representations and/or inaccurate facts in an attempt to hinder judicial proceedings. It is true that, to a certain extent, a lawyer’s conduct influences judicial proceedings, or at least attempts to affect the outcome of the proceedings. However, that influence stems from a lawyer’s attempt to advocate his client’s interests *within the scope of the law*. It is the “corrupt endeavor” to influence the due administration of justice that is the heart of the offense, and Cueto’s personal financial interest is the heart of his corrupt motive. . . .

We have carefully examined the fears articulated by the National Association of Criminal Defense Lawyers, in addition to the arguments put forth by the defendant, that a decision upholding the application of the omnibus clause of § 1503 to litigation-related conduct may deter or somehow chill the criminal defense lawyers in zealous advocacy, and we find those concerns to be exaggerated, at least as considered in light of the facts in the present case. Although we appreciate that it is of significant importance to avoid chilling vigorous advocacy and to maintain the balance of effective representation, we also recognize that a lawyer’s misconduct and criminal acts are not absolutely immune from prosecution. We cannot ignore Cueto’s corrupt endeavors to manipulate the

administration of justice and his clear criminal violations of the law. As the First Circuit recognized in *Cintolo*:

Nothing in the caselaw, fairly read, suggests that lawyers should be plucked gently from the maddening [sic] crowd and sheltered from the rigors of 18 U.S.C. § 1503 in the manner urged by appellant and by the amici. Nor is there sufficient public policy justification favoring such a result. To the contrary, the overriding public policy interest is that “[t]he attorney-client relationship cannot . . . be used to shield or promote illegitimate acts. . . .” “[A]ttorneys, just like all other persons, . . . are not above the law and are subject to its full application under appropriate circumstances.”

Accordingly, we conclude that the omnibus clause of § 1503 may be used to prosecute a lawyer’s litigation-related criminality and that neither the omnibus clause of § 1503 nor this court’s construction of the term “corruptly” is unconstitutionally vague as applied to the conduct charged in the indictment for which Cueto was convicted.

We now turn to Cueto’s argument that his convictions on the obstruction of justice counts were not supported by sufficient evidence. Cueto’s task is a formidable one, and an examination of the record illuminates that the evidence presented in this case overwhelmingly supports the jury’s verdict. . . .

Cueto’s conduct, though nominally litigation-related conduct on behalf of his client, was undertaken with the corrupt intent to protect Venezia, Venezia’s associates, and his business from criminal prosecution and to safeguard his personal financial interest in the illegal gambling operation, whatever the costs and consequences to the due administration of justice.

The charges in Count 2 of the indictment included allegations of a corrupt endeavor to obstruct the due administration of justice in *Venezia v. Robinson* by filing pleadings in federal district court and a continued attempt to hinder the proceedings by filing an appeal in this court and a petition for certiorari in the United States Supreme Court. The evidence demonstrates that Cueto successfully exposed the FBI’s investigation, uncovered the evidence it had gathered, obtained the injunction against Robinson, and continued to file frivolous appeals after the district court dismissed the injunction and the complaint. . . . The jury was amply justified in concluding that Cueto’s repeated filings were motivated by his attempt to protect his client from prosecution and to safeguard his financial interest. Cueto’s actions may qualify as traditional litigation-related conduct in form, but not in substance, and the evidence presented at trial demonstrates that Cueto clearly intended and corruptly endeavored to obstruct the due administration of justice in *Venezia v. Robinson*.

Similar to Count 2, Count 7 includes allegations of preparing and filing and causing defense counsel to prepare and file false pleadings and other court papers; the indictment specifically charged Cueto with encouraging defense counsel in the racketeering case to

file false motions and pleadings for the purpose of impeding and obstructing the administration of justice in that case. We have no doubt that Cueto in fact intended to interfere with the investigation, attempted to delay the indictment, and endeavored to obstruct the proceedings in federal district court in connection with the prosecution of Venezia. We simply are not dealing with non-corrupt, legitimate involvement in the preparation of Venezia's (and his co-defendants') defense. Nor are we dealing with inadvertent interference. From the evidence presented at trial, the jury was amply justified in concluding without a doubt that Cueto corruptly endeavored to obstruct the district court's proceedings in the gambling and racketeering prosecution.

In response to his conviction on Count 6, Cueto argues that his conviction should be reversed because the *Aguilar* nexus is absent; he contends that the government presented insufficient evidence to establish the relationship between his attempts to persuade State's Attorney Haida to investigate and indict Robinson and a pending judicial proceeding. . . . "It is well established that investigations undertaken with the intention of presenting evidence before a grand jury are sufficient to constitute 'the due administration of justice' under § 1503." *Maloney*.

Though Cueto's initial calls and letters to State's Attorney Haida may pre-date the empaneling of the grand jury, the phone call to Congressman Costello occurred after the indictment was unsealed. In addition, his letters to the State's Attorney occurred throughout the investigation, and the evidence indicates that Cueto knew of the investigation. Accordingly, Cueto's conduct prior to the empaneling of the grand jury as well as his subsequent acts to encourage State's Attorney Haida to investigate and prosecute Agent Robinson have the requisite nexus to the judicial proceedings. . . .

Whatever the contours of the line between traditional lawyering and criminal conduct, they must inevitably be drawn case-by-case. We refuse to accept the notion that lawyers may do anything, including violating the law, to zealously advocate their clients' interests and then avoid criminal prosecution by claiming that they were "just doing their job." . . . We respect the importance of allowing defense counsel to perform legitimate activities without hindrance and recognize the potential dangers that could arise if prosecutors were permitted to inquire into the motives of criminal defense attorneys ad hoc. This case, however, does not create that avenue of inquiry; our conclusion is limited to the specific facts of this case. . . . The jury was justified in concluding that Cueto had the requisite knowledge of the FBI's investigation of Venezia, the grand jury's inquiry, and the district court's proceedings and then acted in a manner that had the natural and probable effect of interfering with the lawful function of those governmental entities and the due administration of justice. His role as a defense attorney did not insulate him from the criminal consequences of his corruptly-motivated actions. . .

C. Elements and Examples: Section 1512 and Document Destruction

This case involves the interpretation of (an older version of) § 1512 and its mens rea requirements, as well as further discussion of the nexus issue. More importantly, it involves another line-drawing problem relevant to the corporate context: How do we distinguish between acceptable evidence destruction in advance of litigation and obstruction of justice?

ARTHUR ANDERSEN LLP v. UNITED STATES, 544 U.S. 696 (2005)

Chief Justice REHNQUIST delivered the opinion of the Court.

As Enron Corporation's financial difficulties became public in 2001, petitioner Arthur Andersen LLP, Enron's auditor, instructed its employees to destroy documents pursuant to its document retention policy. A jury found that this action made petitioner guilty of violating 18 U.S.C. §§ 1512(b)(2)(A) and (B). These sections make it a crime to "knowingly us[e] intimidation or physical force, threat[e]n, or corruptly persuad[e] another person . . . with intent to . . . cause" that person to "withhold" documents from, or "alter" documents for use in, an "official proceeding." The Court of Appeals for the Fifth Circuit affirmed. We hold that the jury instructions failed to convey properly the elements of a "corrup[t] persua[sion]" conviction under § 1512(b), and therefore reverse.

Enron Corporation, during the 1990's, switched its business from operation of natural gas pipelines to an energy conglomerate, a move that was accompanied by aggressive accounting practices and rapid growth. Petitioner audited Enron's publicly filed financial statements and provided internal audit and consulting services to it. Petitioner's "engagement team" for Enron was headed by David Duncan. Beginning in 2000, Enron's financial performance began to suffer, and, as 2001 wore on, worsened. On August 14, 2001, Jeffrey Skilling, Enron's Chief Executive Officer (CEO), unexpectedly resigned. Within days, Sherron Watkins, a senior accountant at Enron, warned Kenneth Lay, Enron's newly reappointed CEO, that Enron could "implode in a wave of accounting scandals." She likewise informed Duncan and Michael Odom, one of petitioner's partners who had supervisory responsibility over Duncan, of the looming problems.

On August 28, an article in the Wall Street Journal suggested improprieties at Enron, and the SEC opened an informal investigation. By early September, petitioner had formed an Enron "crisis-response" team, which included Nancy Temple, an in-house counsel. On October 8, petitioner retained outside counsel to represent it in any litigation that might arise from the Enron matter. The next day, Temple discussed Enron with other in-house counsel. Her notes from that meeting reflect that "some SEC investigation" is "highly probable."

On October 10, Odom spoke at a general training meeting attended by 89 employees. . . . Odom urged everyone to comply with the firm's document retention policy. He added:

“[I]f it’s destroyed in the course of [the] normal policy and litigation is filed the next day, that’s great. . . . [W]e’ve followed our own policy, and whatever there was that might have been of interest to somebody is gone and irretrievable.” On October 12, Temple entered the Enron matter into her computer, designating the “Type of Potential Claim” as “Professional Practice—Government/Regulatory Inv[estigation].” Temple also e-mailed Odom, suggesting that he “remin[d] the engagement team of our documentation and retention policy.”

On October 16, Enron announced its third quarter results. That release disclosed a \$1.01 billion charge to earnings. The following day, the SEC notified Enron by letter that it had opened an investigation in August and requested certain information and documents. On October 19, Enron forwarded a copy of that letter to petitioner.

On the same day, Temple also sent an e-mail to a member of petitioner’s internal team of accounting experts and attached a copy of the document policy. On October 20, the Enron crisis-response team held a conference call, during which Temple instructed everyone to “[m]ake sure to follow the [document] policy.” On October 23, Enron CEO Lay declined to answer questions during a call with analysts because of “potential lawsuits, as well as the SEC inquiry.” After the call, Duncan met with other Andersen partners on the Enron engagement team and told them that they should ensure team members were complying with the document policy. Another meeting for all team members followed, during which Duncan distributed the policy and told everyone to comply. These, and other smaller meetings, were followed by substantial destruction of paper and electronic documents.

On October 26, one of petitioner’s senior partners circulated a New York Times article discussing the SEC’s response to Enron. His e-mail commented that “the problems are just beginning and we will be in the cross hairs. The marketplace is going to keep the pressure on this and is going to force the SEC to be tough.” On October 30, the SEC opened a formal investigation and sent Enron a letter that requested accounting documents.

Throughout this time period, the document destruction continued, despite reservations by some of petitioner’s managers. On November 8, Enron announced that it would issue a comprehensive restatement of its earnings and assets. Also on November 8, the SEC served Enron and petitioner with subpoenas for records. On November 9, Duncan’s secretary sent an e-mail that stated: “Per Dave—No more shredding. . . . We have been officially served for our documents.” Enron filed for bankruptcy less than a month later. Duncan was fired and later pleaded guilty to witness tampering.

In March 2002, petitioner was indicted in the Southern District of Texas on one count of violating §§ 1512(b)(2)(A) and (B). The indictment alleged that, between October 10 and November 9, 2001, petitioner “did knowingly, intentionally and corruptly persuade . . . other persons, to wit: [petitioner’s] employees, with intent to cause” them to withhold documents from, and alter documents for use in, “official proceedings, namely:

regulatory and criminal proceedings and investigations.” . . . The jury returned a guilty verdict.

Chapter 73 of Title 18 of the United States Code provides criminal sanctions for those who obstruct justice. Sections 1512(b)(2)(A) and (B), part of the witness tampering provisions, provide in relevant part:

Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to . . . cause or induce any person to . . . withhold testimony, or withhold a record, document, or other object, from an official proceeding [or] alter, destroy, mutilate, or conceal an object with intent to impair the object’s integrity or availability for use in an official proceeding . . . shall be fined under this title or imprisoned not more than ten years, or both.

In this case, our attention is focused on what it means to “knowingly . . . corruptly persuad[e]” another person “with intent to . . . cause” that person to “withhold” documents from, or “alter” documents for use in, an “official proceeding.” . . .

Indeed, “persuad[ing]” a person “with intent to . . . cause” that person to “withhold” testimony or documents from a Government proceeding or Government official is not inherently malign. Consider, for instance, a mother who suggests to her son that he invoke his right against compelled self-incrimination, *see* U.S. Const., Amdt. 5, or a wife who persuades her husband not to disclose marital confidences.

Nor is it necessarily corrupt for an attorney to “persuad[e]” a client “with intent to . . . cause” that client to “withhold” documents from the Government. In *Upjohn Co. v. United States*, for example, we held that Upjohn was justified in withholding documents that were covered by the attorney-client privilege from the Internal Revenue Service (IRS). No one would suggest that an attorney who “persuade[d]” Upjohn to take that step acted wrongfully, even though he surely intended that his client keep those documents out of the IRS’ hands.

“Document retention policies,” which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business. It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances. . . .

Section 1512(b) punishes not just “corruptly persuad[ing]” another, but “*knowingly* corruptly persuad[ing]” another. The Government suggests that “knowingly” does not modify “corruptly persuades,” but that is not how the statute most naturally reads. It provides the *mens rea*—“knowingly”—and then a list of acts—“uses intimidation or physical force, threatens, or corruptly persuades.” We have recognized with regard to similar statutory language that the *mens rea* at least applies to the acts that immediately follow, if not to other elements down the statutory chain. The Government suggests that

it is “questionable whether Congress would employ such an inelegant formulation as ‘knowingly . . . corruptly persuades.’” Long experience has not taught us to share the Government’s doubts on this score, and we must simply interpret the statute as written.

The parties have not pointed us to another interpretation of “knowingly . . . corruptly” to guide us here. . . . “[K]nowledge” and “knowingly” are normally associated with awareness, understanding, or consciousness. “Corrupt” and “corruptly” are normally associated with wrongful, immoral, depraved, or evil. Joining these meanings together here makes sense both linguistically and in the statutory scheme. Only persons conscious of wrongdoing can be said to “knowingly . . . corruptly persuad[e].” And limiting criminality to persuaders conscious of their wrongdoing sensibly allows § 1512(b) to reach only those with the level of “culpability . . . we usually require in order to impose criminal liability.”

The outer limits of this element need not be explored here because the jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing. Indeed, it is striking how little culpability the instructions required. . . . The instructions also diluted the meaning of “corruptly” so that it covered innocent conduct.

The parties vigorously disputed how the jury would be instructed on “corruptly.” The District Court based its instruction on the definition of that term found in the Fifth Circuit Pattern Jury Instruction for § 1503. This pattern instruction defined “corruptly” as “knowingly and dishonestly, with the specific intent to subvert or undermine the integrity” of a proceeding. The Government, however, insisted on excluding “dishonestly” and adding the term “impede” to the phrase “subvert or undermine.” The District Court agreed over petitioner’s objections, and the jury was told to convict if it found petitioner intended to “subvert, undermine, or impede” governmental factfinding by suggesting to its employees that they enforce the document retention policy.

These changes were significant. No longer was any type of “dishonest[y]” necessary to a finding of guilt, and it was enough for petitioner to have simply “impede[d]” the Government’s factfinding ability. As the Government conceded at oral argument, “[i]mpede” has broader connotations than “subvert” or even “[u]ndermine,” and many of these connotations do not incorporate any “corrupt[ness]” at all. The dictionary defines “impede” as “to interfere with or get in the way of the progress of” or “hold up” or “detract from.” Webster’s. By definition, anyone who innocently persuades another to withhold information from the Government “get[s] in the way of the progress of” the Government. With regard to such innocent conduct, the “corruptly” instructions did no limiting work whatsoever.

The instructions also were infirm for another reason. They led the jury to believe that it did not have to find *any* nexus between the “persua[sion]” to destroy documents and any particular proceeding. In resisting any type of nexus element, the Government relies heavily on § 1512(e)(1), which states that an official proceeding “need not be pending or about to be instituted at the time of the offense.” It is, however, one thing to say that a proceeding “need not be pending or about to be instituted at the time of the offense,”

and quite another to say a proceeding need not even be foreseen. A “knowingly . . . corrup[t] persaude[r]” cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material.

We faced a similar situation in *Aguilar*. Respondent Aguilar lied to a Federal Bureau of Investigation agent in the course of an investigation and was convicted of “‘corruptly endeavor[ing] to influence, obstruct, and impede [a] . . . grand jury investigation’.” All the Government had shown was that Aguilar had uttered false statements to an investigating agent “who might or might not testify before a grand jury.” We held that § 1503 required something more—specifically, a “nexus” between the obstructive act and the proceeding. “[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding,” we explained, “he lacks the requisite intent to obstruct.” . . .

The following recent decision of the Supreme Court deals with the scope and reach of 18 U.S.C. § 1512(c)(2), a provision that was added to § 1512 in the wake of the Enron scandal discussed in the foregoing *Andersen* opinion. DOJ, at least, thought Congress, when enacting (c)(2), was widely expanding 1512 into a kind of “omnibus” anti-obstruction law that could apply to pre-proceeding obstruction, partly at DOJ’s urging. The Supreme Court has now decided that is not what Congress did.

FISCHER v. UNITED STATES, 144 S. Ct. 2176 (2024)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Sarbanes-Oxley Act of 2002 imposes criminal liability on anyone who corruptly “alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding.” 18 U.S.C. § 1512(c)(1). The next subsection extends that prohibition to anyone who “otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so.” § 1512(c)(2). We consider whether this “otherwise” clause should be read in light of the limited reach of the specific provision that precedes it.

This case concerns the prosecution of petitioner Joseph Fischer for his conduct on January 6, 2021. That day, both Houses of Congress convened in a joint session to certify the votes in the 2020 Presidential election. While they did so, a crowd of supporters of then-President Donald Trump gathered outside the Capitol. As set forth in the criminal complaint against Fischer, some of the crowd eventually “forced entry” into the building, “breaking windows,” and “assaulting members of the U.S. Capitol Police.” This breach of the Capitol caused Members of Congress to evacuate the Chambers and delayed the certification process. The complaint alleges that Fischer was one of those who invaded the building.

According to the complaint, about an hour after the Houses recessed, Fischer trespassed into the Capitol and was involved in a physical confrontation with law enforcement.

Fischer claimed in Facebook posts that he “pushed police back about 25 feet,” and that he “was inside the [Capitol] talking to police.” Body camera footage shows Fischer near a scum between the crowd and police who were trying to eject trespassers from the building.

A grand jury returned a seven-count superseding indictment against Fischer. Six of those counts allege that Fischer forcibly assaulted a federal officer, entered and remained in a restricted building, and engaged in disorderly and disruptive conduct in the Capitol, among other crimes. 18 U.S.C. §§ 111(a), 231(a)(3), 1752(a)(1), (a)(2); 40 U.S.C. §§ 5104(e)(2)(D), (G). Those six counts carry maximum penalties ranging from six months’ to eight years’ imprisonment.

In Count Three, the only count now before us, the Government charged Fischer with violating 18 U.S.C. § 1512(c)(2). Fischer moved to dismiss that count, arguing that the provision criminalizes only attempts to impair the availability or integrity of evidence. . . .

The controversy before us is about the scope of the residual “otherwise” clause in Section 1512(c)(2). On the one hand, Fischer contends that (c)(2) “applies only to acts that affect the integrity or availability of evidence.” On the other, the Government argues that (c)(2) “capture[s] all forms of obstructive conduct beyond Section 1512(c)(1)’s focus on evidence impairment.” . . .

Subsection (c)(1) describes particular types of criminal conduct in specific terms. To ensure the statute would not be read as excluding substantially similar activity not mentioned, (c)(2) says it is also illegal to engage in some broader range of unenumerated conduct.

The purpose of the “otherwise” clause is therefore, as the parties agree, to cover some set of “matters not specifically contemplated” by (c)(1). The problem is defining what exactly Congress left for (c)(2). Perhaps Congress sought to criminalize all obstructive acts in Section 1512(c), and having named a few examples in (c)(1), devised (c)(2) to prohibit the rest in one go. The point of (c)(1) would then be to illustrate just one type of conduct among many (c)(2) prohibits; it would be subsidiary to the overarching prohibition in (c)(2). But (c)(2) could well have a narrower scope if Congress designed it with the focused language of (c)(1) in mind. Subsection (c)(1) would then prohibit particular types of obstructive conduct and (c)(2) would fill any inadvertent gaps that might exist.

One way to discern the reach of an “otherwise” clause is to look for guidance from whatever examples come before it. Two general principles are relevant. First, the canon of *noscitur a sociis* teaches that a word is “given more precise content by the neighboring words with which it is associated.” *United States v. Williams*. That “avoid[s] ascribing to one word a meaning so broad that it is inconsistent with” “the company it keeps.” *Gustafson v. Alloyd Co.* And under the related canon of *ejusdem generis*, “a ‘general or collective term’ at the end of a list of specific items” is typically “‘controlled and defined

by reference to' the specific classes. . .that precede it." *Southwest Airlines Co. v. Saxon*. These approaches to statutory interpretation track the common sense intuition that Congress would not ordinarily introduce a general term that renders meaningless the specific text that accompanies it.

To see why, consider a straightforward example. A zoo might post a sign that reads, "do not pet, feed, yell or throw objects at the animals, or otherwise disturb them." If a visitor eats lunch in front of a hungry gorilla, or talks to a friend near its enclosure, has he obeyed the regulation? Surely yes. Although the smell of human food or the sound of voices might well disturb gorillas, the specific examples of impermissible conduct all involve direct interaction with and harassment of the zoo animals. Merely eating or talking is so unlike the examples that the zoo provided that it would be implausible to assume those activities were prohibited, even if literally covered by the language. . . .

If, as the Government asserts, (c)(2) covers "all forms of obstructive conduct beyond Section 1512(c)(1)'s focus on evidence impairment," there would have been scant reason for Congress to provide any specific examples at all. The sweep of subsection (c)(2) would consume (c)(1), leaving that narrower provision with no work to do. Indeed, subsection (c)(1) would be an elaborate pumpfake: a list of four types of highly particularized conduct, performed with respect to a record, document, or object and "with the intent to impair the object's integrity or availability for use in an official proceeding," followed in the very next subsection—in the same sentence, no less—by a superseding prohibition on all means of obstructing, influencing, or impeding any official proceeding. Construing Section 1512 in such a way gets the "familiar" analysis we apply to these types of statutes "exactly backwards," eliminating specific terms because of broad language that follows them, rather than limiting the broad language in light of narrower terms that precede it. . . .

Prior to the Sarbanes-Oxley Act, Section 1512 imposed criminal liability on anyone who "knowingly uses intimidation or physical force, threatens, or corruptly persuades another person" to, among other things, shred documents. 18 U.S.C. § 1512(b)(2)(B) (2000 ed.). But the Enron accounting scandal revealed a loophole: Although Enron's "outside auditor, Arthur Andersen LLP, had systematically destroyed potentially incriminating documents," the statute curiously failed to "impos[e] liability on a person who destroys records himself." *Yates*. As a result, prosecutors had to prove that higher-ups at Enron and Arthur Andersen persuaded someone else to shred documents rather than the more obvious theory that someone who shreds documents is liable for doing so.

The parties agree that to plug this loophole, Congress enacted Section 1512(c)—the provision at issue here—as part of the broader Sarbanes-Oxley Act. It would be peculiar to conclude that in closing the Enron gap, Congress actually hid away in the second part of the third subsection of Section 1512 a catchall provision that reaches far beyond the document shredding and similar scenarios that prompted the legislation in the first place. The better conclusion is that subsection (c)(2) was designed by Congress to capture other

forms of evidence and other means of impairing its integrity or availability beyond those Congress specified in (c)(1). . . .

Justice BARRETT, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.

Joseph Fischer allegedly joined a mob of rioters that breached the Capitol on January 6, 2021. At the time, Congress was meeting in a joint session to certify the Electoral College results. The riot forced Congress to suspend the proceeding, delaying it for several hours.

The Court does not dispute that Congress's joint session qualifies as an “official proceeding”; that rioters delayed the proceeding; or even that Fischer's alleged conduct (which includes trespassing and a physical confrontation with law enforcement) was part of a successful effort to forcibly halt the certification of the election results. Given these premises, the case that Fischer can be tried for “obstructing, influencing, or impeding an official proceeding” seems open and shut. So why does the Court hold otherwise?

Because it simply cannot believe that Congress meant what it said. Section 1512(c)(2) is a very broad provision, and admittedly, events like January 6th were not its target. (Who could blame Congress for that failure of imagination?) But statutes often go further than the problem that inspired them, and under the rules of statutory interpretation, we stick to the text anyway. The Court, abandoning that approach, does textual backflips to find some way—any way—to narrow the reach of subsection (c)(2). I respectfully dissent. . . .

The case for the Government's interpretation is straightforward. It can be accomplished in three paragraphs, as compared to the Court's many, many more.

Start with the verbs: To “obstruct” and to “impede” mean to “hinder” or “retard” something's “passage” or “progress.” 10 Oxford English Dictionary 668 (2d ed. 1989). We have previously explained that these words are “broad.” *Marinello v. United States*. To “influence” is similarly expansive, meaning “[t]o affect the condition of” or “to have an effect on” something. 7 Oxford English Dictionary. The object of these verbs is an “official proceeding,” defined to include “a proceeding before the Congress.” 18 U.S.C. § 1515(a)(1)(B). So (c)(2) covers all sorts of actions that affect or interfere with official proceedings.

“[O]therwise,” which introduces 18 U.S.C. § 1512(c)(2), does not narrow its scope. “Otherwise” means “in a different manner,” “by other means,” or “in other respects.” 10 Oxford English Dictionary, at 984; Webster's Third New International Dictionary (2002). It is often used to introduce a “catchall phras[e].” Here, “otherwise” tells the reader how (c)(1) and (c)(2) fit together. Subsection (c)(1) prohibits “alter[ing], destroy[ing], mutilat[ing], or conceal[ing] a record, document, or other object” with “intent to impair [its] integrity or availability for use in an official proceeding.” In other words, (c)(1) targets document and object spoliation—classic means of obstruction.

Subsection (c)(2) then prohibits obstructing, influencing, or impeding an official proceeding by means different from those specified in (c)(1), thereby serving as a catchall. The “enumerated” crimes in (c)(1) and the “unenumerated crimes” in (c)(2) are similar “on one specific dimension”: “the particular similarity specified after the ‘otherwise.’” Here, that means that each crime represents one means through which to obstruct, influence, or impede an official proceeding.

Joseph Fischer allegedly participated in a riot at the Capitol that forced the delay of Congress's joint session on January 6th. Blocking an official proceeding from moving forward surely qualifies as obstructing or impeding the proceeding by means other than document destruction. Fischer's alleged conduct thus falls within (c)(2)'s scope. . . .

[The] canons are valuable tools. But applying either to (c)(2) is like using a hammer to pound in a screw—it looks like it might work, but using it botches the job. Unlike the pattern to which the *noscitur* canon applies, § 1512(c) is not a list of terms that includes an ambiguous word. So the Court does not do what it does when applying *noscitur*: select between multiple accepted meanings of the words “obstructs,” “influences,” and “impedes.” Instead, it modifies those words by adding an adverbial phrase: obstructs, influences or impedes by “impair[ing] the availability or integrity for use in an official proceeding of records, documents, or objects.” The *eiusdem* canon is an equally poor fit. Unlike the pattern to which *eiusdem* applies, (c)(2) is “not a general or collective term following a list of specific items to which a particular statutory command is applicable.” *United States v. Aguilar*. Instead, (c)(1) and (c)(2) are “distinct and independent prohibitions.” Though they share a subject and an adverb—“[w]hoever corruptly”—the two clauses contain different verbs that take different objects. § 1512(c). Moreover, (c)(1) has a separate *mens rea* provision that further disrupts the connection between the clauses.

To my knowledge, we have never applied either of these canons to a statute resembling § 1512(c). Rather than identify such a case, the Court invents examples of a sign at the zoo The zoo example (“do not pet, feed, yell or throw objects at the animals, or otherwise disturb them”) does not help, because it mimics the typical *eiusdem* format of specific words followed by a catchall. The list of specific verbs makes clear that the cleanup phrase (“otherwise disturb”) is limited to conduct that involves direct interaction with the animals. But in the absence of a laundry list followed by a catchall, it is hard to see why the *eiusdem* canon fits.

The Court's football example is only slightly better. As a refresher:

“[A] football league might adopt a rule that players must not ‘grab, twist, or pull a facemask, helmet, or other equipment with the intent to injure a player, or otherwise attack, assault, or harm any player.’ If a linebacker shouts insults at the quarterback and hurts his feelings, has the linebacker nonetheless followed the rule? Of course he has. The examples of prohibited actions all concern dangerous physical conduct that might inflict bodily harm; trash talk is simply not of that kind.”

Put aside that it is hard to imagine anyone describing “trash talk” as inflicting an “injury” or “harming” a player in a football game. The league rule plainly forecloses the possibility. Consistent with the noscitur canon, “harm” takes its meaning from its companions “attack” and “assault.” And while the Court tries to track § 1512(c)’s structure by adding an extra intent clause, the two clauses in its example are still tightly focused on actions directed at the player. (After all, who is wearing the facemask, helmet, or other equipment?) Given that shared theme, it is easy to understand that the first clause’s focus on physical conduct limits the (only slightly) more general clause. But § 1512(c)’s subsections are not so closely related—(c)(1) focuses specifically on objects in a proceeding, and (c)(2) broadens the lens to the proceeding itself.

Consider a rule that actually mirrors § 1512(c):

“Any player who:

“(1) punches, chokes, or kicks an opposing player with the intent to remove him from the game; or

“(2) otherwise interrupts, hinders, or interferes with the game,

“shall be suspended.”

While the specific verbs in the first clause involve actions directed at an opposing player, the second clause is a separate prohibition with an entirely different object. Imagine that, just before the opposing team’s kicker attempts a field goal, players leave the sidelines and storm the field, some tackling referees in the process. Those players have surely “interrupt[ed], hinder[ed], or interfer[ed] with the game,” even though they have not physically injured any opponent. This hypothetical, not the Court’s, is analogous to § 1512(c)—and it supports the Government’s interpretation. . . .

Problem 8-1

Mary, General Counsel of Garmentcorp, learns that Garmentcorp is to be subject to a DOJ investigation for potential violations of the Foreign Corrupt Practices Act involving its operations in Bangladesh. DOJ informs Mary that it intends to interview dozens of Garmentcorp employees and/or subpoena them to testify before a grand jury. Mary retains Biglawfirm, which does not represent Garmentcorp as a corporation, to represent the Garmentcorp employees individually in their interactions with the government, at Garmentcorp’s expense. After discussing the fee arrangements with the lead partner on the matter at Biglawfirm, Mary says to her, “Make sure to pound it into their heads that they should say they ‘do not recall’ if they are the least bit unsure about whether they are getting a fact correct.” Has Mary committed a crime?

Special Counsel Robert Mueller’s report on obstruction of justice in connection with President Trump and the investigation of 2016 Russian election interference, excerpted below, serves two purposes here: (i) to summarize the law of obstruction of justice (at

least prior to *Fischer*); and (ii) to provide a challenging scenario, based on which you should ask: Did the President commit one or more violations of the obstruction statutes in this scenario, leaving aside the question of whether a sitting president is constitutionally amenable to indictment?¹

Report On The Investigation Into Russian Interference In The 2016 Presidential Election

Volume II of II

Special Counsel Robert S. Mueller, III

Washington, D.C. March 2019

EXECUTIVE SUMMARY TO VOLUME II

Our obstruction-of-justice inquiry focused on a series of actions by the President that related to the Russia interference investigations, including the President's conduct towards the law enforcement officials overseeing the investigations and the witnesses to relevant events.

FACTUAL RESULTS OF THE OBSTRUCTION INVESTIGATION

[Ed: The factual allegations involved a series of actions by President Trump alleged to have been designed to thwart investigation into the possibility of Russian interference in the 2016 election. They included his cajoling and then firing of FBI Director James Comey in connection with a criminal prosecution of a Trump loyalist; efforts to get the White House Counsel to engage in false and/or obstructive actions; efforts to get the Attorney General to halt the Special Counsel investigation; and conduct allegedly designed to chill witnesses from cooperating with the Special Counsel investigation.]

... *Overarching factual issues.* We did not make a traditional prosecution decision about these facts, but the evidence we obtained supports several general statements about the President's conduct. Several features of the conduct we investigated distinguish it from typical obstruction-of-justice cases. First, the investigation concerned the President, and some of his actions, such as firing the FBI Director, involved facially lawful acts within his Article II authority, which raises constitutional issues discussed below. At the same time, the President's position as the head of the Executive Branch provided him with unique and powerful means of influencing official proceedings, subordinate officers, and potential witnesses—all of which is relevant to a potential obstruction-of-justice analysis. Second, unlike cases in which a subject engages in obstruction of justice to cover up a crime, the evidence we obtained did not establish that the President was involved in an

¹ The legal analysis in Volume II of the report is far longer than these excerpts and is a useful reference source on the law of obstruction, as well as on some separation-of-powers questions. For the full volume, see ROBERT S. MUELLER, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (March 2019), <https://www.justice.gov/storage/report.pdf>.

underlying crime related to Russian election interference. Although the obstruction statutes do not require proof of such a crime, the absence of that evidence affects the analysis of the President's intent and requires consideration of other possible motives for his conduct. Third, many of the President's acts directed at witnesses, including discouragement of cooperation with the government and suggestions of possible future pardons, took place in public view. That circumstance is unusual, but no principle of law excludes public acts from the reach of the obstruction laws. If the likely effect of public acts is to influence witnesses or alter their testimony, the harm to the justice system's integrity is the same.

Although the series of events we investigated involved discrete acts, the overall pattern of the President's conduct towards the investigations can shed light on the nature of the President's acts and the inferences that can be drawn about his intent. In particular, the actions we investigated can be divided into two phases, reflecting a possible shift in the President's motives. The first phase covered the period from the President's first interactions with Comey through the President's firing of Comey. During that time, the President had been repeatedly told he was not personally under investigation. Soon after the firing of Comey and the appointment of the Special Counsel, however, the President became aware that his own conduct was being investigated in an obstruction-of-justice inquiry. At that point, the President engaged in a second phase of conduct, involving public attacks on the investigation, non-public efforts to control it, and efforts in both public and private to encourage witnesses not to cooperate with the investigation. Judgments about the nature of the President's motives during each phase would be informed by the totality of the evidence. . . .

Because we determined not to make a traditional prosecutorial judgment, we did not draw ultimate conclusions about the President's conduct. The evidence we obtained about the President's actions and intent presents difficult issues that would need to be resolved if we were making a traditional prosecutorial judgment. At the same time, if we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state. Based on the facts and the applicable legal standards, we are unable to reach that judgment. Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him.

I. BACKGROUND LEGAL AND EVIDENTIARY PRINCIPLES

A. Legal Framework of Obstruction of Justice

Three basic elements are common to most of the relevant obstruction statutes: (1) an obstructive act; (2) a nexus between the obstructive act and an official proceeding; and (3) a corrupt intent. *See, e.g.*, 18 U.S.C. §§ 1503, 1505, 1512(c)(2). We describe those elements as they have been interpreted by the courts. We then discuss a more specific statute aimed at witness tampering, *see* 18 U.S.C. § 1512(b), and describe the requirements for attempted offenses and endeavors to obstruct justice, *see* 18 U.S.C. §§ 1503, 1512(c)(2).

Obstructive act. Obstruction-of-justice law “reaches all corrupt conduct capable of producing an effect that prevents justice from being duly administered, regardless of the means employed.” *United States v. Silverman* (interpreting 18 U.S.C. § 1503). An “effort to influence” a proceeding can qualify as an endeavor to obstruct justice even if the effort was “subtle or circuitous” and “however cleverly or with whatever cloaking of purpose” it was made. *United States v. Roe*; see also *United States v. Quattrone*. The verbs “obstruct or impede” are broad” and “can refer to anything that blocks, makes difficult, or hinders.” *Marinello v. United States*.

An improper motive can render an actor’s conduct criminal even when the conduct would otherwise be lawful and within the actor’s authority. See *United States v. Cueto* (affirming obstruction conviction of a criminal defense attorney for “litigation- related conduct”); *United States v. Cintolo* (“any act by any party—whether lawful or unlawful on its face-may abridge § 1503 if performed with a corrupt motive”).

Nexus to a pending or contemplated official proceeding. Obstruction-of-justice law generally requires a nexus, or connection, to an official proceeding. In Section 1503, the nexus must be to pending “judicial or grand jury proceedings.” *United States v. Aguilar*. In Section 1505, the nexus can include a connection to a “pending” federal agency proceeding or a congressional inquiry or investigation. Under both statutes, the government must demonstrate “a relationship in time, causation, or logic” between the obstructive act and the proceeding or inquiry to be obstructed. see also *Arthur Andersen LLP v. United States*. Section 1512(c) prohibits obstructive efforts aimed at official proceedings including judicial or grand jury proceedings. 18 U.S.C. § 1515(a)(1)(A). For purposes of Section 1512, “an official proceeding need not be pending or about to be instituted at the time of the offense.” 18 U.S.C. § 1512(f)(1). Although a proceeding need not already be in progress to trigger liability under Section 1512(c), a nexus to a contemplated proceeding still must be shown. *United States v. Young*; *United States v. Petruk*; *United States v. Phillips*; *United States v. Reich*. The nexus requirement narrows the scope of obstruction statutes to ensure that individuals have “fair warning” of what the law proscribes. *Aguilar*.

The nexus showing has subjective and objective components. As an objective matter, a defendant must act “in a manner that is likely to obstruct justice,” such that the statute “excludes defendants who have an evil purpose but use means that would only unnaturally and improbably be successful.” *Aguilar*. “[T]he endeavor must have the natural and probable effect of interfering with the due administration of justice.” As a subjective matter, the actor must have “contemplated a particular, foreseeable proceeding.” *Petruk*. A defendant need not directly impede the proceeding. Rather, a nexus exists if “discretionary actions of a third person would be required to obstruct the judicial proceeding if it was foreseeable to the defendant that the third party would act on the [defendant’s] communication in such a way as to obstruct the judicial proceeding.” *United States v. Martinez*.

Corruptly. The word “corruptly” provides the intent element for obstruction of justice and means acting “knowingly and dishonestly” or “with an improper motive.” *United States v. Richardson*; *United States v. Gordon* (to act corruptly means to “act[] with an improper purpose and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede or obstruct” the relevant proceeding) (some quotation marks omitted); see 18 U.S.C. § 1515(6) (“As used in section 1505, the term ‘corruptly’ means acting with an improper purpose, personally or by influencing another.”); see also *Arthur Andersen* (interpreting “corruptly” to mean “wrongful, immoral, depraved, or evil” and holding that acting “knowingly . . . corruptly” in 18 U.S.C. § 1512(c) requires “consciousness of wrongdoing”). The requisite showing is made when a person acted with an intent to obtain an “improper advantage for [him]self or someone else, inconsistent with official duty and the rights of others.” *BALLENTINE’S LAW DICTIONARY* (3d ed. 1969); see *United States v. Pasha*; *Aguilar* (characterizing this definition as the “longstanding and well-accepted meaning” of “corruptly”).

Witness tampering. A more specific provision in Section 1512 prohibits tampering with a witness. See 18 U.S.C. § 1512(b)(1)(3) (making it a crime to “knowingly use[] intimidation . . . or corruptly persuade[] another person,” or “engage[] in misleading conduct towards another person,” with the intent to “influence, delay, or prevent the testimony of any person in an official proceeding” or to “hinder, delay, or prevent the communication to a law enforcement officer . . . of information relating to the commission or possible commission of a Federal offense”). To establish corrupt persuasion, it is sufficient that the defendant asked a potential witness to lie to investigators in contemplation of a likely federal investigation into his conduct. The “persuasion” need not be coercive, intimidating, or explicit; it is sufficient to “urge,” “induce,” “ask[],” “argu[e],” “giv[e] reasons,” *Sparks*, or “coach[] or remind[] witnesses by planting misleading facts,” *Edlund*. Corrupt persuasion is shown “where a defendant tells a potential witness a false story as if the story were true, intending that the witness believe the story and testify to it.” *United States v. Rodolitz*; see *United States v. Gabriel*. It also covers urging a witness to recall a fact that the witness did not know, even if the fact was actually true. See *LaShay*. Corrupt persuasion also can be shown in certain circumstances when a person, with an improper motive, urges a witness not to cooperate with law enforcement. See *United States v. Shotts* (telling secretary “not to [say] anything [to the FBI] and [she] would not be bothered”). . . .

Attempts and endeavors. Section 1512(c)(2) covers both substantive obstruction offenses and attempts to obstruct justice. Under general principles of attempt law, a person is guilty of an attempt when he has the intent to commit a substantive offense and takes an overt act that constitutes a substantial step towards that goal. “[T]he act [must be] substantial, in that it was strongly corroborative of the defendant’s criminal purpose.” *United States v. Pratt*. While “mere abstract talk” does not suffice, any “concrete and specific” acts that corroborate the defendant’s intent can constitute a “substantial step.” *United States v. Irving*. Thus, “soliciting an innocent agent to engage in conduct constituting an element of the crime” may qualify as a substantial step. Model Penal Code § 5.01(2)(g); see *United States v. Lucas*.

The omnibus clause of 18 U.S.C. § 1503 prohibits an “endeavor” to obstruct justice, which sweeps more broadly than Section 1512’s attempt provision. “It is well established that a[n] [obstruction-of-justice] offense is complete when one corruptly endeavors to obstruct or impede the due administration of justice; the prosecution need not prove that the due administration of justice was actually obstructed or impeded.” *United States v. Davis*. . . .

The Mueller report went on to analyze and reject arguments that principles regarding the presidency and presidential powers located in Article II of the Constitution restricted the application of the obstruction statutes to the actions of the President at issue in this scenario. That analysis would have to be reformulated in light of the Supreme Court’s decision in July 2024 in *Trump v. United States*, 603 U.S. 593 (2024), in which the Court fashioned new constitutional principles of presidential immunity from criminal prosecution. In addition, the report did not reach a legal conclusion regarding the President’s conduct, which it described as presenting “difficult issues,” on the ground that an existing opinion of the Department of Justice concluded that a President may not constitutionally be subject to indictment while still in office. It would be inappropriate for a prosecutor to state a position on the President’s liability, the report concluded, when there could be no prospect of contesting such an allegation in court.

D. Elements and Examples: Section 1519

The following two cases deal with interpretation of § 1519, specifically with regards to what mens rea and/or nexus requirements it might or might not have, and what kinds of acts the statute covers. This statute involves many of the same policy problems presented by the other statutes but in the context of different statutory text. Notice how courts try to deal with the interaction of policy considerations and text.

UNITED STATES v. YIELDING, 657 F.3d 688 (8th Cir. 2011)

COLLTON, Circuit Judge:

In approximately 1998, [Geff] Yielding began to work as a surgical and administrative assistant for Dr. Richard Jordan, a neurosurgeon in North Little Rock, Arkansas. Dr. Jordan performed surgeries at several area hospitals, including Baptist Health Medical Center in North Little Rock (“Baptist”). Yielding was responsible for ensuring that the required equipment was present at all of Dr. Jordan’s surgeries.

Jordan “Jody” Wall was a charge nurse at Baptist in 2003 and 2004. He was responsible for ordering medical supplies for Dr. Jordan’s surgeries at that hospital. Yielding told Wall which supplies were needed for each scheduled surgery, and Wall ensured that the requested items were available. When Baptist did not have enough supplies on hand, Wall asked Denise Rhodes, the hospital’s senior inventory coordinator, to order the needed items.

In 2002, Yielding's wife, Kelley Yielding, incorporated Advanced Neurophysiology, Inc. ("ANI"), a medical services company of which she was the sole shareholder. By 2003, Kelley had begun to work as an independent sales agent for two medical supply companies known as Orthofix and Osteotech. Orthofix sold external bone growth stimulators, which promote bone growth following surgery in patients who would otherwise have difficulty growing new bone. Osteotech sold bone allograft, which is substitute bone that is used to fill a void in a patient's bone after surgery or trauma.

Kelley Yielding marketed the two companies' products to surgeons, and received commissions on each sale. From February 2003 to October 2004, Kelley received approximately \$384,000 in commissions from Osteotech and Orthofix that were attributable to purchases by Baptist. During the same period, ANI issued twenty-two checks to Wall totaling \$54,366.08.

In November 2004, Baptist terminated Wall and Rhodes after an internal investigation revealed irregularities in the ordering of Osteotech bone and Orthofix bone growth stimulators. Baptist determined that Rhodes had placed purchasing orders for the Osteotech and Orthofix products without proper authorization, and that the hospital should not have purchased any Orthofix bone growth stimulators. Baptist also discovered that more than one hundred pieces of bone were missing from the hospital's inventory.

On December 27, 2004, Dr. Jordan forwarded to the Yieldings an e-mail he had received from a Baptist administrator. In the e-mail, the administrator characterized the purchases of the bone growth stimulators as "very suspicious," and informed Dr. Jordan that the hospital was "continuing [its] investigation of this issue as well as the . . . missing pieces of bone."

Three days later, U.S. Bank issued a check to ANI for \$34,018.90. This was the precise amount of ANI's total payments to Wall in 2004. The check listed the remitter as Jordan Wall, and the purpose of the payment as "REPAYMENT ON LOAN." Bank records showed that on the same day, Yielding withdrew \$21,018.90 from the Yieldings' personal bank account at U.S. Bank. A receipt and currency transaction report indicated that Yielding also paid the bank \$13,000 in cash.

The Federal Bureau of Investigation opened an inquiry into the irregularities at Baptist in mid-2005. In an interview in October 2005, Wall told investigators that the Yieldings had given him a loan of "[m]aybe \$10,000," not the \$34,018.90 paid by check in December 2004. On April 14, 2006, the FBI executed search warrants at the Yieldings' home and at Dr. Jordan's office. During the search of the Yielding residence, the agents discovered a promissory note describing an interest-free loan of \$34,018.90 issued from ANI to Wall in January 2004. The note was marked as paid on December 30, 2004.

The agents also interviewed Kelley Yielding. She initially described the payments from ANI to Wall as a loan and denied that Wall had been employed by ANI. Yielding told the agents that he and his wife had given Wall a loan of approximately \$30,000, that the

loan had been documented, and that Wall had repaid the loan. After the agents confronted Yielding with bank records indicating that he used his own funds to purchase Wall's check to ANI, however, Yielding stated that Wall had convinced him to pay Wall approximately \$3000 per month in exchange for Wall's promise to keep all of Kelley Yielding's supplies fully in stock. Yielding told the agents that Wall asked him to purchase a cashier's check to make it appear as if the payments to Wall had been a loan that Wall was paying back. On the same day, the FBI again interviewed Wall, who then admitted that he had received payments from the Yieldings in exchange for ordering Osteotech bone and Orthofix bone growth stimulators.

Kelley Yielding died on October 2, 2006. . . . On May 8, 2008, a grand jury indicted Yielding on forty-six counts of mail fraud, falsification of documents, and payment of kickbacks involving a federal health care program.

At trial, . . . Wall testified that Yielding had approached him and had offered to pay him in exchange for ordering the products sold by Kelley Yielding. According to Wall, Yielding gave Wall lists of items to order, and Wall then asked Rhodes to obtain the listed supplies. Wall recalled that Yielding once told him to order some bone products so that Kelley would qualify for a free vacation. In return for Wall's efforts, Yielding gave him envelopes containing checks from ANI. Wall testified that Yielding told him to "keep it quiet," and asked him in approximately December 2004 to sign and date a promissory note so that the note would appear to have been signed in January 2004. Wall said that Yielding also asked him to sign a cashier's check that would make the payments from ANI to Wall look like a loan. . . .

Yielding raises several challenges to his conviction on count two for violating 18 U.S.C. § 1519, an obstruction of justice statute. Section 1519 . . . provides:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

18 U.S.C. § 1519. The charge in this case was based on Yielding's knowing falsification of a promissory note with the intent to disguise checks paid from ANI to Wall as "loans" rather than kickbacks.

Yielding's narrowest challenge is to the district court's jury instructions on the § 1519 charge. The district court instructed the jury as follows:

The crime of falsifying a document as charged in Count Two of the indictment, has three essential elements, which are:

One, the defendant knowingly falsified a document;

Two, the defendant did so with the intent to impede, obstruct, or influence the investigation or proper administration of any matter or in contemplation of or relation to any such matter; and

Three, the matter was within the jurisdiction of the United States Department of Health and Human Services which is an agency of the United States.

If all of these essential elements have been proved beyond a reasonable doubt as to the defendant then you must find the defendant guilty of the crime charged under Count Two; otherwise you must find the defendant not guilty of this crime under Count Two.

The United States does not have to prove that the matter be pending at the time of the obstruction, but only that the acts be taken in relation to or contemplation of any such matter or case.

Further, the United States does not have to prove that the falsifying of the document would naturally or probably result in obstruction.

In order to meet its burden, the United States need not prove that the defendant specifically knew that the matter was within the jurisdiction of a department or agency.

Yielding renews objections lodged in the district court regarding the elements of the offense. To resolve the challenges to the instructions, therefore, we must consider what proof is required to establish a violation of § 1519.

One element on which both parties agree is that the government must prove that Yielding “knowingly . . . falsifie[d] . . . any . . . document.” The falsification must be done knowingly; an unwitting falsehood will not suffice.

The element of intent is more complex. The statute provides that liability may arise in three different situations involving matters within the jurisdiction of a federal department or agency: (1) when a defendant acts directly with respect to “the investigation or proper administration of any matter,” that is, a pending matter, (2) when a defendant acts “in . . . contemplation of any such matter,” and (3) when a defendant acts “in relation to . . . any such matter.” Although the phrasing of the statute is a bit awkward, the government concedes that the prosecution must show intent to impede, obstruct, or influence the investigation or proper administration of a matter in each of these three scenarios. We think this is the better reading of the statute. The phrase “or in relation to or contemplation of any such matter” is set off by commas and follows the reference to an accused’s intent to obstruct the investigation of “any matter.” It seems to us that Congress thereby sought to extend the prohibition to situations in which the accused does not act directly with respect to a pending matter, but acts either in contemplation of a future matter or in relation to a pending matter. The statute, for example, does not allow a defendant to escape liability for shredding documents with intent to obstruct a

foreseeable investigation of a matter within the jurisdiction of a federal agency just because the investigation has not yet commenced.

But we do not think Congress, in expanding the scope of § 1519 beyond actions directed to a pending matter, eliminated the need for proof of intent to impede, obstruct, or influence a federal matter. In other words, the statute does not impose liability for “knowingly . . . destroy[ing] . . . any . . . document . . . in . . . contemplation of any [federal] matter,” *without* an intent to impede, obstruct, or influence a matter. If it did, then the statute would forbid innocent conduct such as routine destruction of documents that a person consciously and in good faith determines are irrelevant to a foreseeable federal matter. We thus understand the intent element of the statute to encompass three possible scenarios: (1) a defendant acts with intent to impede, obstruct, or influence the investigation or proper administration of a federal matter, (2) a defendant, in contemplation of a federal matter, acts with intent to impede, obstruct, or influence the investigation or proper administration of the matter, and (3) a defendant, in relation to a federal matter, acts with intent to impede, obstruct, or influence the investigation or proper administration of the matter.

The parties disagree, however, about whether the intent element of § 1519 also requires what the Supreme Court has described as a “nexus” between the alleged obstructive act and the federal matter. Yielding contends that the government was required to prove not only that he intended to impede, obstruct, or influence the investigation or proper administration of a matter, but also that he knew that his actions would have the “natural and probable effect” of interfering with the investigation or proper administration of a matter. He objects that the district court erred by instructing the jury that the government need not “prove that the falsifying of the document would naturally or probably result in obstruction.” . . .

We conclude that the “nexus” requirement urged by Yielding—that the government must show the accused knew his actions were likely to affect a federal matter—does not apply to a prosecution for the knowing falsification of documents under § 1519. The text of § 1519 requires only proof that the accused knowingly committed one of several acts, including falsification of a document, and did so “with the intent to impede, obstruct, or influence the investigation or proper administration” of a federal matter. The requisite knowledge and intent can be present even if the accused lacks knowledge that he is likely to succeed in obstructing the matter. It presumably will be easier to prove that an accused intended to obstruct an investigation if the obstructive act was likely to affect the investigation. But we do not think the statute allows an accused with the requisite intent to avoid liability if he overestimated the importance of a falsified record or shredded a document for the purpose of eliminating a small but appreciable risk that the document would lead investigators to discover his wrongdoing.

The language of § 1519 is materially different from the statutes considered in *Aguilar* and *Arthur Andersen*. The former forbade “corruptly endeavor[ing]” to obstruct, and the latter prohibited “knowingly corrup[t] persua[sion].” In both cases, the Court was thus

required to discern the substance of an intent requirement from statutory terms that appeared to imply one, but did not speak directly to its content. . . . But in § 1519, Congress spoke more directly to the requisite intent and described its scope more precisely. The statute includes no ambiguous phrase such as “corruptly endeavor” or “knowingly corruptly persuade” that calls for implication of an additional intent requirement. . . . We think the text of § 1519 gives fair warning that knowingly falsifying a document, in contemplation of a federal matter, with intent to impede, obstruct, or interfere with that matter may result in criminal liability, whether or not the obstruction was likely to succeed. That the accused’s intent must be wrongful is evident from the nature of the acts prohibited, such as knowing falsification of documents, and the requisite intent to influence, obstruct, or impede an investigation or proper administration of a federal matter. The jury instruction was therefore not erroneous, because § 1519 does not require a nexus of the kind articulated in *Aguilar* and *Arthur Andersen*. . . .

As of this edition, no other circuit court has refuted the holding of *Yielding* that § 1519 does not contain a nexus requirement. However, not many opinions have followed it either. *See United States v. Kernell*, 667 F.3d 746 (6th Cir. 2012) (“[T]he nexus requirement is derived from the language of other obstruction-of-justice statutes, wording that is not found in § 1519. Congress is not required to use the same structure for all obstruction-of-justice statutes.”). Does the absence of a nexus requirement create any problems from a policy standpoint?

UNITED STATES v. YATES, 574 U.S. 528 (2015)

Justice GINSBURG announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice BREYER, and Justice SOTOMAYOR join. [Justice ALITO concurred on narrower grounds; his concurrence is omitted]

John Yates, a commercial fisherman, caught undersized red grouper in federal waters in the Gulf of Mexico. To prevent federal authorities from confirming that he had harvested undersized fish, Yates ordered a crew member to toss the suspect catch into the sea. For this offense, he was charged with, and convicted of, violating 18 U.S.C. § 1519, which provides:

“Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.”

. . . [Yates] maintains that fish are not trapped within the term “tangible object,” as that term is used in § 1519.

Section 1519 was enacted as part of the Sarbanes–Oxley Act of 2002, 116 Stat. 745, legislation designed to protect investors and restore trust in financial markets following the collapse of Enron Corporation. A fish is no doubt an object that is tangible; fish can be seen, caught, and handled, and a catch, as this case illustrates, is vulnerable to destruction. But it would cut § 1519 loose from its financial-fraud mooring to hold that it encompasses any and all objects, whatever their size or significance, destroyed with obstructive intent. Mindful that in Sarbanes–Oxley, Congress trained its attention on corporate and accounting deception and cover-ups, we conclude that a matching construction of § 1519 is in order: A tangible object captured by § 1519, we hold, must be one used to record or preserve information.

On August 23, 2007, the Miss Katie, a commercial fishing boat, was six days into an expedition in the Gulf of Mexico. Her crew numbered three, including Yates, the captain. Engaged in a routine offshore patrol to inspect both recreational and commercial vessels, Officer John Jones of the Florida Fish and Wildlife Conservation Commission decided to board the Miss Katie to check on the vessel’s compliance with fishing rules. Although the Miss Katie was far enough from the Florida coast to be in exclusively federal waters, she was nevertheless within Officer Jones’s jurisdiction. Because he had been deputized as a federal agent by the National Marine Fisheries Service, Officer Jones had authority to enforce federal, as well as state, fishing laws.

Upon boarding the Miss Katie, Officer Jones noticed three red grouper that appeared to be undersized hanging from a hook on the deck. At the time, federal conservation regulations required immediate release of red grouper less than 20 inches long. 50 C.F.R. § 622.37(d)(2)(ii) (effective April 2, 2007). Violation of those regulations is a civil offense punishable by a fine or fishing license suspension. *See* 16 U.S.C. §§ 1857(1)(A), (G), 1858(a), (g).

Suspecting that other undersized fish might be on board, Officer Jones proceeded to inspect the ship’s catch, setting aside and measuring only fish that appeared to him to be shorter than 20 inches. Officer Jones ultimately determined that 72 fish fell short of the 20-inch mark. A fellow officer recorded the length of each of the undersized fish on a catch measurement verification form. With few exceptions, the measured fish were between 19 and 20 inches; three were less than 19 inches; none were less than 18.75 inches. After separating the fish measuring below 20 inches from the rest of the catch by placing them in wooden crates, Officer Jones directed Yates to leave the fish, thus segregated, in the crates until the Miss Katie returned to port. Before departing, Officer Jones issued Yates a citation for possession of undersized fish.

Four days later, after the Miss Katie had docked in Cortez, Florida, Officer Jones measured the fish contained in the wooden crates. This time, however, the measured fish, although still less than 20 inches, slightly exceeded the lengths recorded on board. Jones surmised that the fish brought to port were not the same as those he had detected during his initial inspection. Under questioning, one of the crew members admitted that, at Yates’s direction, he had thrown overboard the fish Officer Jones had measured at

sea, and that he and Yates had replaced the tossed grouper with fish from the rest of the catch. . . .

The Sarbanes–Oxley Act, all agree, was prompted by the exposure of Enron’s massive accounting fraud and revelations that the company’s outside auditor, Arthur Andersen LLP, had systematically destroyed potentially incriminating documents. The Government acknowledges that § 1519 was intended to prohibit, in particular, corporate document-shredding to hide evidence of financial wrongdoing. Prior law made it an offense to “intimidat[e], threat[n], or corruptly persuad[e] another person” to shred documents. § 1512(b) (emphasis added). Section 1519 cured a conspicuous omission by imposing liability on a person who destroys records himself. *See* S.Rep. No. 107–146, (2002) (describing § 1519 as “a new general anti shredding provision” and explaining that “certain current provisions make it a crime to persuade another person to destroy documents, but not a crime to actually destroy the same documents yourself”). The new section also expanded prior law by including within the provision’s reach “any matter within the jurisdiction of any department or agency of the United States.” . . .

The ordinary meaning of an “object” that is “tangible,” as stated in dictionary definitions, is “a discrete . . . thing,” Webster’s Third New International Dictionary (2002), that “possess[es] physical form,” Black’s Law Dictionary (10th ed. 2014). From this premise, the Government concludes that “tangible object,” as that term appears in § 1519, covers the waterfront, including fish from the sea.

Whether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words. Rather, “[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.* *See also Deal v. United States* (it is a “fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used”). Ordinarily, a word’s usage accords with its dictionary definition. In law as in life, however, the same words, placed in different contexts, sometimes mean different things. . . .

We note first § 1519’s caption: “Destruction, alteration, or falsification of records in Federal investigations and bankruptcy.” That heading conveys no suggestion that the section prohibits spoliation of any and all physical evidence, however remote from records. Neither does the title of the section of the Sarbanes–Oxley Act in which § 1519 was placed, § 802: “Criminal penalties for altering documents.” 116 Stat. 800. Furthermore, § 1520, the only other provision passed as part of § 802, is titled “Destruction of corporate audit records” and addresses only that specific subset of records and documents. While these headings are not commanding, they supply cues that Congress did not intend “tangible object” in § 1519 to sweep within its reach physical objects of every kind, including things no one would describe as records, documents, or devices closely associated with them. *See Almendarez–Torres v. United*

States (“[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.” If Congress indeed meant to make § 1519 an all-encompassing ban on the spoliation of evidence, as the dissent believes Congress did, one would have expected a clearer indication of that intent.

Section 1519’s position within Chapter 73 of Title 18 further signals that § 1519 was not intended to serve as a cross-the-board ban on the destruction of physical evidence of every kind. Congress placed § 1519 (and its companion provision § 1520) at the end of the chapter, following immediately after the pre-existing § 1516, § 1517, and § 1518, each of them prohibiting obstructive acts in specific contexts. See § 1516 (audits of recipients of federal funds); § 1517 (federal examinations of financial institutions); § 1518 (criminal investigations of federal health care offenses). *See also* S. Rep. No. 107–146 (observing that § 1517 and § 1518 “apply to obstruction in certain limited types of cases, such as bankruptcy fraud, examinations of financial institutions, and healthcare fraud”). . . .

The contemporaneous passage of § 1512(c)(1), which was contained in a section of the Sarbanes–Oxley Act discrete from the section embracing § 1519 and § 1520, is also instructive. Section 1512(c)(1) provides:

“(c) Whoever corruptly—

“(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding

“shall be fined under this title or imprisoned not more than 20 years, or both.”

The legislative history reveals that § 1512(c)(1) was drafted and proposed after § 1519. *See* 148 Cong. Rec. 12518 (2002). The Government argues, and Yates does not dispute, that § 1512(c)(1)’s reference to “other object” includes any and every physical object. But if § 1519’s reference to “tangible object” already included all physical objects, as the Government and the dissent contend, then Congress had no reason to enact § 1512(c)(1): Virtually any act that would violate § 1512(c)(1) no doubt would violate § 1519 as well, for § 1519 applies to “the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . or in relation to or contemplation of any such matter,” not just to “an official proceeding.”

The Government acknowledges that, under its reading, § 1519 and § 1512(c)(1) “significantly overlap.” Nowhere does the Government explain what independent function § 1512(c)(1) would serve if the Government is right about the sweeping scope of § 1519. We resist a reading of § 1519 that would render superfluous an entire provision passed in proximity as part of the same Act. *See Marx v. General Revenue Corp.* (“[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.”).

The words immediately surrounding “tangible object” in § 1519—“falsifies, or makes a false entry in any record [or] document”—also cabin the contextual meaning of that term. As explained in *Gustafson v. Alloyd Co.*, we rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to “avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.” See also *United States v. Williams* (“a word is given more precise content by the neighboring words with which it is associated”). In *Gustafson*, we interpreted the word “communication” in § 2(10) of the Securities Act of 1933 to refer to a public communication, rather than any communication, because the word appeared in a list with other words, notably “notice, circular, [and] advertisement,” making it “apparent that the list refer[red] to documents of wide dissemination.” And we did so even though the list began with the word “any.”

The *noscitur a sociis* canon operates in a similar manner here. “Tangible object” is the last in a list of terms that begins “any record [or] document.” The term is therefore appropriately read to refer, not to any tangible object, but specifically to the subset of tangible objects involving records and documents, i.e., objects used to record or preserve information. . . .

This moderate interpretation of “tangible object” accords with the list of actions § 1519 proscribes. The section applies to anyone who “alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object” with the requisite obstructive intent. (Emphasis added.) The last two verbs, “falsif[y]” and “mak[e] a false entry in,” typically take as grammatical objects records, documents, or things used to record or preserve information, such as logbooks or hard drives. See, e.g., Black’s Law Dictionary (10th ed. 2014) (defining “falsify” as “[t]o make deceptive; to counterfeit, forge, or misrepresent; esp., to tamper with (a document, record, etc.)”). It would be unnatural, for example, to describe a killer’s act of wiping his fingerprints from a gun as “falsifying” the murder weapon. But it would not be strange to refer to “falsifying” data stored on a hard drive as simply “falsifying” a hard drive. Furthermore, Congress did not include on § 1512(c)(1)’s list of prohibited actions “falsifies” or “makes a false entry in.” See § 1512(c)(1) (making it unlawful to “alte[r], destro[y], mutilat[e], or concea[l] a record, document, or other object” with the requisite obstructive intent). That contemporaneous omission also suggests that Congress intended “tangible object” in § 1519 to have a narrower scope than “other object” in § 1512(c)(1).

A canon related to *noscitur a sociis*, *eiusdem generis*, counsels: “Where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” *Wash. State Dep’t of Social and Health Servs. v. Guardianship Estate of Keffeler*. . . . Had Congress intended “tangible object” in § 1519 to be interpreted so generically as to capture physical objects as dissimilar as documents and fish, Congress would have had no reason to refer specifically to “record” or “document.” The Government’s unbounded reading of “tangible object” would render

those words misleading surplusage. . . . It is highly improbable that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial record-keeping. . . .

Justice KAGAN, with whom Justice SCALIA, Justice KENNEDY, and Justice THOMAS join, dissenting.

A criminal law, 18 U.S.C. § 1519, prohibits tampering with “any record, document, or tangible object” in an attempt to obstruct a federal investigation. This case raises the question whether the term “tangible object” means the same thing in § 1519 as it means in everyday language—any object capable of being touched. The answer should be easy: Yes. The term “tangible object” is broad, but clear. Throughout the U.S. Code and many States’ laws, it invariably covers physical objects of all kinds. And in § 1519, context confirms what bare text says: All the words surrounding “tangible object” show that Congress meant the term to have a wide range. That fits with Congress’s evident purpose in enacting § 1519: to punish those who alter or destroy physical evidence—any physical evidence—with the intent of thwarting federal law enforcement.

The plurality instead interprets “tangible object” to cover “only objects one can use to record or preserve information.” The concurring opinion similarly, if more vaguely, contends that “tangible object” should refer to “something similar to records or documents”—and shouldn’t include colonial farmhouses, crocodiles, or fish. In my view, conventional tools of statutory construction all lead to a more conventional result: A “tangible object” is an object that’s tangible. I would apply the statute that Congress enacted and affirm the judgment below.

While the plurality starts its analysis with § 1519’s heading (“We note first § 1519’s caption”), I would begin with § 1519’s text. When Congress has not supplied a definition, we generally give a statutory term its ordinary meaning. *See, e.g., Schindler Elevator Corp. v. United States ex rel. Kirk*. As the plurality must acknowledge, the ordinary meaning of “tangible object” is “a discrete thing that possesses physical form.” A fish is, of course, a discrete thing that possesses physical form. *See generally* Dr. Seuss, *One Fish Two Fish Red Fish Blue Fish* (1960). So the ordinary meaning of the term “tangible object” in § 1519, as no one here disputes, covers fish (including too-small red grouper).

That interpretation accords with endless uses of the term in statute and rule books as construed by courts. Dozens of federal laws and rules of procedure (and hundreds of state enactments) include the term “tangible object” or its first cousin “tangible thing”—some in association with documents, others not. . . .

That is not necessarily the end of the matter; I agree with the plurality (really, who does not?) that context matters in interpreting statutes. We do not “construe the meaning of statutory terms in a vacuum.” *Tyler v. Cain*. Rather, we interpret particular words “in their context and with a view to their place in the overall statutory scheme.” *Davis v. Michigan Dept. of Treasury*. And sometimes that means, as the plurality says, that the

dictionary definition of a disputed term cannot control. *See, e.g., Bloate v. United States*. But this is not such an occasion, for here the text and its context point the same way. Stepping back from the words “tangible object” provides only further evidence that Congress said what it meant and meant what it said.

Begin with the way the surrounding words in § 1519 reinforce the breadth of the term at issue. Section 1519 refers to “any” tangible object, thus indicating (in line with that word’s plain meaning) a tangible object “of whatever kind.” Webster’s Third New International Dictionary (2002). This Court has time and again recognized that “any” has “an expansive meaning,” bringing within a statute’s reach all types of the item (here, “tangible object”) to which the law refers. *Department of Housing and Urban Development v. Rucker*; *see, e.g., Republic of Iraq v. Beatty*; *Ali v. Federal Bureau of Prisons*. And the adjacent laundry list of verbs in § 1519 (“alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry”) further shows that Congress wrote a statute with a wide scope. Those words are supposed to ensure—just as “tangible object” is meant to—that § 1519 covers the whole world of evidence-tampering, in all its prodigious variety. *See United States v. Rodgers* (rejecting a “narrow, technical definition” of a statutory term when it “clashes strongly” with “sweeping” language in the same sentence).

Still more, “tangible object” appears as part of a three-noun phrase (including also “records” and “documents”) common to evidence-tampering laws and always understood to embrace things of all kinds. The Model Penal Code’s evidence-tampering section, drafted more than 50 years ago, similarly prohibits a person from “alter[ing], destroy[ing], conceal[ing] or remov[ing] any record, document or thing “in an effort to thwart an official investigation or proceeding. ALI, Model Penal Code § 241.7(1) (1962) (emphasis added). The Code’s commentary emphasizes that the offense described in that provision is “not limited to conduct that [alters] a written instrument.” Rather, the language extends to “any physical object.” . . .

The words “record, document, or tangible object” in § 1519 also track language in 18 U.S.C. § 1512, the federal witness-tampering law covering (as even the plurality accepts) physical evidence in all its forms. Section 1512, both in its original version (preceding § 1519) and today, repeatedly uses the phrase “record, document, or other object”—most notably, in a provision prohibiting the use of force or threat to induce another person to withhold any of those materials from an official proceeding. § 4(a) of the Victim and Witness Protection Act of 1982, 96 Stat. 1249, as amended, 18 U.S.C. § 1512(b)(2). That language, which itself likely derived from the Model Penal Code, encompasses no less the bloody knife than the incriminating letter, as all courts have for decades agreed. . . .

And legislative history, for those who care about it, puts extra icing on a cake already frosted. Section 1519, as the plurality notes, was enacted after the Enron Corporation’s collapse, as part of the Sarbanes–Oxley Act of 2002, 116 Stat. 745. But the provision began its life in a separate bill, and the drafters emphasized that Enron was “only a case study exposing the shortcomings in our current laws” relating to both “corporate and

criminal” fraud. S. Rep. No. 107–146, (2002). The primary “loophole[]” Congress identified arose from limits in the part of § 1512 just described: That provision, as uniformly construed, prohibited a person from inducing another to destroy “record[s], document[s], or other object[s]”—of every type—but not from doing so himself. § 1512(b)(2). Congress (as even the plurality agrees) enacted § 1519 to close that yawning gap. But § 1519 could fully achieve that goal only if it covered all the records, documents, and objects § 1512 did, as well as all the means of tampering with them. And so § 1519 was written to do exactly that—“to apply broadly to any acts to destroy or fabricate physical evidence,” as long as performed with the requisite intent. S. Rep. No. 107–146. “When a person destroys evidence,” the drafters explained, “overly technical legal distinctions should neither hinder nor prevent prosecution.” Ah well: Congress, meet today’s Court, which here invents just such a distinction with just such an effect. *See United States v. Philadelphia Nat. Bank* (“[C]reat[ing] a large loophole in a statute designed to close a loophole” is “illogical and disrespectful of . . . congressional purpose”).

As Congress recognized in using a broad term, giving immunity to those who destroy non-documentary evidence has no sensible basis in penal policy. A person who hides a murder victim’s body is no less culpable than one who burns the victim’s diary. A fisherman, like John Yates, who dumps undersized fish to avoid a fine is no less blameworthy than one who shreds his vessel’s catch log for the same reason. Congress thus treated both offenders in the same way. It understood, in enacting § 1519, that destroying evidence is destroying evidence, whether or not that evidence takes documentary form. . . .

I tend to think, for the reasons the plurality gives, that § 1519 is a bad law—too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion. And I’d go further: In those ways, § 1519 is unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code.

But whatever the wisdom or folly of § 1519, this Court does not get to rewrite the law. “Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress.” *Rodgers*. If judges disagree with Congress’s choice, we are perfectly entitled to say so—in lectures, in law review articles, and even in dicta. But we are not entitled to replace the statute Congress enacted with an alternative of our own design.

The next case, another decision interpreting § 1519, includes more material on the relationship between obstruction and the role of lawyers, as well as on reliance on advice of counsel in the obstruction context. See if you can understand what is going on procedurally in this case and why the court reaches the issues of statutory interpretation that it does. Note that this is a single district court opinion—important for what it discusses and because there are relatively few decisions on § 1519, but not of course a generally binding decision.

UNITED STATES v. STEVENS, 771 F. Supp. 2d 556 (D. Md. 2011)

ROGER W. TITUS, District Judge:

On November 8, 2010, a grand jury for the United States District Court for the District of Maryland returned a six-Count indictment against Lauren Stevens (“Stevens”), former Vice President and Associate General Counsel of GlaxoSmithKline (“GSK”). The indictment charged Stevens with one count of obstruction of a proceeding in violation of 18 U.S.C. § 1512, one count of falsification and concealment of documents in violation of 18 U.S.C. § 1519, and four counts of making a false statement in violation of 18 U.S.C. § 1001. The charges arose out of Stevens’ response to an inquiry by the United States Food and Drug Administration (“FDA”) into GSK’s alleged off-label promotion of the anti-depressant drug Wellbutrin SR (“Wellbutrin”). A jury trial is scheduled to begin April 5, 2011. The parties have filed multiple pretrial motions, most of which will be discussed below.

On October 9, 2002, the FDA sent a letter to GSK stating that the FDA had recently received information indicating that GSK had possibly promoted Wellbutrin for weight loss, a use not approved by the FDA. The FDA asked GSK to provide it with materials related to Wellbutrin promotional programs sponsored by GSK, including copies of all slides, videos, handouts, and other materials presented or distributed at any GSK program or activity related to Wellbutrin. Stevens was “in charge of” GSK’s “response to the FDA’s inquiry and investigation” and “led a team of lawyers and paralegals who gathered documents and information.”

The United States alleges that Stevens obstructed the FDA’s investigation by withholding and concealing documents and other information about GSK’s promotional activities for Wellbutrin, including for unapproved uses, while representing to the FDA that she had completed her response to its inquiry, and that Stevens falsified and altered documents in order to impede the FDA’s investigation of GSK. In particular, the Government alleges Stevens withheld slide sets used by speakers at GSK promotional events that promoted off-label use of Wellbutrin and withheld information regarding compensation received by attendees at promotional events. The Government alleges that Stevens signed and sent to the FDA six letters containing materially false statements regarding GSK’s promotion of Wellbutrin for off-label uses.

In responding to the FDA’s inquiry, Stevens was assisted by GSK in-house counsel and outside counsel from the law firm of King & Spalding. Stevens’ primary defense to the charges in the indictment is that she relied in good faith on the advice of counsel in responding to the FDA’s inquiry, and that such reliance negated the requisite intent to obstruct the FDA’s investigation or to make false statements.

The Government filed two pretrial motions. The first seeks to preclude Stevens from asserting good faith reliance on the advice of counsel as a defense to Count 2. The Government argues that good faith reliance on the advice of counsel is not a defense to Count 2 because 18 U.S.C. § 1519 is a general intent crime, and good faith reliance on

advice of counsel is only a defense to specific intent crimes. The Government also moved in limine to exclude evidence regarding the opinions of other in-house and outside counsel that were not expressed to Stevens at the time of GSK's response to the FDA's inquiry, regarding whether they viewed GSK's responses to be appropriate and not misleading. . . .

Good faith reliance on the advice of counsel is only relevant to specific intent crimes because such reliance demonstrates a defendant's lack of the requisite intent to violate the law. *United States v. Miller* ("The reliance defense . . . is designed to refute the government's proof that the defendant intended to commit the offense."), *United States v. Polytarides* ("The basis for the defense of action taken on the advice of counsel is that, in relying on counsel's advice, defendant lacked the requisite intent to violate the law."). The United States argues that 18 U.S.C. § 1519 is a general intent crime, and therefore Stevens' good faith reliance on advice of counsel is irrelevant to a determination of her guilt on Count 2.

Whether a conviction under § 1519 requires proof that a defendant acted with the specific intent to violate the law is a question of statutory construction. *Staples v. United States*. A close reading of the statutory language reveals that a conviction under § 1519 can only be premised on conduct that was intentional or willful. . . .

The Supreme Court's decision in *Arthur Andersen* guides this Court's interpretation of § 1519. . . .

The Supreme Court held that one could not "knowingly . . . corruptly persuad[e]" another person with intent to cause that person to withhold documents from, or alter documents for use in, an official proceeding without being "conscious of [his] wrongdoing." *Andersen*. The Court stated that "limiting criminality to persuaders conscious of their wrongdoing sensibly allows § 1512(b) to reach only those with the level of culpability usually required to impose criminal liability."

As in *Arthur Andersen*, the most natural, grammatical reading of § 1519 is one in which the word "knowingly" modifies "with intent to impede, obstruct, or influence." The mens rea of 1519 is not just "knowingly"—meaning "with awareness, understanding, or consciousness"—as the Government suggests. Rather, the mens rea is "knowingly . . . with intent to impede, obstruct, or influence," a mens rea clearly requiring consciousness of wrongdoing. One cannot be said to "knowingly . . . alter [], . . . conceal[], cover[] up, falsif[y], or make[] false entry in any record [or] document . . . with intent to impede, obstruct, or influence" an investigation or administration of a matter within the jurisdiction of a federal agency unless it is that individual's intent to do that which is wrongful. As one of our sister courts has held, though the word "corruptly" is not found in § 1519, the same evil intent embodied in § 1512 is embodied in § 1519. *United States v. Moyer*. The language "with intent to impede, obstruct, or influence" "imposes upon the § 1519 defendant the same sinister mentality which 'corruptly' requires of a § 1512(b)(2) defendant." As with 18 U.S.C. § 1512, the most reasonable reading of Section 1519 is one which imposes criminal liability only on those who were conscious of the

wrongfulness of their actions. To hold otherwise would allow § 1519 to reach inherently innocent conduct, such as a lawyer's instruction to his client to withhold documents the lawyer in good faith believes are privileged. . . .

Stevens moved for disclosure of the Government's presentation to the grand jury, arguing that disclosure was warranted pursuant to Federal Rule of Criminal Procedure 6(e)(3)(E)(ii) because the Government may have failed to properly instruct the grand jury regarding the advice of counsel defense and may have failed to present critical exculpatory evidence. In response to Stevens' motion, the Government filed both a redacted and an unredacted opposition. In its unredacted opposition, filed under seal for the Court's in camera review, the Government conceded that a grand juror had asked a question about the advice of counsel defense, and that a response was given, but the Government did not disclose to the Court the nature of that response. The Court ordered the grand jury transcripts disclosed for the Court's immediate, in camera review, reviewed the transcripts, and disclosed a brief excerpt from the grand jury transcripts to Stevens to allow for further briefing on whether the grand jury was properly instructed on the advice of counsel defense.

The excerpt disclosed by the Court read as follows:

MR. JASPERSE: Do the Grand Jurors have any legal questions for Ms. Bloom or I?

A JUROR: I have a question. Does it matter that maybe she was—that Lauren Stevens was getting direction from somebody else about how to handle this? Does it matter or is it not relevant?

MR. JASPERSE: There is something in the law called the advice of counsel defense and that is a defense that a defendant can raise, once the defendant has been charged.

There are also exceptions to the advice of counsel defense. So in other words, a person who is charged with a crime cannot simply say, Well, my lawyer said it was okay. There are various requirements, including that the purpose in getting the advice cannot be to commit a crime or to engage in fraud. Another requirement is that the person receiving the advice must provide full information, all of the information, to the attorney who is rendering the advice.

MS. BLOOM: And I think essentially if the elements of the crime are met, that the person knows that they are submitting a false statement and—what the advice of counsel defense goes to is if someone reasonably relies on someone else to believe that they are not committing a crime, but when—if you have an attorney who knowingly submits a false statement—and I think you saw some evidence—you know, would that person know that that's a crime.

So, that while it can be relevant at trial what a person knows and who else gave them advice, if you find probable cause for the elements here that the attorney Lauren Stevens reasonably knew that she was making false statements and the elements that Patrick went through, then that's sufficient to find probable cause.

Does that help?

A JUROR: Yes.

. . . Stevens argued that dismissal of the indictment was warranted because the advice of counsel instruction was incorrect, and there was grave doubt that the decision to indict was free from the substantial influence of the improper instruction. The Government argued that the grand jury was properly instructed and that even if the instruction was deficient, dismissal of the indictment was neither required nor warranted.

Though often referred to as the “advice of counsel defense,” this label is actually a misnomer. Good faith reliance on the advice of counsel, when proven, negates the element of wrongful intent of a defendant that is required for a conviction. *See United States v. Peterson* (“A good faith reliance on the advice of counsel is not a defense to securities fraud. It is simply a means of demonstrating good faith and represents possible evidence of an absence of any intent to defraud.”); *see also Oakley, Inc. v. Bugaboos* (just because the “‘advice of counsel defense’ contains the word defense . . . does not an affirmative defense make.”).

An affirmative defense is “[a] defendant’s assertion of facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim, even if all the allegations in the complaint are true.” Black’s Law Dictionary (9th ed. 2009). By contrast, the advice of counsel “defense” negates the defendant’s wrongful intent, and therefore demonstrates an absence of an element of the offense—mens rea. . . .

The Court has grave doubts as to whether the decision to indict was free from the substantial influence of the improper advice of counsel instruction. *Bank of Nova Scotia*. A grand juror explicitly asked about the legal implications of Stevens’ reliance on the advice of others in responding to the FDA and whether it was relevant. The grand juror was essentially told that advice of counsel was not relevant to the decision to indict, but rather was an issue to be raised in defense at trial.

The grand juror’s question was not just any question, but rather was much akin to asking about an elephant in the room. The grand jury was well aware of the Defendant’s role as the leader of a team of lawyers and paralegals, and the question was a natural one that arose out of her status. The question went to the heart of the intent required to indict. The incorrect answer either substantially influenced the decision to indict or, at the very least, creates grave doubt as to that decision. Accordingly, dismissal of the indictment is appropriate and required in the interests of justice.

The parties differ as to whether a dismissal should be with or without prejudice. The Court has carefully reviewed the grand jury transcripts and found no evidence that the prosecutors involved engaged in “willful prosecutorial misconduct.” *United States v. Feurtado*. This is not a case in which the Government attempted to affirmatively mislead the grand jury to obtain an indictment—rather it is a case in which prosecutors simply misinstructed the grand jury on the law. However, even in the absence of willful prosecutorial misconduct, “a defendant is entitled to dismissal of an indictment . . . where actual prejudice is established.” Under these circumstances, dismissal of the indictment is necessary to allay the Court’s grave doubts about the grand jury’s decision to indict, but dismissal with prejudice is wholly inappropriate. (affirming district court’s dismissal without prejudice where government’s errors before the grand jury were unintentional, rather than the product of prosecutorial misconduct). Accordingly, the indictment shall be dismissed without prejudice to the Government’s right to seek Steven’s indictment before a different grand jury that is appropriately instructed as to the law in conformity with this opinion.²

The opinion in *Stevens* is as good a place as any to pause and consider the general matter of defense arguments that reliance on advice of counsel meant that a defendant lacked the requisite *mens rea* to have committed a specific intent crime such as obstruction of justice or wire fraud. The following cases clearly sets out the rules on such arguments.

UNITED STATES v. DENKBERG, 139 F.4th 147 (2d Cir. 2025)

José A. Cabranes, Circuit Judge:

In 2003, [Sean] Novis owned and operated a direct-mailing operation in Long Island, New York. [Gary] Denkberg joined the operation in 2004 and served as Novis's partner. Working together over more than a decade, Denkberg and Novis engaged in a mass-mailing fraud scheme in which they sent hundreds of thousands of fake "prize notices" to American consumers that were designed to give recipients the impression that they had won a large cash prize—typically in excess of one million dollars. To claim their prize, the elaborately designed notices instructed recipients that they needed only to pay a small processing fee, typically between \$20 and \$40. And so they did. From 2004 until September 2016, Denkberg and Novis's operation generated approximately \$80 million dollars of revenue from over three million transactions.

However, those who paid the fee (hereafter, "the victims"), did not receive the advertised cash prize. Instead, victims received a "sweepstakes report"—a thin booklet with

² The aftermath: the government reindicted Stevens on the same charge. At trial, when the government concluded its proof, the trial court dismissed the case for legally insufficient evidence and it never reached a jury.

publicly available information that described third-party sweepstakes that they could enter to win cash prizes.

To effectuate their scheme, Denkberg and Novis went to great lengths to construct convoluted prize notices for the purpose of deceiving their victims. The notices were personalized to the recipients based on identifying information gathered from "list brokers," affixed with official-looking seals, rubber stamps, and hand drawn signatures produced by a hired artist, and designed to appear as though they had been sent from seemingly official, but fictitious, organizations and officials. Using large, bold, and capitalized font, some of the notices appeared to alert the victims that they were a "SELECTED WINNER-PAY GUARANTEED" and that their prize was "AVAILABLE and GUARANTEED to you." Some of the notices were crafted to look like checks, financial statements, stock certificates, and other official documents.

Buried beneath, alongside, or on the backside of their notices, often in small text and incoherent legalese, Denkberg and Novis included "disclaimers" that the victims had not actually won a cash prize but instead had merely received an "opportunity" to purchase a "sweepstakes report." . . .

Over the course of their approximately twelve-year fraudulent scheme, Denkberg and Novis were primarily represented by the solo practitioner Charles Chernofsky, by father and son attorneys Sheldon Lustigman and Andrew Lustigman of the Lustigman firm, and, after the Lustigman firm merged with Olshan Frome Wolosky ("Olshan") in 2011, by Adam Solomon too. Throughout the course of Defendants' fraudulent scheme, their attorneys offered advice on "compliance with the generally accepted principles governing advertising." In email correspondence with Defendants, the attorneys claimed that Defendants' mailings would be reviewed under a "Reasonable Consumer Standard." These attorneys overwhelmingly approved Defendants' fraudulent notices, sometimes providing minimal edits, which were often, but not always, incorporated into the notices by Defendants.

In response to complaints from victims that they had not received their promised prizes, Denkberg and Novis would send victims disclaimer letters that they had not, in fact, won a sweepstakes and instead "misunderstood the sales promotion that we sent to you."

Over time, the fact that Defendants received a high volume of repeat payments from elderly customers caught the attention of their Canadian payment processor, who, in March 2008, warned Defendants by email of the "significant regulatory risk" their scheme posed. And eventually, in 2012, the U.S. Postal Service ("USPS") brought two administrative actions against Defendants that culminated in signed cease-and-desist agreements and a \$5,000 fine.

Despite signing the cease-and-desist agreements, agreeing to discontinue and abandon "such promotional activities and representations for obtaining money or property

through the mails," Denkberg and Novis resumed such activities almost immediately, forming new shell companies with nearly identical prize notices. Defendants' lawyers continued to review these notices, purportedly under a "reasonable consumer" standard applicable to civil advertising law, offering only minor revisions, often with the disclaimer in their email opinions that "there can be no assurance that the Postal Service or other regulator might not view the matter differently, but we think that your position would be legally defensible with the copy as revised." . . .

In September 2016, Defendants' fraudulent scheme ended when, in a civil anti-fraud action, they stipulated to an injunction under . . . prohibiting them and their business entities from, *inter alia*, distributing prize notices. . . .

Despite the overwhelming evidence of Denkberg's and Novis's fraudulent intent presented by the Government, Defendants argue that no rational juror could have found that they possessed the requisite fraudulent intent because of the evidence that Defendants introduced that they had relied on the advice of counsel.

In order "to benefit from an advice-of-counsel defense, a party must show that he (1) 'honestly and in good faith' sought the advice of counsel; (2) 'fully and honestly la[id] all the facts before his counsel'; and (3) 'in good faith and honestly follow[ed]' counsel's advice, believing it to be correct and intending that his acts be lawful."

Importantly, in a fraud case, an advice-of-counsel defense "is not an affirmative defense that defeats liability even if the jury accepts the government's allegations as true." Instead, the evidence introduced regarding a defendant's good faith reliance on the advice of counsel, "if believed, can raise a reasonable doubt in the minds of the jurors about whether the government has proved the required element of the offense that the defendant had an 'unlawful intent.'" In other words, evidence introduced regarding a defendant's good faith reliance on the advice of counsel is inconclusive; it simply raises factual questions about a defendant's intent for a jury to decide.

The advice-of-counsel jury instruction offered by the District Court—following model instructions endorsed by our Court in *Scully*—directed the jury to consider a wide range of factual questions that inform the ultimate question of fraudulent intent, including (but not limited to): whether Defendants "sought," "consulted" and followed the advice of counsel in good faith; whether they believed the attorney was "competent"; whether they believed such advice "to be correct"; whether they made full and accurate reports of material facts to their counsel; and whether the advice provided by their attorney was "reasonable[]." . . .

Contrary to the arguments of Defendants, an advice-of-counsel defense does not limit the jury's considerations of good faith and criminal intent to the simple question of whether a defendant relied—without more—on legal advice. Otherwise, an individual with fraudulent intent could purposefully seek out and rely on unreasonable, incomplete,

or collusively constructed "legal advice" for the purpose of establishing a pretextual defense.

Here, a rational juror could have easily found that Defendants had fraudulent intent despite the evidence introduced of their reliance on counsel. The pervasive evidence of fraudulent intent—including the elaborate construction of the prize notices, the continuance of their operation despite numerous complaints from victims and state attorneys general, the 2012 USPS agreement, and the targeting of vulnerable victims with additional prize notices—could lead a jury to infer that Defendants *sought* legal advice in bad faith, potentially for the *purpose* of establishing a pretextual defense.

A rational juror could also reject the claim that Denkberg and Novis relied on the legal advice in good faith and that their counsel's legal advice was "reasonable." Denkberg and Novis never consulted their attorneys for advice on criminal law, their attorneys lacked criminal legal expertise, and their attorneys' legal advice on advertising law included disclaimers that clients were not guaranteed immunity from legal repercussions. This was despite evidence that Defendants monitored enforcement actions against similar sweepstakes mailing schemes, including a May 2015 enforcement action by the Federal Trade Commission and subsequent criminal prosecutions. Such evidence permits an inference that Defendants were aware their scheme was similarly illegal. Further, in representing Defendants before the 2012 USPS administrative actions and during settlement negotiations, their attorneys continued to largely approve of the prize notice scheme after complaints from victims and state attorneys general and after Defendants signed a cease-and-desist-agreement with the USPS. This permitted an inference that Defendants did not act in good faith by continuing to rely on the advice of these same counsel.

Jurors could also doubt the testimony of Attorney Andrew Lustigman regarding the purpose and scope of his representation of Defendants. In particular, a juror could decide not to credit Lustigman's testimony that Defendants wanted to comply with the 2012 USPS settlement, and to question whether he had disclosed all relevant oral communications with Denkberg and Novis because of his own potential exposure to criminal liability. Indeed, a jury could have concluded that the legal advice Lustigman provided to Defendants was a pretext and a sham.

Finally, the jury heard evidence that Defendants did not provide their attorneys with all material information. For example, Solomon testified that Defendants did not inform him about the structure of their mailing schedule designed to target the same vulnerable victims. The jury also heard evidence that Defendants did not always follow that advice, even where counsel suggested edits to fake prize notices. For example, Chernofsky advised Denkberg to remove terms such as "recipient" in June 2007, and "payment" in May 2012, but as subsequent notices received in evidence showed, Defendants continued to use such terms. Similarly, although counsel repeatedly warned Defendants that the disclaimer statements were insufficiently legible, evidence showed that the

Defendants' copywriter "grayed out" the disclaimers in a small, light font purposely to make them difficult to read.

In sum, a rational juror could have found that Denkberg and Novis had fraudulent intent, notwithstanding evidence that they had relied on the advice of counsel.

Problem 8-2

Walter hands a laptop to his wife Skylar and says, "I think I am going to be in trouble with the police soon. This has stuff on it I am not allowed to have. Take it to my lawyer Saul, he will know what to do with it." Walter then runs out of the house and takes off in his car. Skylar takes the laptop to Saul's office. Saul says he cannot say how he knows, but the laptop contains images of child pornography, the possession of which is a federal felony. Skylar gives Saul her consent when he asks if he can destroy the hard drive. Saul then destroys the hard drive. What crimes, if any, have Skylar and Saul committed and what defenses, if any, might they have?

Problem 8-3

Returning to a more recent set of obstruction issues, ones involving former President Trump, review the following indictment. Consider how you might have attempted to defend the defendants against these charges. The actual matter is moot, of course, because, upon reassuming the presidency, President Trump ordered the DOJ to dismiss the case in its entirety.

SUPERSEDING INDICTMENT, UNITED STATES v. DONALD J. TRUMP, WALTINE NAUTA and CARLOS DE OLIVEIRA, No. 9:23-cr-80101-AMC (S.D. Fla. July 27, 2023)

The Grand Jury charges that:

INDICTMENT

GENERAL ALLEGATIONS

At times material to this Indictment, on or about the dates and approximate times stated below:

1. Defendant DONALD J. TRUMP was the forty-fifth President of the United States of America. He held office from January 20, 2017, until January 20, 2021. As president, TRUMP had lawful access to the most sensitive classified documents and national defense information gathered and owned by the United States government,

including information from the agencies that comprise the United States Intelligence Community and the United States Department of Defense.

2. Over the course of his presidency, TRUMP gathered newspapers, press clippings, letters, notes, cards, photographs, official documents, and other materials in cardboard boxes that he kept in the White House. Among the materials TRUMP stored in his boxes were hundreds of classified documents.

3. The classified documents TRUMP stored in his boxes included information regarding defense and weapons capabilities of both the United States and foreign countries; United States nuclear programs; potential vulnerabilities of the United States and its allies to military, attack; and plans for possible retaliation in response to a foreign attack. The unauthorized disclosure of these classified documents could put at risk the national security of the United States, foreign relations, the safety of the United States military, and human sources and the continued viability of sensitive intelligence collection methods.

4. At 12:00 p.m. on January 20, 2021, TRUMP ceased to be president. As he departed the White House, TRUMP caused scores of boxes, many of which contained classified documents, to be transported to The Mar-a-Lago Club in Palm Beach, Florida, where he maintained his residence. TRUMP was not authorized to possess or retain those classified documents.

5. The Mar-a-Lago Club was an active social club, which, between January 2021 and August 2022, hosted events for tens of thousands of members and guests. After TRUMP's presidency, The Mar-a-Lago Club was not an authorized location for the storage, possession, review, display, or discussion of classified documents. Nevertheless, TRUMP stored his boxes containing classified documents in various locations at The Mar-a-Lago Club-including in a ballroom, a bathroom and shower, an office space, his bedroom, and a storage room.

6. On two occasions in 2021, TRUMP showed classified documents to others, as follows:

- a. In July 2021, at Trump National Golf Club in Bedminster, New Jersey ("The Bedminster Club"), during an audio-recorded meeting with a writer, a publisher, and two members of his staff, none of whom possessed a security clearance, TRUMP showed and described a "plan of attack" that TRUMP said was prepared for him by the Department of Defense and a senior military official. TRUMP told the individuals that the plan was "highly confidential" and "secret." TRUMP also said, "as president I could have declassified it," and, "Now I can't, you know, but this is still a secret."

- b. In August or September 2021, at The Bedminster Club, TRUMP showed a representative of his political action committee who did not possess a security clearance a classified map related to a military operation and told the representative that he should not be showing it to the representative and that the representative should not get too close.

7. On March 30, 2022, the Federal Bureau of Investigation (“FBI”) opened a criminal investigation into the unlawful retention of classified documents at The Mar-a-Lago Club. A federal grand jury investigation began the next month. The grand jury issued a subpoena requiring TRUMP to turn over all documents with classification markings. TRUMP endeavored to obstruct the FBI and grand jury investigations and conceal his continued retention of classified documents by, among other things:

- a. suggesting that his attorney falsely represent to the FBI and grand jury that TRUMP did not have documents called for by the grand jury subpoena;
- b. directing defendant WALTINE NAUTA to move boxes of documents to conceal them from TRUMP’s attorney, the FBI, and the grand jury;
- c. suggesting that his attorney hide or destroy documents called for by the grand jury subpoena;
- d. providing to the FBI and grand jury just some of the documents called for by the grand jury subpoena, while claiming that he was cooperating fully; and
- e. causing a certification to be submitted to the FBI and grand jury falsely representing that all documents called for by the grand jury subpoena had been produced-while knowing that, in fact, not all such documents had been produced.

8. As a result of TRUMP’s retention of classified documents after his presidency and refusal to return them, hundreds of classified documents were not recovered by the United States government until 2022, as follows:

- a. On January 17, nearly one year after TRUMP left office, and after months of demands by the National Archives and Records Administration for TRUMP to provide all missing presidential records, TRUMP provided only 15 boxes, which contained 197 documents with classification markings.
- b. On June 3, in response to a grand jury subpoena demanding the production of all documents with classification markings, TRUMP’s attorney provided to the FBI 38 more documents with classification markings.

- c. On August 8, pursuant to a court-authorized search warrant, the FBI recovered from TRUMP's office and a storage room at The Mar-a-Lago Club 102 more documents with classification markings.

TRUMP's Co-Conspirators

9. Defendant NAUTA was a member of the United States Navy stationed as a valet in the White House during TRUMP's presidency. Beginning in August 2021, NAUTA became an executive assistant in The Office of Donald J. Trump and served as TRUMP's personal aide or "body man." NAUTA reported to TRUMP, worked closely with TRUMP, and traveled with TRUMP.

10. Beginning in January 2022, Defendant CARLOS DE OLIVEIRA was employed as the property manager at The Mar-a-Lago Club. Prior to holding the position of property manager, DE OLIVEIRA was employed as a valet at The Mar-a-Lago Club.

The Mar-a-Lago Club

11. The Mar-a-Lago Club was located on South Ocean Boulevard in Palm Beach, Florida, and included TRUMP's residence, more than 25 guest rooms, two ballrooms, a spa, a gift store, exercise facilities, office space, and an outdoor pool and patio. As of January 2021, The Mar-a-Lago Club had hundreds of members and was staffed by more than 150 full-time, part-time, and temporary employees.

12. Between January 2021 and August 2022, The Mar-a-Lago Club hosted more than 150 social events, including weddings, movie premieres, and fundraisers that together drew tens of thousands of guests.

13. The United States Secret Service (the "Secret Service") provided protection services to TRUMP and his family after he left office, including at The Mar-a-Lago Club, but it was not responsible for the protection of TRUMP's boxes or their contents. TRUMP did not inform the Secret Service that he was storing boxes containing classified documents at The Mar-a-Lago Club.

Classified Information

14. National security information was information owned by, produced by, produced for, and under the control of the United States government. Pursuant to Executive Order 12958, signed on April 17, 1995, as amended by Executive Order 13292 on March 25, 2003, and Executive Order 13526 on December 29, 2009, national security information was classified as "TOP SECRET," "SECRET," or "CONFIDENTIAL," as follows:

- a. Information was classified as TOP SECRET if the unauthorized disclosure of that information reasonably could be expected to cause

exceptionally grave damage to the national security that the original classification authority was able to identify or describe.

- b. Information was classified as SECRET if the unauthorized disclosure of that information reasonably could be expected to cause serious damage to the national security that the original classification authority was able to identify or describe.
- c. Information was classified as CONFIDENTIAL if the unauthorized disclosure of that information reasonably could be expected to cause damage to the national security that the original classification authority was able to identify or describe.

15. The classification marking “NOFORN” stood for “Not Releasable to Foreign Nationals” and denoted that dissemination of that information was limited to United States persons.

16. Classified information related to intelligence sources, methods, and analytical processes was designated as Sensitive Compartmented Information (“SCI”). SCI was to be processed, stored, used, or discussed in an accredited Sensitive Compartmented Information Facility (“SCIF”), and only individuals with the appropriate security clearance and additional SCI permissions were authorized to have access to such national security information.

17. When the vulnerability of, or threat to, specific classified information was exceptional, and the normal criteria for determining eligibility for access to classified information were insufficient to protect the information from unauthorized disclosure, the United States could establish Special Access Programs (“SAPs”) to further protect the classified information. The number of these programs was to be kept to an absolute minimum and limited to programs in which the number of persons who ordinarily would have access would be reasonably small and commensurate with the objective of providing enhanced protection for the information involved. Only individuals with the appropriate security clearance and additional SAP permissions were authorized to have access to such national security information, which was subject to enhanced handling and storage requirements.

18. Pursuant to Executive Order 13526, information classified at any level could be lawfully accessed only by persons determined by an appropriate United States government official to be eligible for access to classified information and who had signed an approved non-disclosure agreement, who received a security clearance, and who had a “need-to-know” the classified information. After his presidency, TRUMP was not authorized to possess or retain classified documents.

19. Executive Order 13526 provided that a former president could obtain a waiver of the “need-to-know” requirement, if the agency head or senior agency official

of the agency that originated the classified information: (1) determined in writing that access was consistent with the interest of national security and (2) took appropriate steps to protect classified information from unauthorized disclosure or compromise and ensured that the information was safeguarded in a manner consistent with the order. TRUMP did not obtain any such waiver after his presidency.

20. As part of his official duties as president, TRUMP received intelligence briefings from high-level United States government officials, including briefings from the Director of the Central Intelligence Agency, the Chairman of the Joint Chiefs of Staff, senior White House officials, and a designated briefer. He regularly received a collection of classified intelligence from the United States Intelligence Community (“USIC”) known as the “President’s Daily Brief.”

21. The USIC’s mission was to collect, analyze, and deliver foreign intelligence and counterintelligence information to America’s leaders, including the president, policymakers, law enforcement, and the military, so they could make sound decisions to protect the United States. The USIC consisted of United States executive branch departments and agencies responsible for the conduct of foreign relations and the protection of national security.

22. After his presidency, TRUMP retained classified documents originated by, or implicating the equities of, multiple USIC members and other executive branch departments and agencies

23. In January 2021, as he was preparing to leave the White House, TRUMP and his White House staff, including NAUTA, packed items, including some of TRUMP’s boxes. TRUMP was personally involved in this process. TRUMP caused his boxes, containing hundreds of classified documents, to be transported from the White House to The Mar-a-Lago Club.

24. From January through March 15, 2021, some of TRUMP’s boxes were stored in The Mar-a-Lago Club’s White and Gold Ballroom, in which events and gatherings took place. TRUMP’s boxes were for a time stacked on the ballroom’s stage

25. In March 2021, NAUTA and others moved some of TRUMP’s boxes from the White and Gold Ballroom to the business center at The Mar-a-Lago Club.

26. On April 5, 2021, an employee of The Office of Donald J. Trump (“Trump Employee 1”) texted another employee of that office (“Trump Employee 2”) to ask whether TRUMP’s boxes could be moved out of the business center to make room for staff to use it as an office. Trump Employee 2 replied, “Woah!! Ok so potus specifically asked Walt for those boxes to be in the business center because they are his ‘papers.’” Later that day, Trump Employee 1 and Trump Employee 2 exchanged the following text messages:

Trump Employee 2:

We can definitely make it work if we move his papers into the lake room?

Trump Employee 1:

There is still a little room in the shower where his other stuff is. Is it only his papers he cares about? There's some other stuff in there that are not papers. Could that go to storage? Or does he want everything in there on property

Trump Employee 2:

Yes—anything that's not the beautiful mind paper boxes can definitely go to storage. Want to take a look at the space and start moving tomorrow AM?

27. After the text exchange between Trump Employee 1 and Trump Employee 2, in April 2021, some of TRUMP's boxes were moved from the business center to a bathroom and shower in The Mar-a-Lago Club's Lake Room

28. In May 2021, TRUMP directed that a storage room on the ground floor of The Mar-a-Lago Club (the "Storage Room") be cleaned out so that it could be used to store his boxes. The hallway leading to the Storage Room could be reached from multiple outside entrances, including one accessible from The Mar-a-Lago Club pool patio through a doorway that was often kept open. The Storage Room was near the liquor supply closet, linen room, lock shop, and various other rooms.

29. On June 24, 2021, TRUMP's boxes that were in the Lake Room were moved to the Storage Room. After the move, there were more than 80 boxes in the Storage Room

30. On December 7, 2021, NAUTA found several of TRUMP's boxes fallen and their contents spilled onto the floor of the Storage Room, including a document marked "SECRET//REL TO USA, FVEY," which denoted that the information in the document was releasable only to the Five Eyes intelligence alliance consisting of Australia, Canada, New Zealand, the United Kingdom, and the United States. NAUTA texted Trump Employee 2, "I opened the door and found this." . . . NAUTA also attached two photographs he took of the spill. Trump Employee 2 replied, "Oh no oh no," and "I'm sorry potus had my phone." One of the photographs NAUTA texted to Trump Employee 2 is depicted below with the visible classified information redacted. TRUMP's unlawful retention of this document is charged in Count 8 of this Superseding Indictment. . . .

TRUMP's Production of 15 Cardboard Boxes to the National Archives and Records Administration

31. Beginning in May 2021, the National Archives and Records Administration ("NARA"), which was responsible for archiving presidential records, repeatedly demanded that TRUMP turn over presidential records that he had kept after his presidency. On multiple occasions, beginning in June, NARA warned TRUMP through his representatives that if he did not comply, it would refer the matter of the missing records to the Department of Justice.

32. Between November 2021 and January 2022, NAUTA and Trump Employee 2—at TRUMP's direction—brought boxes from the Storage Room to TRUMP's residence for TRUMP to review.

33. On November 12, 2021, Trump Employee 2 provided TRUMP a photograph of his boxes in the Storage Room by taping it to one of the boxes that Trump Employee 2 had placed in TRUMP's residence. Trump Employee 2 provided TRUMP the photograph so that TRUMP could see how many of his boxes were stored in the Storage Room. . . .

34. On November 17, 2021, NAUTA texted Trump Employee 2 about the photograph Trump Employee 2 had provided to TRUMP, stating, "He mentioned about a picture of the 'boxes' he wants me to see it?" Trump Employee 2 replied, "Calling you shortly."

35. On November 25, 2021, Trump Employee 2 texted NAUTA about TRUMP's review of the contents of his boxes, asking, "Has he mentioned boxes to you? I delivered some, but I think he may need more. Could you ask if he'd like more in pine hall?" Pine Hall was an entry room in TRUMP's residence. NAUTA replied in three successive text messages:

Nothing about boxes yet

He has one he's working on in pine hall

Knocked out 2 boxes yesterday

36. On November 29, 2021, Trump Employee 2 texted NAUTA, asking, "Next you are on property (no rush) could you help me bring 4 more boxes up?". NAUTA replied, "Yes!! Of course."

37. On December 29, 2021, Trump Employee 2 texted a TRUMP representative who was in contact with NARA ("Trump Representative I"), "box answer will be wrenched out of him today, promise!" The next day, Trump Representative I replied in two successive text messages:

Hey—Just checking on Boxes. . . .

would love to have a number to them today

Trump Employee 2 spoke to TRUMP and then responded a few hours later in two successive text messages:

12

Is his number

38. On January 13, 2022, NAUTA texted Trump Employee 2 about TRUMP's "tracking" of boxes, stating, "He's tracking the boxes, more to follow today on whether he wants to go through more today or tomorrow." Trump Employee 2 replied, "Thank you!"

39. On January 15, 2022, NAUTA sent Trump Employee 2 four successive text messages:

One thing he asked

Was for new covers for the boxes,
for Monday m.

Morning

*can we get new box covers before
giving these to them on Monday? They
have too much writing on them..! marked too
much

Trump Employee 2 replied, "Yes, I will get that!"

40. On January 17, 2022, Trump Employee 2 and NAUTA gathered 15 boxes from TRUMP's residence, loaded the boxes in NAUTA's car, and took them to a commercial truck for delivery to NARA.

41. When interviewed by the FBI in May 2022 regarding the location and movement of boxes before the production to NARA, NAUTA made false and misleading statements . . ., including:

- a. falsely stating that he was not aware of TRUMP's boxes being brought to TRUMP's residence for his review before TRUMP provided 15 boxes to NARA in January 2022;
- b. falsely stating that he did not know how the boxes that he and Trump Employee 2 brought from TRUMP's residence to the commercial truck

for delivery to NARA on January 17, 2022, had gotten to the residence; and

- c. when asked whether he knew where TRUMP's boxes had been stored, before they were in TRUMP's residence and whether they had been in a secure or locked location, NAUTA falsely responded, "I wish, I wish I could tell you. I don't know. I don't—I honestly just don't know."

42. When the 15 boxes that TRUMP had provided reached NARA in January 2022, NARA reviewed the contents and determined that 14 of the boxes contained documents with classification markings. Specifically, as the FBI later determined, the boxes contained 197 documents with classification markings, of which 98 were marked "SECRET," 30 were marked "TOP SECRET," and the remainder were marked "CONFIDENTIAL." Some of those documents also contained SCI and SAP markings.

43. On February 9, 2022, NARA referred the discovery of classified documents in TRUMP's boxes to the Department of Justice for investigation.

44. On March 30, 2022, the FBI opened a criminal investigation.

45. On April 26, 2022, a federal grand jury opened an investigation.

46. On May 11, 2022, the grand jury issued a subpoena (the "May 11 Subpoena") to The Office of Donald J. Trump requiring the production of all documents with classification markings in the possession, custody, or control of TRUMP or The Office of Donald J. Trump. Two attorneys representing TRUMP ("Trump Attorney 1" and "Trump Attorney 2") informed TRUMP of the May 11 Subpoena, and he authorized Trump Attorney 1 to accept service.

47. On May 22, 2022, NAUTA entered the Storage Room at 3:47 p.m. and left approximately 34 minutes later, carrying one of TRUMP's boxes.

48. On May 23, 2022, TRUMP met with Trump Attorney 1 and Trump Attorney 2 at The Mar-a-Lago Club to discuss the response to the May 11 Subpoena. Trump Attorney 1 and Trump Attorney 2 told TRUMP that they needed to search for documents that would be responsive to the subpoena and provide a certification that there had been compliance with the subpoena. TRUMP, in sum and substance, made the following statements, among others, as memorialized by Trump Attorney 1:

- a. I don't want anybody looking, I don't want anybody looking through my boxes, I really don't, I don't want you looking through my boxes.

- b. Well what if we, what happens if we just don't respond at all or don't play ball with them?
- c. Wouldn't it be better if we just told them we don't have anything here?
- d. Well look isn't it better if there are no documents?

49. While meeting with Trump Attorney 1 and Trump Attorney 2 on May 23, TRUMP, in sum and substance, told the following story, as memorialized by Trump Attorney 1:

[Attorney], he was great, he did a great job. You know what? He said, he said that it—that it was him. That he was the one who deleted all of her emails, the 30,000 emails, because they basically dealt with her scheduling and her going to the gym and her having beauty appointments. And he was great. And he, so she didn't get in any trouble because he said that he was the one who deleted them.

TRUMP related the story more than once that day.

50. On May 23, TRUMP also confirmed his understanding with Trump Attorney 1 that Trump Attorney 1 would return to The Mar-a-Lago Club on June 2 to search for any documents with classification markings to produce in response to the May 11 Subpoena. Trump Attorney 1 made it clear to TRUMP that Trump Attorney 1 would conduct the search for responsive documents by looking through TRUMP's boxes that had been transported from the White House and remained in storage at The Mar-a-Lago Club. TRUMP indicated that he wanted to be at The Mar-a-Lago Club when Trump Attorney 1 returned to review his boxes on June 2, and that TRUMP would change his summer travel plans to do so. TRUMP told Trump Attorney 2 that Trump Attorney 2 did not need to be present for the review of boxes.

51. After meeting with Trump Attorney 1 and Trump Attorney 2 on May 23, TRUMP delayed his departure from The Mar-a-Lago Club to The Bedminster Club for the summer so that he would be present at The Mar-a-Lago Club on June 2, when Trump Attorney 1 returned to review the boxes.

52. Between TRUMP's May 23 meeting with Trump Attorney 1 and Trump Attorney 2 to discuss the May 11 Subpoena, and June 2, when Trump Attorney 1 returned to The Mar-a-Lago Club to review the boxes in the Storage Room, NAUTA removed—at TRUMP's direction—a total of approximately 64 boxes from the Storage Room and brought them to TRUMP's residence, as set forth below:

- a. On May 24, 2022, between 5:30 p.m. and 5:38 p.m., NAUTA removed three boxes from the Storage Room.
- b. On May 30, 2022, at 9:08 a.m., TRUMP and NAUTA spoke by phone for approximately 30 seconds. Between 10:02 a.m. and 11:51 a.m., NAUTA removed a total of approximately 50 boxes from the Storage Room.
- c. On May 30, 2022, at 12:33 p.m., a Trump family member texted NAUTA:

Good afternoon Walt,
Happy Memorial Day!

I saw you put boxes to Potus room. Just FYI and
I will tell him as well:
Not sure how many he wants to take on Friday on the
plane. We will NOT have a room for them. Plane will
be full with luggage.
Thank you!

NAUTA replied:

Good Afternoon Ma'am [Smiley Face Emoji]
Thank you so much.

I think he wanted to pick from them. I don't imagine him
wanting to take the boxes.

He told me to put them in the room and that he
was going to talk to you about them.

- d. On June 1, 2022, beginning at 12:52 p.m., NAUTA removed approximately 11 boxes from the Storage Room.

53. On June 1, 2022, TRUMP spoke with Trump Attorney 1 by phone and asked whether Trump Attorney 1 was coming to The Mar-a-Lago Club the next day and for exactly what purpose. Trump Attorney 1 reminded TRUMP that Trump Attorney 1 was going to review the boxes that had been transported from the White House and remained in storage at The Mar-a-Lago Club so that Trump Attorney 1 could have a custodian of records certify that the May 11 subpoena had been complied with fully.

54. On June 2, 2022, the day that Trump Attorney 1 was scheduled to review TRUMP's boxes in the Storage Room, TRUMP spoke with NAUTA on the phone at 9:29 a.m. for approximately 24 seconds.

55. Later that day, between 12:33 p.m. and 12:52 p.m., NAUTA and an employee of The Mar-a-Lago Club moved approximately 30 boxes from TRUMP's residence to the Storage Room.

56. In sum, between May 23, 2022, and June 2, 2022, before Trump Attorney 1's review of TRUMP's boxes in the Storage Room, NAUTA—at TRUMP's direction—moved approximately 64 boxes from the Storage Room to TRUMP's residence and brought to the Storage Room only approximately 30 boxes. Neither TRUMP nor NAUTA informed Trump Attorney 1 of this information.

The False Certification to the FBI and the Grand Jury

57. On the afternoon of June 2, 2022, as TRUMP had been informed, Trump Attorney 1 arrived at The Mar-a-Lago Club to review TRUMP's boxes to look for documents with classification markings in response to the May 11 Subpoena. TRUMP met with Trump Attorney 1 before Trump Attorney 1 conducted the review. NAUTA escorted Trump Attorney 1 to the Storage Room.

58. Between 3:53 p.m. and 6:23 p.m., Trump Attorney 1 reviewed the contents of TRUMP's boxes in the Storage Room. Trump Attorney 1 located 38 documents with classification markings inside the boxes, which Trump Attorney 1 removed and placed in a Redweld folder. Trump Attorney 1 contacted NAUTA and asked him to bring clear duct tape to the Storage Room, which NAUTA did. Trump Attorney 1 used the clear duct tape to seal the Redweld folder with the documents with classification markings inside.

59. After Trump Attorney 1 finished sealing the Redweld folder containing the documents with classification markings that he had found inside TRUMP's boxes, NAUTA took Trump Attorney 1 to a dining room in The Mar-a-Lago Club to meet with TRUMP. After Trump Attorney 1 confirmed that he was finished with his search of the Storage Room, TRUMP asked, "Did you find anything? . . . Is it bad? Good?"

60. TRUMP and Trump Attorney 1 then discussed what to do with the Redweld folder containing documents with classification markings and whether Trump Attorney 1 should bring them to his hotel room and put them in a safe there. During that conversation, TRUMP made a plucking motion, as memorialized by Trump Attorney 1:

He made a funny motion as though—ell okay why don't you take them with you to your hotel room and if there's anything really bad in there, like, you know, pluck it out. And that was the motion that he made. He didn't say that.

61. That evening, Trump Attorney 1 contacted the Department of Justice and requested that an FBI agent meet him at The Mar-a-Lago Club the next day, June 3, so that he could turn over the documents responsive to the May 11 Subpoena.

62. Also that evening, Trump Attorney 1 contacted another TRUMP attorney (“Trump Attorney 3”) and asked her if she would come to The Mar-a-Lago Club the next morning to act as a custodian of records and sign a certification regarding the search for documents with classification markings in response to the May 11 Subpoena. Trump Attorney 3, who had no role in the review of TRUMP’s boxes in the Storage Room, agreed.

63. The next day, on June 3, 2022, at Trump Attorney 1’s request, Trump Attorney 3 signed a certification as the custodian of records for The Office of Donald J. Trump and took it to The Mar-a-Lago Club to provide it to the Department of Justice and FBI. In the certification, Trump Attorney 3—he performed no search of TRUMP’s boxes, had not reviewed the May 11 Subpoena, and had not reviewed the contents of the Redweld folder—stated, among other things, that “[b]ased upon the information that [had] been provided to” her:

- a. “A diligent search was conducted of the boxes that were moved from the White House to Florida”;
- b. “This search was conducted after receipt of the subpoena, in order to locate any and all documents that are responsive to the subpoena”; and
- c. “Any and all responsive documents accompany this certification.”

64. These statements were false because, among other reasons, TRUMP had directed NAUTA to move boxes before Trump Attorney 1’s June 2 review, so that many boxes were not searched and many documents responsive to the May 11 Subpoena could not be found—and in fact were not found—by Trump Attorney 1.

65. Shortly after Trump Attorney 3 executed the false certification, on June 3, 2022, Trump Attorney 1 and Trump Attorney 3 met at The Mar-a-Lago Club with personnel from the Department of Justice and FBI. Trump Attorney 1 and Trump Attorney 3 turned over the Redweld folder containing documents with classification markings, as well as the false certification signed by Trump Attorney 3 as custodian of records. TRUMP, who had delayed his departure from The Mar-a-Lago Club, joined Trump Attorney 1 and Trump Attorney 3 for some of the meeting. TRUMP claimed to the Department of Justice and FBI that he was “an open book.”

66. Earlier that same day, NAUTA, DE OLIVEIRA and others loaded several of TRUMP’s boxes along with other items on aircraft that flew TRUMP and his family north for the summer.

67. On June 3, 2022, when FBI agents were at The Mar-a-Lago Club to collect the documents with classification markings from Trump Attorney 1 and Trump Attorney 3, the agents observed that there were surveillance cameras located near the Storage Room.

68. On June 22, 2022, the Department of Justice emailed an attorney for TRUMP’s business organization a draft grand jury subpoena requiring the production of certain security camera footage from The Mar-a-Lago Club, including footage from cameras “on ground floor (basement),” where the Storage Room was located.

69. On June 23, 2022, at 8:46 p.m., TRUMP called DE OLIVEIRA and they spoke for approximately 24 minutes.

70. On Friday, June 24, 2022, the Department of Justice emailed the attorney for TRUMP’s business organization the final grand jury subpoena, which required the production of “[a]ny and all surveillance records, videos, images, photographs and/or CCTV from internal cameras” at certain locations at The Mar-a-Lago Club, including “on ground floor (basement),” from January 10, 2022, to June 24, 2022.

71. That same day, June 24, 2022, at 1:25 p.m., Trump Attorney 1 spoke with TRUMP by phone regarding the subpoena for security camera footage. At 3:44 p.m., NAUTA received a text message from a co-worker, Trump Employee 3, indicating that TRUMP wanted to see NAUTA. Less than two hours later, NAUTA—who was scheduled to travel with TRUMP to Illinois the next day—changed his travel schedule and began to make arrangements to go to Palm Beach, Florida, instead.

72. NAUTA provided inconsistent explanations to colleagues for his sudden travel to Florida. At 7:14 p.m. on June 24, he texted one person that he would not be traveling with TRUMP the next day because he had a family emergency and used “shushing” emojis; at 9:48 p.m. that night, he texted a Secret Service agent that he had to check on a family member in Florida; and after he arrived in Florida on June 25, he texted the same Secret Service agent that he was in Florida working.

73. Around the same time on June 24 that NAUTA was making his travel plans to go to Florida, NAUTA and DE OLIVEIRA contacted Trump Employee 4, who was the Director of Information Technology (“IT”) at The Mar-a-Lago Club, as follows:

- a. At 5:02 p.m., NAUTA sent text messages to Trump Employee 4 asking, “Hy bro You around this weekend.”
- b. At 5:05 p.m., NAUTA texted DE OLIVEIRA, asking, “Hey brother You working today?” DE OLIVEIRA responded, “Yes I just left.” NAUTA then called DE OLIVEIRA and they spoke for approximately two minutes.
- c. At 5:09 p.m., Trump Employee 4 texted a response to NAUTA, “I am local. Entertaining some family that came to visit. What’s up?” NAUTA responded to Trump Employee 4, “Ok, cool. No biggie just wanted to see if you where around. Enjoy bro!”

- d. At 6:56 p.m., DE OLIVEIRA texted Trump Employee 4, “Hey buddy how are you . . . Walter call me early said it was trying to get in touch with you I guess he’s coming down tomorrow I guess needs you for something.” Trump Employee 4 responded, “He reached out but he didn’t say what he wanted. I told him I was local but entertaining some family that came from NYC this weekend. He told me to no worries.”
- e. At 6:58 p.m., Trump Employee 4 texted NAUTA, “Bro, if you need me I can get away for a few. Just let me know.” NAUTA responded, “Sounds good!! Thank you.”

74. On Saturday, June 25, 2022, NAUTA traveled from Bedminster, New Jersey, to Palm Beach, Florida. Prior to NAUTA’s trip, DE OLIVEIRA told a valet at The Mar-a-Lago Club (“Trump Employee 5”) that NAUTA was coming down. DE OLIVEIRA asked Trump Employee 5 not to tell anyone that NAUTA was coming down because NAUTA wanted the trip to remain secret. DE OLIVEIRA also told Trump Employee 5 that NAUTA wanted DE OLIVEIRA to talk to Trump Employee 4 to see how long camera footage was stored.

75. Shortly after arriving in Palm Beach on the evening of June 25, NAUTA went to The Mar-a-Lago Club and met with DE OLIVEIRA at 5:46 p.m. At The Mar-a-Lago Club, NAUTA and DE OLIVEIRA went to the security guard booth where surveillance video is displayed on monitors, walked with a flashlight through the tunnel where the storage Room was located, and observed and pointed out surveillance cameras.

76. On Monday, June 27, 2022, at 9:48 a.m., DE OLIVEIRA walked to the IT office where Trump Employee 4 was working with another employee in the IT department. DE OLIVEIRA requested that Trump Employee 4 step away from the office so that DE OLIVEIRA and Trump Employee 4 could talk.

77. At 9:49 a.m., Trump Employee 4 and DE OLIVEIRA left the area of the IT office together and walked through a basement tunnel. DE OLIVEIRA took Trump Employee 4 to a small room known as an “audio closet” near the White and Gold Ballroom. Once inside the audio closet, DE OLIVEIRA and Trump Employee 4 had the following exchange:

- a. DE OLIVEIRA told Trump Employee 4 that their conversation should remain between the two of them.
- b. DE OLIVEIRA asked Trump Employee 4 how many days the server retained footage. Trump Employee 4 responded that he believed it was approximately 45 days.
- c. DE OLIVEIRA told Trump Employee 4 that “the boss” wanted the server deleted. Trump Employee 4 responded that he would not know

how to do that, and that he did not believe that he would have the rights to do that. Trump Employee 4 told DE OLIVEIRA that DE OLIVEIRA would have to reach out to another employee who was a supervisor of security for TRUMP's business organization. DE OLIVEIRA then insisted Trump Employee 4 that "the boss" wanted the server deleted and asked, "what are we going to do?"

78. At 10:14 a.m., DE OLIVEIRA texted NAUTA, who was still in Florida, "Hey buddy are you working today?" DE OLIVEIRA then called NAUTA at 10:15 a.m., and they spoke for approximately one minute.

79. Later that day, at 1:06 p.m., NAUTA texted DE OLIVEIRA, who was at The Mar-a-Lago Club, "On my way to you." Between 1:31 p.m. and 1:50 p.m., DE OLIVEIRA walked through the bushes on the north edge of The Mar-a-Lago-Club property to meet with NAUTA on the adjacent property; then walked back to the IT office that he had visited that morning; and then walked again through the bushes on the northern edge of The Mar-a-Lago Club property to meet with NAUTA on the adjacent property.

80. At 3:55 p.m., TRUMP called DE OLIVEIRA and they spoke for approximately three and a half minutes.

81. In July 2022, the FBI and grand jury obtained and reviewed surveillance video from The Mar-a-Lago Club showing the movement of boxes set forth above.

82. On August 8, 2022, the FBI executed a court-authorized search warrant at The Mar-a-Lago Club. The search warrant authorized the FBI to search for and seize, among other things, all documents with classification markings.

83. During the execution of the warrant at The Mar-a-Lago Club, the FBI seized 102 documents with classification markings in TRUMP's office and the Storage Room, as follows:

Location	Number of Documents	Classification Markings
TRUMP's Office	27	Top Secret (6) Secret (18) Confidential (3)
Storage Room	75	Top Secret (11) Secret (36) Confidential (28)

84. Just over two weeks after the FBI discovered classified documents in the Storage Room and TRUMP's office, on August 26, 2022, NAUTA called Trump Employee 5 and said words to the effect of, "someone just wants to make sure Carlos is good." In response, Trump Employee 5 told NAUTA that DE OLIVEIRA was loyal and

that DE OLIVEIRA would not do anything to affect his relationship with TRUMP. That same day, at NAUTA's request, Trump Employee 5 confirmed in a Signal chat group with NAUTA and the PAC Representative that DE OLIVEIRA was loyal. That same day, TRUMP called DE OLIVEIRA and told DE OLIVEIRA that TRUMP would get DE OLIVEIRA an attorney.

COUNTS 1–32

Willful Retention of National Defense Information (18 U.S.C. § 793(e))

85. The General Allegations of this Indictment are re-alleged and fully incorporated here by reference.

86. On or about the dates set forth in the table below, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendant,

DONALD J. TRUMP

having unauthorized possession of, access to, and control over documents relating to the national defense, did willfully retain the documents and fail to deliver them to the officer and employee of the United States entitled to receive them; that is—TRUMP, without authorization, retained—at The Mar-a-Lago Club documents relating to the national defense, including the following [ed: listing of documents and counts omitted]

COUNT 33

Conspiracy to Obstruct Justice (18 U.S.C. § 1512(k))

87. The General Allegations of this Indictment are re-alleged and fully incorporated here by reference.

88. From on or about May 11, 2022, through in or around August 2022, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

DONALD J. TRUMP and

WALTINE NAUTA, and

CARLOS DE OLIVEIRA

did knowingly combine, conspire, confederate, and agree with each other and with others known and unknown to the grand jury, to engage in misleading conduct toward another person and corruptly persuade another person to withhold a record, document, and other object from an official proceeding, in violation of 18 U.S.C. § 1512(b)(2)(A), and to corruptly conceal a record, document, and other object from an official proceeding, in violation of 18 U.S.C. § 1512(c)(1).

The Purpose of the Conspiracy

89. The purpose of the conspiracy was for TRUMP to keep classified documents he had taken with him from the White House and to hide and conceal them from a federal grand jury.

The Manner and Means of the Conspiracy

90. The manner and means by which the defendants sought to accomplish the objects and purpose of the conspiracy included, among other things, the following:

- a. Suggesting that Trump Attorney 1 falsely represent to the FBI and grand jury that TRUMP did not have documents called for by the May 11 Subpoena;
- b. moving boxes of documents to conceal them from Trump Attorney 1, the FBI, and the grand jury;
- c. suggesting that Trump Attorney 1 hide or destroy documents called for by the May 11 Subpoena;
- d. providing to the FBI and grand jury-just some of the documents called for by the May 11 Subpoena, while TRUMP claimed he was cooperating fully;
- e. causing a false certification to be submitted to the FBI and grand jury representing that all documents with classification markings had been produced, when in fact they had not; and
- f. making false and misleading statements to the FBI.

All in violation of Title 18, United States Code, Section 1512(k).

COUNT 34

Withholding a Document or Record (18 U.S.C. §§ 1512(b)(2)(A), 2)

91. The General Allegations of this Indictment are re-alleged and fully incorporated here by reference.

92. From on or about May 11, 2022, through in or around August 2022, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

DONALD J. TRUMP and

WALTINE NAUTA

did knowingly engage in misleading conduct toward another person, and knowingly corruptly persuade and attempt to persuade another person, with intent to cause and induce any person to withhold a record, document, and other object from an official proceeding; that is—(1) TRUMP attempted to persuade Trump Attorney 1 to hide and conceal documents from a federal grand jury; and (2) TRUMP and NAUTA misled Trump Attorney 1 by moving boxes that contained documents with classification markings so that Trump Attorney 1 would not find the documents and produce them to a federal grand jury.

All in violation of Title 18, United States Code, Sections 1512(b)(2)(A) and 2.

COUNT 35

Corruptly Concealing a Document or Record (18 U.S.C. §§ 1512(c)(1), 2)

93. The General Allegations of this Indictment are re-alleged and fully incorporated here by reference.

94. From on or about May 11, 2022, through in or around August 2022, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

DONALD J. TRUMP and

WALTINE NAUTA

did corruptly conceal a record, document, and other object, and attempted to do so, with the intent to impair the object's integrity and availability for use in an official proceeding; that is—TRUMP and NAUTA hid and concealed boxes that contained documents with classification markings from Trump Attorney 1 so that Trump Attorney 1 would not find the documents and produce them to a federal grand jury.

All in violation of Title 18, United States Code, Sections 1512(c)(1) and 2.

COUNT 36

Concealing a Document in a Federal Investigation (18 U.S.C. §§ 1519, 2)

95. The General Allegations of this Indictment are re-alleged and fully incorporated here by reference.

96. From on or about May 11, 2022, through in or around August 2022, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

DONALD J. TRUMP and

WALTINE NAUTA,

did knowingly conceal, cover up, falsify, and make a false entry in any record, document, and tangible object with the intent to impede, obstruct, and influence the investigation and proper administration of any matter within the jurisdiction of a department and agency of the United States, and in relation to and contemplation of any such matter; that is—during a federal criminal investigation being conducted by the FBI, (1) TRUMP and NAUTA hid, concealed, and covered up from the FBI TRUMP’s continued possession of documents with classification markings at The Mar-a-Lago Club; and (2) TRUMP caused a false certification to be submitted to the FBI.

All in violation of Title 18, United States Code, Sections 1519 and 2.

COUNT 37

Scheme to Conceal (18 U.S.C. §§ 1001(a)(1), 2)

97. The General Allegations of this Indictment are re-alleged and fully incorporated here by reference.

98. From on or about May 11, 2022, through in or around August 2022, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

DONALD J. TRUMP and

WALTINE NAUTA

in a matter within the jurisdiction of the judicial branch and executive branch of the United States government, did knowingly and willfully falsify, conceal, and cover up by any trick, scheme, and device a material fact; that is—during a federal grand jury investigation and a federal criminal investigation being conducted by the FBI, TRUMP and NAUTA hid and concealed from the grand jury and the FBI TRUMP’s continued possession of documents with classification markings.

All in violation of Title 18, United States Code, Sections 1001(a)(1) and 2.

COUNT 38

False Statements and Representations (18 U.S.C. §§ 1001(a)(2), 2)

99. The General Allegations of this Indictment are re-alleged and fully incorporated here by reference.

100. On or about June 3, 2022, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendant,

DONALD J. TRUMP

in a matter within the jurisdiction of the judicial branch and executive branch of the United States government, did knowingly and willfully make and cause to be made a materially false, fictitious, and fraudulent statement and representation; that is—during a federal grand jury investigation and a federal criminal investigation being conducted by the FBI, TRUMP caused the following false statements and representations to be made to the grand jury and the FBI in a sworn certification executed by Trump Attorney 3:

- a. “A diligent search was conducted of the boxes that were moved from the White House to Florida”;
- b. “This search was conducted after receipt of the subpoena, in order to locate any and all documents that are responsive to the subpoena”; and
- c. “Any and all responsive documents accompany this certification.”

101. The statements and representations set forth above were false, as TRUMP knew, because TRUMP had directed that boxes be removed from the Storage Room before Trump Attorney 1 conducted the June 2, 2022 search for documents with classification markings, so that Trump Attorney 1’s search would not and did not include all of TRUMP’s boxes that were removed from the White House; Trump Attorney 1’s search would not and did not locate all documents responsive to the May 11 Subpoena; and all responsive documents were not provided to the FBI and the grand jury with the certification. In fact, after June 3, 2022, more than 100 documents with classification markings remained at The Mar-a-Lago Club until the FBI search on August 8, 2022.

All in violation of Title 18, United States Code, Sections 1001(a)(2) and 2.

COUNT 39

False Statements and Representations (18 U.S.C. § 1001(a)(2))

102. The General Allegations of this Indictment are re-alleged and fully incorporated here by reference.

103. On May 26, 2022, NAUTA participated in a voluntary interview with the FBI. During the interview, the FBI explained to NAUTA that the FBI was investigating how classified documents had been kept at The Mar-a-Lago Club, and the FBI asked NAUTA questions about the location and movement of TRUMP’s boxes before TRUMP provided 15 boxes to NARA on January 17, 2022. NAUTA was represented by counsel, and the FBI advised NAUTA that the interview was voluntary and that he could leave at any time. The FBI also advised NAUTA that it was a criminal offense to lie to the FBI. The interview was recorded.

104. On or about May 26, 2022, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendant,

WALTINE NAUTA

in a matter within the jurisdiction of the executive branch of the United States government, did knowingly and willfully make a materially false, fictitious, and fraudulent statement and representation; that is—in a voluntary interview during a federal criminal investigation being conducted by the FBI, NAUTA was asked the following questions and gave the following false answers:

Question: Does any—are you aware of any boxes being brought to his home—his suite?

Answer: No

Question: All right. So, so to the best of your knowledge, you're saying that those boxes that you brought onto the truck, first time you ever laid eyes on them was just the day of when [Trump Employee 2] needed you to—

Answer: Correct.

Question: —to take them. Okay.

Question: In knowing that we're trying to track the life of these boxes and where they could have been kept and stored and all that kind of stuff—

Answer: Mm-hm.

Question: —do you have any information that could—that would—that could help us understand, like, where they were kept, how they were kept, were they secured, were they locked? Something that makes the intelligence community feel better about these things, you know?

Answer: I wish, I wish I could tell you. I don't know. I don't—I honestly just don't know.

Question: And what—so, so you only saw the 15 boxes, 15, 17 boxes—

Answer: Mm-hm.

Question: —the day of the move? Even—they just showed up that day?

Answer: They were in Pine Hall. [Trump Employee 2] just asked me, hey, can we move some boxes?

Question: Okay.

Answer: And I was like, okay.

Question: So, you didn't know—had no idea how they got there before?

Answer: No.

105. The . . . statements and representations above were false, as NAUTA knew, because (1) NAUTA did in fact know that the boxes in Pine Hall had come from the Storage Room, as NAUTA himself, with the assistance of Trump Employee 2, had moved the boxes from the Storage Room to Pine Hall; and (2) NAUTA had observed the boxes in and moved them to various locations at The Mar-a-Lago Club.

All in violation of Title 18, United States Code, Section 1001(a)(2).

COUNT 40

Altering, Destroying, Mutilating, or Concealing an Object (18 U.S.C. §§ 1512(b)(2)(B), 2)

106. The General Allegations of this Superseding Indictment are re-alleged and fully incorporated here by reference.

107. From on or about June 22, 2022, through in or around August 2022, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

DONALD J. TRUMP,

WALTINE NAUTA, and

CARLOS DE OLIVEIRA

did knowingly corruptly persuade and attempt to persuade another person, with intent to cause and induce any person to alter, destroy, mutilate, and conceal an object with intent to impair the object's integrity and availability for use in an official proceeding; that is—TRUMP, NAUTA, and DE OLIVEIRA requested that Trump Employee 4 delete security camera footage at The Mar-a-Lago Club to prevent the footage from being provided to a federal grand jury.

All in violation of Title 18, United States Code, Sections 1512(b)(2)(B) and 2.

COUNT 41

Corruptly Altering, Destroying, Mutilating or Concealing a Document, Record, or Other Object (18 U.S.C. §§ 1512(c)(1), 2)

108. The General Allegations of this Superseding Indictment are re-alleged and fully incorporated here by reference.

109. From on or about June 22, 2022, through in or around August 2022, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

DONALD J. TRUMP,

WALTINE NAUTA, and

CARLOS DE OLIVEIRA

did corruptly alter, destroy, mutilate, and conceal a record, document and other object and attempted to do so, with the intent to impair the object's integrity and availability for use in an official proceeding; that is—TRUMP, NAUTA, and DE OLIVEIRA requested that Trump Employee 4 delete security camera footage at The Mar-a-Lago Club to prevent the footage from being provided to a federal grand jury.

All in violation of Title 18, United States Code, Sections 1512(c)(1) and 2.

COUNT 42

False Statements and Representations (18 U.S.C. § 1001(a)(2))

110. The General Allegations of this Superseding Indictment are re-alleged and fully incorporated here by reference.

111. On January 13, 2023, DE OLIVEIRA participated in a voluntary interview with the FBI at DE OLIVEIRA's residence. During the interview, the FBI explained to DE OLIVEIRA that the FBI was investigating how classified documents had been kept at The Mar-a-Lago Club, and the FBI asked DE OLIVEIRA questions about the location and movement of TRUMP's boxes and other items. DE OLIVEIRA was advised by the FBI that the interview was voluntary and that he could tell the agents to leave at any time. The FBI also advised DE OLIVEIRA that it was a criminal offense to lie to the FBI. The interview was recorded.

On or about January 13, 2023, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendant,

CARLOS DE OLIVEIRA

112. In a matter within the jurisdiction of the executive branch of the United States government, did knowingly and willfully make a materially false, fictitious, and fraudulent statement and representation; that is—in a voluntary interview during a federal criminal investigation being conducted by the FBI, DE OLIVEIRA was asked the following questions and gave the following false answers:

Question: When—after the end of the presidency, boxes arrived to Mar-a-Lago. Were you part of any group to help—

Answer: No.

Question: —unload them and move them?

Answer: No.

Question: Do you—were you—do you even know, like, or were you even there or aware that boxes were—

Answer: No.

Question: —like, all this stuff was being moved in?

Answer: Never saw anything.

Question: Okay.

Answer: Yeah. And then—

Question: Even his personal stuff, like, his clothes—

Answer: Never.

Question: —and furniture, nothing?

Answer: Never saw nothing.

Question: Okay. So you don't know where items would have been stored, as soon as he moved back to Mar-a-Lago?

Answer: No.

113. The underscored statements and representations above were false, as DE OLIVEIRA knew, because DE OLIVEIRA had personally observed and helped move TRUMP's boxes when they arrived at The Mar-a-Lago Club in January 2021.

All in violation of Title 18, United States Code, Section 1001(a)(2).

9. PERJURY AND FALSE STATEMENTS

As with obstruction of justice, perjury and false statement charges are “trans-substantive” in corporate crime. You should expect these offenses to be potentially in play any time a client or subject of an investigation testifies or speaks to the government, and therefore in virtually every investigation and prosecution—no matter what the underlying legal violation might be.

Many of the same policy issues that arise with obstruction charges are relevant with respect to perjury and false statement charges. As far as doctrine goes, perjury turns out to be narrower than most people think, while the federal false statements statute covers a much broader realm of conduct than most people would expect to be criminal.

A. Statutes

These are not as complicated as the obstruction statutes. Section 1621 is the modern version of the longstanding federal perjury statute. Section 1623 is a more recent statute intended to alter the law a bit in terms of how § 1621 had been interpreted. Section 1623 is, not surprisingly, used more often now. Section 1622 criminalizes subornation of perjury, which of course covers conduct that might be easier for a prosecutor to charge as obstruction (witness tampering) under § 1512. Section 1001 (“thousand and one,” as it is called) is the federal false statements statute.

18 U.S.C. § 1621. Perjury generally

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

18 U.S.C. § 1622. Subornation of perjury

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1623. False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

B. Perjury

The following Supreme Court case is the classic statement of the “literal truth defense” to perjury. (“Literal truth” is not a formal affirmative defense; the issue has to do with the government’s burden of proof.) Factual precision is essential in talking about perjury

charges. Exactly how were the words false, or not necessarily false? Exactly how could/should the questioner have posed the question(s) so that a perjury charge could be brought if a witness lied?

BRONSTON v. UNITED STATES, 409 U.S. 352 (1973)

Mr. Chief Justice BURGER delivered the opinion for a unanimous Court.

We granted the writ in this case to consider a narrow but important question in the application of the federal perjury statute, 18 U.S.C. § 1621: whether a witness may be convicted of perjury for an answer, under oath, that is literally true but not responsive to the question asked and arguably misleading by negative implication.

Petitioner is the sole owner of Samuel Bronston Productions, Inc., a company that between 1958 and 1964, produced motion pictures in various European locations. For these enterprises, Bronston Productions, opened bank accounts in a number of foreign countries; in 1962, for example, it had 37 accounts in five countries. As president of Bronston Productions, petitioner supervised transactions involving the foreign bank accounts.

In June 1964, Bronston Productions, petitioned for an arrangement with creditors under Chapter XI of the Bankruptcy Act, 11 U.S.C. § 701 et seq. On June 10, 1966, a referee in bankruptcy held a § 21(a) hearing to determine, for the benefit of creditors, the extent and location of the company's assets. Petitioner's perjury conviction was founded on the answers given by him as a witness at that bankruptcy hearing, and in particular on the following colloquy with a lawyer for a creditor of Bronston Productions:

'Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?

'A. No, sir.

'Q. Have you ever?

'A. The company had an account there for about six months, in Zurich.

'Q. Have you any nominees who have bank accounts in Swiss banks?

'A. No, sir.

'Q. Have you ever?

'A. No, sir.'

It is undisputed that for a period of nearly five years, between October 1959 and June 1964, petitioner had a personal bank account at the International Credit Bank in Geneva, Switzerland, into which he made deposits and upon which he drew checks totaling more than \$180,000. It is likewise undisputed that petitioner's answers were literally truthful. (a) Petitioner did not at the time of questioning have a Swiss bank account. (b) Bronston Productions, Inc., did have the account in Zurich described by petitioner. (c) Neither at

the time of questioning nor before did petitioner have nominees who had Swiss accounts. The Government's prosecution for perjury went forward on the theory that in order to mislead his questioner, petitioner answered the second question with literal truthfulness but unresponsively addressed his answer to the company's assets and not to his own—thereby implying that he had no personal Swiss bank account at the relevant time.

At petitioner's trial, the District Court instructed the jury that the 'basic issue' was whether petitioner 'spoke his true belief.' Perjury, the court stated, 'necessarily involves the state of mind of the accused' and 'essentially consists of willfully testifying to the truth of a fact which the defendant does not believe to be true'; petitioner's testimony could not be found 'willfully' false unless at the time his testimony was given petitioner 'fully understood the questions put to him but nevertheless gave false answers knowing the same to be false.' The court further instructed the jury that if petitioner did not understand the question put to him and for that reason gave an unresponsive answer, he could not be convicted of perjury. Petitioner could, however, be convicted if he gave an answer 'not literally false but when considered in the context in which it was given, nevertheless constitute(d) a false statement' . . . [T]he jury returned its verdict, finding petitioner guilty on the count of perjury before us today and not guilty on another charge not here relevant.

In the Court of Appeals, petitioner contended, as he had in post-trial motions before the District Court, that the key question was imprecise and suggestive of various interpretations. In addition, petitioner contended that he could not be convicted of perjury on the basis of testimony that was concededly truthful, however unresponsive. A divided Court of Appeals held that the question was readily susceptible of a responsive reply and that it adequately tested the defendant's belief in the veracity of his answer. The Court of Appeals further held that, '(f)or the purposes of 18 U.S.C. § 1621, an answer containing half of the truth which also constitutes a lie by negative implication, when the answer is intentionally given in place of the responsive answer called for by a proper question, is perjury.' In this Court, petitioner renews his attack on the specificity of the question asked him and the legal sufficiency of his answer to support a conviction for perjury. The problem of the ambiguity of the question is not free from doubt, but we need not reach that issue. Even assuming, as we do, that the question asked petitioner specifically focused on petitioner's personal bank accounts, we conclude that the federal perjury statute cannot be construed to sustain a conviction based on petitioner's answer.

The statute, 18 U.S.C. § 1621, substantially identical in its relevant language to its predecessors for nearly a century, is 'a federal statute enacted in an effort to keep the course of justice free from the pollution of perjury.'

There is, at the outset, a serious literal problem in applying § 1621 to petitioner's answer. The words of the statute confine the offense to the witness who 'willfully . . . states . . . any material matter which he does not believe to be true.' Beyond question, petitioner's answer to the crucial question was not responsive if we assume, as we do, that the first question was directed at personal bank accounts. There is, indeed, an implication in the

answer to the second question that there was never a personal bank account; in casual conversation this interpretation might reasonably be drawn. But we are not dealing with casual conversation and the statute does not make it a criminal act for a witness to willfully state any material matter that *implies* any material matter that he does not believe to be true.

The Government urges that the perjury statute be construed broadly to reach petitioner's answer and thereby fulfill its historic purpose of reinforcing our adversary factfinding process. We might go beyond the precise words of the statute if we thought they did not adequately express the intention of Congress, but we perceive no reason why Congress would intend the drastic sanction of a perjury prosecution to cure a testimonial mishap that could readily have been reached with a single additional question by counsel alert—as every examiner ought to be—to the incongruity of petitioner's unresponsive answer. Under the pressures and tensions of interrogation, it is not uncommon for the most earnest witnesses to give answers that are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it. It should come as no surprise that a participant in a bankruptcy proceeding may have something to conceal and consciously tries to do so, or that a debtor may be embarrassed at his plight and yield information reluctantly. It is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.

It is no answer to say that here the jury found that petitioner intended to mislead his examiner. A jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner; the state of mind of the witness is relevant only to the extent that it bears on whether 'he does not believe (his answer) to be true.' To hold otherwise would be to inject a new and confusing element into the adversary testimonial system we know. Witnesses would be unsure of the extent of their responsibility for the misunderstandings and inadequacies of examiners, and might well fear having that responsibility tested by a jury under the vague rubric of 'intent to mislead' or 'perjury by implication.' The seminal modern treatment of the history of the offense concludes that one consideration of policy overshadowed all others during the years when perjury first emerged as a common-law offense: 'that the measures taken against the offense must not be so severe as to discourage witnesses from appearing or testifying.' . . .

Thus, we must read § 1621 in light of our own and the traditional Anglo-American judgment that a prosecution for perjury is not the sole, or even the primary, safeguard against errant testimony. While 'the lower federal courts have not dealt with the question often,' and while their expressions do not deal with unresponsive testimony and are not precisely in point, 'it may be said that they preponderate against the respondent's contention.' The cases support petitioner's position that the perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in

derailing the questioner—so long as the witness speaks the literal truth. The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry. . . .

It may well be that petitioner's answers were not guileless but were shrewdly calculated to evade. Nevertheless, we are constrained to agree with Judge Lumbard, who dissented from the judgment of the Court of Appeals, that any special problems arising from the literally true but unresponsive answer are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution.

Here is one of the most famous examples of testimony and the issue of "literal truth."

PRESIDENT BILL CLINTON'S GRAND JURY TESTIMONY

Q: Mr. President, I want to before I go into a new subject area. . . The statement of your attorney, Mr. Bennett, at the Paul[a] Jones deposition, "counsel is fully aware. . . that Ms. Lewinsky has filed, has an affidavit which they are in possession of saying that there is no sex of any kind in any manner, shape or form, with President Clinton"? That statement was made by your attorney in front of Judge Susan Webber Wright, correct?

A: That's correct.

Q: That statement is a completely false statement. Whether or not Mr. Bennett knew of your relationship with Ms. Lewinsky, the statement that there was "no sex of any kind in any manner, shape or form, with President Clinton," was an utterly false statement. Is that correct?

A: It depends on what the meaning of the word "is" is. If the—if he—if "is" means is and never has been, that is not—that is one thing. If it means there is none, that was a completely true statement. But as I have testified, and I'd like to testify again, this is—it is somewhat unusual for a client to be asked about his lawyer's statements, instead of the other way around. I was not paying a great deal of attention to this exchange. I was focusing on my own testimony.

Grand Jury Testimony of President Clinton, August 17, 1998, pg. 57–58.

"It is clear to the [House Judiciary] Committee that the President perjured himself when he said that Mr. Bennett's statement that there was 'no sex of any kind' was 'completely true' depending on what the word 'is' is."

Impeachment of William Jefferson Clinton, President of the United States, H.R. Rep. No. 105-830 (1998).

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In addition to reading the material above about President Clinton's grand jury testimony, watch the relevant three-minute excerpt of his testimony, which is available here:

<http://www.youtube.com/watch?v=xHlt1W83JFU>. (Feel free, of course, to watch additional portions of the testimony available online for further context.) Under *Bronston*, is the assertion of the House Judiciary Committee in its articles of impeachment, excerpted above, correct?

The following (overblown) prosecution involving testimony in a civil forfeiture case explains materiality in the context of perjury and gives a bit more feel for "literal truth," as well as a sense of the defense argument of "ambiguous question."

UNITED STATES v. KROSS, 14 F.3d 751 (2d Cir. 1994)

FEINBERG, Circuit Judge:

Laura Kross appeals from a judgment of conviction entered in March 1993, after a jury trial in the United States District Court for the District of Vermont before Franklin S. Billings, Jr., J. Kross was indicted on five counts of making false declarations in a civil deposition in violation of 18 U.S.C. § 1623, and the jury found her guilty on three counts. . . . For the reasons set forth below, we affirm.

Earth People's Park (the Park), a 592-acre parcel of land in the extreme northeastern corner of Vermont, is owned by Earth People's Park, Inc., a California corporation (the Corporation). Since the founding of the Park in 1970, the Corporation has allowed people to come to the Park at no charge in order to live in harmony with nature. Kross resided in the Park from 1971 to 1979, when she moved to nearby Brownington, Vermont.

In 1990, the United States filed a civil forfeiture complaint against the Park pursuant to 21 U.S.C. § 881(a)(7). *United States v. Earth People's Park, Consisting of 592 Acres, More or Less, Located in Norton, Vermont, with all Appurtenances and Attachments Thereon*. The United States sought forfeiture on the grounds that the property was being used for the cultivation and distribution of marijuana. The Corporation asserted the defense of innocent ownership, claiming that it had no knowledge of illegal drug-related activity at the Park.

The Assistant United States Attorney conducting the forfeiture litigation deposed Kross in January 1991, at which time she was accompanied by an attorney representing the Corporation. The testimony of Kross at the deposition formed the basis for the three counts of the indictment (Counts III, IV and V) on which she was convicted. Count III set forth her responses to questions about her knowledge of illegal drug use in the Park, as follows:

Q: Did you ever see anyone smoking marijuana in the Park?

A: *Not to the best of my recollection. When I lived up there, I kept pretty much to myself.*

...

Q: With regard to Koslosky, Greenip and Brown and Gagliola, did you ever see them smoking marijuana in the Park?

A: *No, uh-uh.*

Q: Do you have any information as to whether they did smoke marijuana in the Park?

A: *No, nobody's ever come and said that to me.*

Count IV concerned her knowledge of marijuana cultivation in the Park:

Q: Did you ever see anyone grow marijuana on [Earth People's] Park property?

A: *No.*

Q: Even if you didn't see anyone grow it. Did you ever see anyone grow it there?

A: *No. It's a big 600 acres.*

...

Q: Did you ever have any information about [Koslosky, Greenip, Brown and Gagliola] growing marijuana in the Park?

A: *Definitely not.*

Count V concerned her prior criminal history:

Q: Have you ever been arrested?

A: *No.*

Q: Have you ever been charged by State or Federal authorities with any crime?

A: *No.*

Q: Really, I'm not asking whether you've been convicted; I'm asking whether you've been charged?

A: *No, not that I remember.*

At trial, the government presented testimony to show that Kross was aware of the use and cultivation of the marijuana by Park residents. Evidence also showed that Kross had been charged with felonies in Vermont state court in 1980 and 1990.

Kross argues that the district court erred in denying her pretrial motion to dismiss the indictment on the grounds that the information sought in the deposition was immaterial to the underlying forfeiture proceeding, that the deposition questions at issue were fundamentally ambiguous and that her statements were literally true. . . .

Kross contends that the indictment should have been dismissed because none of her allegedly false declarations were material to the civil forfeiture action. We disagree.

We have consistently held in the grand jury context that a false declaration is “material” within the meaning of § 1623 when it has “a natural effect or tendency to influence, impede or dissuade the grand jury from pursuing its investigation.” *United States v. Kiszewski* (quoting *United States v. Berardi*). We have pointed out that in a § 1623 prosecution for false declarations to a grand jury,

[m]atters arguably cumulative or collateral to the grand jury’s objective in a given case are considered for their *potential* to aid that body, not for the *probability* of assistance from a truthful answer.

United States v. Gribben. Because the grand jury’s function is investigative, materiality in that context is “broadly construed.” However, we have apparently not yet addressed the issue of materiality under § 1623 in the context of a deposition in a civil matter. The purpose of civil discovery is also investigative, and the scope of discovery includes any information that “appears reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1).

The Fifth Circuit has held that for purposes of § 1623, materiality in a civil discovery deposition is not limited to evidence admissible at trial, but includes matters properly the subject of and material to a deposition under Rule 26(b)(1). *United States v. Holley*. The Ninth and Sixth Circuits have also adapted a materiality definition under § 1623 to the civil deposition context. See *United States v. Clark*; *United States v. Adams*. But the resultant definition is considerably narrower than that of the Fifth Circuit: it requires not merely discoverability under Rule 26(b)(1), but also the tendency of the false statement itself to affect the outcome of the underlying civil suit for which the deposition was taken. See *Clark*; *Adams*.

The facts of the present case favor a broad construction of the definition of materiality similar to the approach we have already used in the grand jury context. While a government deposition in a forfeiture action under 21 U.S.C. § 881 is civil in form, forfeiture actions are predicated upon a nexus between the property and criminal activity. Under the circumstances of this case, we see no persuasive reason not to apply the broad standard for materiality of whether a truthful answer might reasonably be calculated to lead to the discovery of evidence admissible at the trial of the underlying suit.

We turn now to apply this broad standard to the facts of this case. With respect to Counts III and IV, Kross maintains that she was not an agent of the Corporation. Therefore, she argues, any knowledge she may have had concerning drug use or cultivation at the Park was not attributable to the Corporation and was thus immaterial to the forfeiture proceeding against the Corporation. At the time the questions were asked, however, the government was entitled to explore her knowledge based on the theory that she was an agent. Certainly, Kross' denial of agency would not end the matter, in view of evidence that she had represented herself to the Assistant conducting the deposition as the agent of the Corporation and had acted as its agent in the past. In any case, even if Kross was not the Corporation's agent, the information sought was material in that it concerned not only her *knowledge* of drug activity at the Park, but also the *existence* of drug activity.

As to Count III, Kross further argues that the information sought was immaterial to the forfeiture suit because marijuana smoking is not a felony justifying forfeiture under Title 21. Thus, she argues, even if she had testified that she had knowledge of marijuana smoking, that would not have demonstrated that the Park was being used to facilitate the more serious narcotics crimes that could justify a forfeiture. We disagree with this reasoning. It is true that neither marijuana smoking nor knowledge thereof constitutes independent grounds for civil forfeiture. Nevertheless, evidence of marijuana smoking on Park property was material at the discovery stage of the forfeiture proceeding because such evidence might lead to evidence of cultivation or distribution of marijuana, which would justify forfeiture.

With respect to Count IV, Kross also argues that she "could reasonably have understood" the questions to refer to the time when she lived in the Park in the 1970s. Thus, she claims, her answer about marijuana cultivation was immaterial because it did not concern the drug crimes that formed the basis for the 1990 forfeiture proceeding, but rather concerned activity predating the five-year statute of limitations period for § 881 forfeiture actions. Kross' argument is unconvincing, however, because the questioner clearly asked Kross if she had "ever" seen or had information about marijuana cultivation in the Park. In addition, as the district court correctly found,

Although evidence of pre-1985 drug crimes could not legally constitute a basis for forfeiture, evidence that [the Corporation] knew of illegal pre-1985 drug activity could certainly have led to information that the [C]orporation was not an "innocent owner," as well as an inference that the [C]orporation failed to satisfy its affirmative duty to safeguard the property from further drug activity.

Furthermore, the prior marijuana cultivation, while not the basis for the forfeiture proceeding, is nonetheless relevant to discovery regarding the later cultivation that did form the basis for the proceeding.

With respect to Count V, Kross argues that the statements regarding her prior criminal history were not material because they could have produced no useful testimony.

Furthermore, she argues, the Assistant United States Attorney already knew of the prior charges against her.

Turning to the latter argument first, whether the questioner knows the answer to a question is irrelevant to materiality. *Cf. United States v. Lee*. As to the usefulness of truthful responses, the 1990 charges eventually resulted in a conviction. Since Kross was convicted of welfare fraud, a crime involving “dishonesty or false statement,” evidence of the conviction might have been admissible at trial of the forfeiture action to impeach Kross’s credibility if she were a witness. Fed. R. Evid. 609(a)(2). Though matters relating to the credibility of a prospective witness might not always be material within the meaning of the perjury statute, *see United States v. Freedman*, in this case there was evidence that Kross represented herself to the prosecutor as an agent of the owner of the defendant property. In such circumstances, matters affecting her credibility were material. *Cf. United States v. Salinas* (witness’s credibility material where witness was defendant in underlying action); *United States v. Sablosky*.

Although the 1980 charges were ultimately dismissed, the charges concerned marijuana possession. Thus, truthful testimony concerning those charges might have led to evidence of other drug-related activity by Kross.

Kross contends that her statements referred to in Counts III and IV of the indictment cannot have been perjurious because the questions asked were fundamentally ambiguous. She argues that because the questions were asked in the context of other questions about the year 1975, she assumed the questions referred to marijuana smoking and cultivation in the year 1975. According to Kross, the indictment alleges that she grew marijuana sometime between 1976 and 1990 and thus fails to allege that her answer was false.

While it is true that answers to “fundamentally ambiguous” questioning may be insufficient to support a perjury conviction, *United States v. Lighte*, Kross’ argument is wholly without merit. The indictment in fact alleges that Kross knew of and participated in marijuana cultivation between 1975 and 1990. Moreover, in both instances, the questioner clearly asked Kross if she had “ever” seen anyone smoking or growing marijuana in the Park. We agree with the district court that “ever” is not an imprecise word. . . .

What should be done about the witness who avoids testifying truthfully by being deliberately evasive rather than uttering provable falsehoods? Sometimes, in such a case of what one might call “near perjury,” a prosecutor will charge the witness with obstruction of justice rather than perjury. This is a famous case in which such an effort failed. Whether you agree with this decision or not, it should be clear why a distinction needs to be maintained between the crimes of perjury and obstruction of justice, and the obstruction of justice statutes prevented from being used to prosecute “sort of perjury.”

UNITED STATES v. BONDS, 784 F.3d 582 (9th Cir. 2015) (en banc)

Per Curiam Opinion; Concurrence by Judge KOZINSKI; Concurrence by Judge N.R. SMITH; Concurrence by Judge REINHARDT; Concurrence by Judge W. FLETCHER; Dissent by Judge RAWLINSON

During a grand jury proceeding, defendant gave a rambling, non-responsive answer to a simple question. Because there is insufficient evidence that Statement C was material, defendant's conviction for obstruction of justice in violation of 18 U.S.C. § 1503 is not supported by the record. Whatever section 1503's scope may be in other circumstances, defendant's conviction here must be reversed. . . .

KOZINSKI, Circuit Judge, with whom Circuit Judges O'SCANLAIN, GRABER, CALLAHAN and NGUYEN join, concurring:

Can a single non-responsive answer by a grand jury witness support a conviction for obstruction of justice under 18 U.S.C. § 1503?

Defendant [Barry Bonds], who was then a professional baseball player, was summoned before a grand jury and questioned for nearly three hours about his suspected use of steroids. He was subsequently charged with four counts of making false statements and one count of obstruction of justice, all based on his grand jury testimony. The jury convicted him on the obstruction count and was otherwise unable to reach a verdict.

The jury instructions identified seven of defendant's statements that the government alleged obstructed justice. The jury, however, found only one statement obstructive. That statement was referred to as Statement C at trial and is italicized in the passage below:

Q: Did Greg[, your trainer,] ever give you anything that required a syringe to inject yourself with?

A: I've only had one doctor touch me. And that's my only personal doctor. Greg, like I said, we don't get into each others' personal lives. We're friends, but I don't—we don't sit around and talk baseball, because he knows I don't want—don't come to my house talking baseball. If you want to come to my house and talk about fishing, some other stuff, we'll be good friends. You come around talking about baseball, you go on. I don't talk about his business. You know what I mean?

Q: Right.

A: That's what keeps our friendship. You know, I am sorry, but that—you know, that—I was a celebrity child, not just in baseball by my own instincts. I became a celebrity child with a famous father. I just don't get into other people's business because of my father's situation, you see.

Defendant was again asked about injectable steroids immediately following this exchange and a few other times during his testimony. He provided direct responses to the follow-up questions. For example, he was asked whether he ever “injected [him]self with anything that Greg . . . gave [him].” He responded “I’m not that talented, no.” The government believed that those answers were false but, as noted, the jury failed to convict defendant on the false statement counts. . . .

[S]ection 1503’s coverage is vast. By its literal terms, it applies to all stages of the criminal and civil justice process, not just to conduct in the courtroom but also to trial preparation, discovery and pretrial motions. Indeed, it arguably covers conduct taken in anticipation that a civil or criminal case might be filed, such as tax planning, hiding assets or talking to police. And the text of the omnibus clause, in concert with our definition of corruptly, encompasses any act that a jury might infer was intended to “influence, obstruct, or impede . . . the due administration of justice.” That’s true even if no actual obstruction occurs, because the clause’s use of “endeavors” makes “success . . . irrelevant.” See *United States v. Richardson*.

Stretched to its limits, section 1503 poses a significant hazard for everyone involved in our system of justice, because so much of what the adversary process calls for could be construed as obstruction. Did a tort plaintiff file a complaint seeking damages far in excess of what the jury ultimately awards? That could be viewed as corruptly endeavoring to “influence . . . the due administration of justice” by seeking to recover more than the claim deserves. So could any of the following behaviors that make up the bread and butter of litigation: filing an answer that denies liability for conduct that is ultimately adjudged wrongful or malicious; unsuccessfully filing (or opposing) a motion to dismiss or for summary judgment; seeking a continuance in order to inflict delay on the opposing party; frivolously taking an appeal or petitioning for certiorari—the list is endless. Witnesses would be particularly vulnerable because, as the Supreme Court has noted, “[u]nder the pressures and tensions of interrogation, it is not uncommon for the most earnest witnesses to give answers that are not entirely responsive.” *Bronston v. United States*.

Lawyers face the most pervasive threat under such a regime. Zealous advocacy sometimes calls for pushing back against an adversary’s just case and casting a despicable client in a favorable light, yet such conduct could be described as “endeavor[ing] to . . . impede . . . the due administration of justice.” Even routine advocacy provides ample occasion for stumbling into the heartland of the omnibus clause’s sweeping coverage. Oral arguments provide a ready example. One need not spend much time in one of our courtrooms to hear lawyers dancing around questions from the bench rather than giving pithy, direct answers. There is, for instance, the ever popular “but that is not this case” retort to a hypothetical, which could be construed as an effort to divert the court and thereby “influence . . . the due administration of justice.”

It is true that any such maneuver would violate section 1503 only if it were done “corruptly.” But it is equally true that we have given “corruptly” such a broad

construction that it does not meaningfully cabin the kind of conduct that is subject to prosecution. As noted, we have held that a defendant acts “corruptly,” as that term is used in section 1503, if he does so “with the purpose of obstructing justice.” *Rasheed*. In the examples above, a prosecutor could argue that a complaint was filed corruptly because it was designed to extort a nuisance settlement, or an answer was filed corruptly because its principal purpose was to pressure a needy plaintiff into an unjust settlement, or that the lawyer who parried a judicial hypothetical with “but that is not this case” was endeavoring to distract the court so it would reach a wrong result. That a jury or a judge might not buy such an argument is neither here nor there; a criminal prosecution, even one that results in an acquittal, is a life-wrenching event. Nor does an acquittal wipe clean the suspicion that a guilty defendant got off on a technicality.

We have no doubt that United States Attorneys and their Assistants would use the power to prosecute for such crimes judiciously, but that is not the point. Making everyone who participates in our justice system a potential criminal defendant for conduct that is nothing more than the ordinary tug and pull of litigation risks chilling zealous advocacy. It also gives prosecutors the immense and unreviewable power to reward friends and punish enemies by prosecuting the latter and giving the former a pass. The perception that prosecutors have such a potent weapon in their arsenal, even if never used, may well dampen the fervor with which lawyers, particularly those representing criminal defendants, will discharge their duties. The amorphous nature of the statute is also at odds with the constitutional requirement that individuals have fair notice as to what conduct may be criminal. *See United States v. JDT* (citing *Skilling v. United States*).

Because the statute sweeps so broadly, due process calls for prudential limitations on the government’s power to prosecute under it. Such a limitation already exists in our case law interpreting section 1503: the requirement of materiality. *See United States v. Thomas*. Materiality screens out many of the statute’s troubling applications by limiting convictions to those situations where an act “has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body.” *See Kungys v. United States; Thomas*. Put another way, the government must prove beyond a reasonable doubt that the charged conduct was capable of influencing a decisionmaking person or entity—for example, by causing it to cease its investigation, pursue different avenues of inquiry or reach a different outcome. *See United States v. McKenna* (finding statement material because it could have affected the “decision-making process”); *Weinstock v. United States* (noting that, to be material, a statement “must have some weight in the process of reaching a decision”).

In weighing materiality, we consider “the intrinsic capabilities of the . . . statement itself,” rather than the statement’s actual effect on the decisionmaker, *see United States v. Serv. Deli Inc.*, and we evaluate the statement in “the context in which [it was] made,” *United States v. Rigas*; *see also United States v. McBane; Weinstock* (noting that in context, a statement was “rob[bed] . . . of any materiality—any possible influence upon the [decisionmaker] in reaching its decision”).

We start with the self-evident proposition that Statement C, standing alone, did not have the capacity to divert the government from its investigation or influence the grand jury's decision whether to indict anyone. Here it is again:

That's what keeps our friendship. You know, I am sorry, but that—you know, that—I was a celebrity child, not just in baseball by my own instincts. I became a celebrity child with a famous father. I just don't get into other people's business because of my father's situation, you see.

The statement says absolutely nothing pertinent to the subject of the grand jury's investigation. Even when paired with the question that prompted it,

Did Greg ever give you anything that required a syringe to inject yourself with?

Statement C communicates nothing of value or detriment to the investigation. Had the answer been "I'm afraid of needles," it would have been plausible to infer an unspoken denial, with the actual words serving as an explanation or elaboration. But, as given, the answer did not enlighten, obfuscate, confirm or deny anything within the scope of the question posed.

The most one can say about this statement is that it was non-responsive and thereby impeded the investigation to a small degree by wasting the grand jury's time and trying the prosecutors' patience. But real-life witness examinations, unlike those in movies and on television, invariably are littered with non-responsive and irrelevant answers. This happens when the speaker doesn't understand the question, begins to talk before thinking (lawyers do this with surprising frequency), wants to avoid giving a direct answer (ditto), or is temporizing. Courtrooms are pressure-laden environments and a certain number of non-responsive or irrelevant statements can be expected as part of the give-and-take of courtroom discourse. Because some non-responsive answers are among the road hazards of witness examination, any one such statement is not, standing alone, "capable of influencing . . . the decision of [a] decisionmaking body." *See Thomas*.

This is true even if, as the government now argues, Statement C is literally false. An irrelevant or wholly non-responsive answer says nothing germane to the subject of the investigation, whether it's true or false. For example, if a witness is asked, "Do you own a gun?" it makes no difference whether he answers "The sky is blue" or "The sky is green." That the second statement is false makes it no more likely to impede the investigation than the first.

Statement C does not, however, stand alone. It was a small portion of a much longer examination, and we must look at the record as a whole to determine whether a rational trier of fact could have found the statement capable of influencing the grand jury's investigation, in light of defendant's entire grand jury testimony. If, for example, a witness engages in a pattern of irrelevant statements, or launches into lengthy

disquisitions that are clearly designed to waste time and preclude the questioner from continuing his examination, the jury could find that the witness's behavior was capable of having some sway.

On careful review of the record, we find insufficient evidence to render Statement C material. In conducting this review, we are mindful that we must give the jury the benefit of the doubt and draw all reasonable inferences in favor of its verdict. *See Jackson v. Virginia*. At the same time, we must conduct our review with some rigor for the prudential reasons discussed above.

The government charged a total of seven statements, only one of which the jury found to be obstructive. Two of these statements (including Statement C) appear to be wholly irrelevant—verbal detours with no bearing on the proceedings. One statement is “I don’t know,” followed by a brief explanation for the lack of knowledge. The rest are direct answers that the government claimed were false, all concerning whether defendant’s trainer had provided or injected him with steroids. In the context of three hours of grand jury testimony, these six additional statements are insufficient to render the otherwise innocuous Statement C material. If this were enough to establish materiality, few witnesses or lawyers would be safe from prosecution.

N.R. SMITH, Circuit Judge, with whom Circuit Judges WARDLAW, CALLAHAN, and FRIEDLAND join, concurring:

I agree that no reasonable juror could have found Bonds guilty of violating 18 U.S.C. § 1503. . . .

Congress could not have intended § 1503 to be so broadly applied as to reach a single truthful but evasive statement such as Statement C. Our conclusion that Statement C could not have “the natural and probable effect” of impeding the grand jury’s investigative function stems from two sources: (1) the Government’s duty to clarify merely misleading or evasive testimony and (2) relevant precedent indicating that the Government must show that truthful but misleading or evasive testimony must amount to a refusal to testify before it is material. Taken together, these two sources lead to the conclusion that a single truthful but evasive or misleading statement cannot satisfy § 1503’s materiality requirement.

The Supreme Court’s decision in *Bronston v. United States* requires the conclusion that Statement C does not violate § 1503. Although *Bronston* dealt with a conviction for perjury, the Supreme Court’s language regarding the government’s duty to conduct competent and thorough questioning is illuminating. In short, “[t]he burden is on the questioner to pin the witness down to the specific object of the questioner’s inquiry.” Extending § 1503’s reach to transient evasive or misleading statements would obviate the prosecutor’s duty to thoroughly examine the witness. *Id.* (noting that competent cross-examination should be conducted “by counsel alert—as every examiner ought to be—to the incongruity of [the witness’s] unresponsive answer”). It would be contrary to the statute’s purpose to allow the government to permit an evasive or misleading

statement to go unchallenged, in the hopes of obtaining an obstruction of justice conviction later. The government is obligated to do all it can to obtain a direct statement in response to its questioning. The truth-seeking function of the grand jury may be impaired by lax questioning as much, if not more than, an inarticulate or wandering answer.

Bronston counsels that, to convict a defendant for violating § 1503, the jury must find more than that the witness uttered an evasive or misleading statement at some point during his testimony—the “natural and probable effect” of a single truthful but evasive or misleading statement is merely to prompt follow-up questions. Given this burden, Statement C did not have the natural or probable effect of interfering with the due administration of justice, because the Government had a duty to clarify any single misleading or evasive statement Bonds made.

The Supreme Court’s materiality standard reinforces *Bronston*’s core holding: we should not find liability for a single statement that is merely misleading or evasive. The judicially-created materiality requirement is a primary objective limitation on § 1503’s expansive reach. *See United States v. Thomas*. This materiality standard necessarily takes into account the context of the charged conduct, evaluating whether the misleading or evasive statement could have “the natural and probable effect of interfering with the due administrative of justice” given the entirety of a witness’s examination. *Aguilar*. The Government may not isolate a single statement, prove it misleading or evasive, and argue that the statement is material based solely on that fact.

Evasive or misleading statements are different from false statements. Instead of providing the tribunal with bad information, information that can be evaluated for its capability to influence, a misleading or evasive statement is meant to divert or slow the truth-seeking function in the first instance; it does not so much influence an investigation as divert it by depriving the question of its force. In this sense, offering evasive or misleading testimony is closely analogous to the destruction of evidence. *See United States v. Rasheed* (“the destruction or concealment of documents can fall within the prohibition of the statute” by “suppress[ing] evidence”). We should evaluate the materiality of evasive or misleading testimony the same way: for its capability to impede the investigative function of the grand jury.

The Fifth Circuit’s explanation of the materiality standard in *United States v. Griffin* is particularly persuasive precedent. A false, misleading, or evasive statement may be material, taken in the context of the entire examination, when it amounts to “a flat refusal to testify.” *United States v. Griffin*. Evasive or misleading testimony, in this light, can only obstruct the due administration of justice when it completely thwarts the investigative nature of the tribunal—when it derails the grand jury “as effectively as if [the witness] refused to answer the question at all.” The proper question is not whether a statement had the intrinsic capability to influence the grand jury, but whether the statement, viewed in the context of the witness’s testimony as a whole, “closed off entirely the avenue of inquiry being pursued by” the grand jury. *United States v. Brown*;

see also United States v. Cohn (“The blatantly evasive witness achieves th[e] effect [of impeding the gathering of relevant evidence] as surely by erecting a screen of feigned forgetfulness as one who burns files or induces a potential witness to absent himself.”).

Applying the materiality standard a single truthful but evasive or misleading statement can never be material. Our examination of Statement C—a single evasive or misleading statement—reveals why. No rational juror could have found that Statement C amounted to a refusal to testify, such that Bonds’s testimony thwarted the grand jury’s investigative function.

In summary, the “natural and probable effect” of a single true but evasive response to the government’s questioning is not to impede the grand jury but, rather, to prompt follow-up questioning. A statement that “goes off into the cosmos” merely triggers the prosecutor’s duty to pin the witness down and elicit a clear response. Indeed, that is exactly what happened in this case. Faced with a rambling response, the prosecutor restated the same question and elicited a direct, unambiguous answer from Bonds: “No.” No rational juror could conclude that Bonds refused to answer the question; it is plain in the record that Bonds gave his testimony to the grand jury. Further, this is thus not a situation in which a witness testified evasively for so long and with such persistence that the grand jury’s investigation would likely have been thwarted, as would be required for the testimony to be material. Statement C was therefore not material, and Bonds’s conviction must be reversed. . . .

C. False Statements (18 U.S.C. § 1001)

18 U.S.C. § 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party’s counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

The above statute is one of the broadest of all federal criminal prohibitions in terms of the conduct it may cover—given the vast realm of all communications between individuals and the federal government. The following case is about the jurisdictional element of § 1001. The issue is whether the defendant needs to know that the lie involves something within federal jurisdiction. The Court says no. Was this correctly decided as a matter of policy and statutory text?

UNITED STATES v. YERMIAN, 468 U.S. 63 (1984)

Justice POWELL delivered the opinion of the Court.

Respondent Esmail Yermian was convicted in the District Court of Central California on three counts of making false statements in a matter within the jurisdiction of a federal agency, in violation of § 1001. The convictions were based on false statements respondent supplied his employer in connection with a Department of Defense security questionnaire. Respondent was hired in 1979 by Gulton Industries, a defense contractor. Because respondent was to have access to classified material in the course of his employment, he was required to obtain a Department of Defense Security Clearance. To this end, Gulton's security officer asked respondent to fill out a "Worksheet For Preparation of Personnel Security Questionnaire."

In response to a question on the worksheet asking whether he had ever been charged with any violation of law, respondent failed to disclose that in 1978 he had been convicted of mail fraud, in violation of 18 U.S.C. § 1341. In describing his employment history, respondent falsely stated that he had been employed by two companies that had in fact never employed him. The Gulton security officer typed these false representations onto a form entitled "Department of Defense Personnel Security Questionnaire." Respondent reviewed the typed document for errors and signed a certification stating that his answers were "true, complete, and correct to the best of [his] knowledge" and that he understood "that any misrepresentation or false statement . . . may subject [him] to prosecution under section 1001 of the United States Criminal Code."

After witnessing respondent's signature, Gulton's security officer mailed the typed form to the Defense Industrial Security Clearance Office for processing. Government investigators subsequently discovered that respondent had submitted false statements on the security questionnaire. Confronted with this discovery, respondent acknowledged that he had responded falsely to questions regarding his criminal record and employment history. On the basis of these false statements, respondent was charged with three counts in violation of § 1001.

At trial, respondent admitted to having actual knowledge of the falsity of the statements he had submitted in response to the Department of Defense security questionnaire. He explained that he had made the false statements so that information on the security questionnaire would be consistent with similar fabrications he had submitted to Gulton in his employment application. Respondent's sole defense at trial was that he had no actual knowledge that his false statements would be transmitted to a federal agency.

Consistent with this defense, respondent requested a jury instruction requiring the Government to prove not only that he had actual knowledge that his statements were false at the time they were made, but also that he had actual knowledge that those statements were made in a matter within the jurisdiction of a federal agency. The District Court rejected that request and instead instructed the jury that the Government must prove that respondent "knew or should have known that the information was to be submitted to a government agency." . . . [T]he jury returned convictions on all three counts charged in the indictment. . . .

The only issue presented in this case is whether Congress intended the terms "knowingly and willfully" in § 1001 to modify the statute's jurisdictional language, thereby requiring the Government to prove that false statements were made with actual knowledge of federal agency jurisdiction. The issue thus presented is one of statutory interpretation. Accordingly, we turn first to the language of the statute. . . .

The statutory language requiring that knowingly false statements be made "in any matter within the jurisdiction of any department or agency of the United States" is a jurisdictional requirement. Its primary purpose is to identify the factor that makes the false statement an appropriate subject for federal concern. Jurisdictional language need not contain the same culpability requirement as other elements of the offense. Indeed, we have held that "the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute." Certainly in this case, the statutory language makes clear that Congress did not intend the terms "knowingly and willfully" to establish the standard of culpability for the jurisdictional element of § 1001. The jurisdictional language appears in a phrase separate from the prohibited conduct modified by the terms "knowingly and willfully." Any natural reading of § 1001, therefore, establishes that the terms "knowingly and willfully" modify only the making of "false, fictitious or fraudulent statements," and not the predicate circumstance that those statements be made in a matter within the jurisdiction of a federal agency.

Once this is clear, there is no basis for requiring proof that the defendant had actual knowledge of federal agency jurisdiction. The statute contains no language suggesting any additional element of intent, such as a requirement that false statements be “knowingly made in a matter within federal agency jurisdiction,” or “with the intent to deceive the Federal Government.” On its face, therefore, § 1001 requires that the Government prove that false statements were made knowingly and willfully, and it unambiguously dispenses with any requirement that the Government also prove that those statements were made with actual knowledge of federal agency jurisdiction. Respondent’s argument that the legislative history of the statute supports a contrary interpretation is unpersuasive. . . .

Respondent argues that absent proof of actual knowledge of federal agency jurisdiction, § 1001 becomes a “trap for the unwary,” imposing criminal sanctions on “wholly innocent conduct.” Whether or not respondent fairly may characterize the intentional and deliberate lies prohibited by the statute (and manifest in this case) as “wholly innocent conduct,” this argument is not sufficient to overcome the express statutory language of § 1001. . . . In the unlikely event that § 1001 could be the basis for imposing an unduly harsh result on those who intentionally make false statements to the Federal Government, it is for Congress and not this Court to amend the criminal statute.

The next case is a pivotal Supreme Court decision dealing with the treatment of an “exculpatory no” under § 1001. Is there any persuasive way to get the policy argument to line up with the argument about statutory language here?

BROGAN v. UNITED STATES, 522 U.S. 398 (1988)

Justice SCALIA delivered the opinion of the Court.

While acting as a union officer during 1987 and 1988, petitioner James Brogan accepted cash payments from JRD Management Corporation, a real estate company whose employees were represented by the union. On October 4, 1993, federal agents from the Department of Labor and the Internal Revenue Service visited petitioner at his home. The agents identified themselves and explained that they were seeking petitioner’s cooperation in an investigation of JRD and various individuals. They told petitioner that if he wished to cooperate, he should have an attorney contact the United States Attorney’s Office, and that if he could not afford an attorney, one could be appointed for him.

The agents then asked petitioner if he would answer some questions, and he agreed. One question was whether he had received any cash or gifts from JRD when he was a union officer. Petitioner’s response was “no.” At that point, the agents disclosed that a search of JRD headquarters had produced company records showing the contrary. They also told petitioner that lying to federal agents in the course of an investigation was a crime. Petitioner did not modify his answers, and the interview ended shortly thereafter.

Petitioner was indicted for accepting unlawful cash payments from an employer in violation of 29 U.S.C. §§ 186(b)(1), (a)(2) and (d)(2), and making a false statement within the jurisdiction of a federal agency in violation of 18 U.S.C. § 1001. He was . . . found guilty. . . . We granted certiorari on the issue of the “exculpatory no.” . . .

By its terms, 18 U.S.C. § 1001 covers “any” false statement—that is, a false statement “of whatever kind.” The word “no” in response to a question assuredly makes a “statement,” *see, e.g.*, Webster’s New International Dictionary (2d ed.1950) (def. 2: “That which is stated; an embodiment in words of facts or opinions”), and petitioner does not contest that his utterance was false or that it was made “knowingly and willfully.” In fact, petitioner concedes that under a “literal reading” of the statute he loses.

Petitioner asks us, however, to depart from the literal text that Congress has enacted, and to approve the doctrine adopted by many Circuits which excludes from the scope of § 1001 the “exculpatory no.” The central feature of this doctrine is that a simple denial of guilt does not come within the statute. There is considerable variation among the Circuits concerning, among other things, what degree of elaborated tale-telling carries a statement beyond simple denial. In the present case, however, the Second Circuit agreed with petitioner that his statement would constitute a “true ‘exculpatory n[o]’ as recognized in other circuits,” but aligned itself with the Fifth Circuit in categorically rejecting the doctrine.

Petitioner’s argument in support of the “exculpatory no” doctrine proceeds from the major premise that § 1001 criminalizes only those statements to Government investigators that “pervert governmental functions”; to the minor premise that simple denials of guilt to Government investigators do not pervert governmental functions; to the conclusion that § 1001 does not criminalize simple denials of guilt to Government investigators. Both premises seem to us mistaken. As to the minor: We cannot imagine how it could be true that falsely denying guilt in a Government investigation does not pervert a governmental function. Certainly the investigation of wrongdoing is a proper governmental function; and since it is the very *purpose* of an investigation to uncover the truth, any falsehood relating to the subject of the investigation perverts that function. It could be argued, perhaps, that a *disbelieved* falsehood does not pervert an investigation. But making the existence of this crime turn upon the credulousness of the federal investigator (or the persuasiveness of the liar) would be exceedingly strange; such a defense to the analogous crime of perjury is certainly unheard of. Moreover, as we shall see, the only support for the “perversion of governmental functions” limitation is a statement of this Court referring to the *possibility* (as opposed to the certainty) of perversion of function—a possibility that exists whenever investigators are told a falsehood relevant to their task.

In any event, we find no basis for the major premise that only those falsehoods that pervert governmental functions are covered by § 1001. Petitioner derives this premise from a comment we made in *United States v. Gilliland*, a case involving the predecessor to § 1001. That earlier version of the statute subjected to criminal liability “whoever

shall knowingly and willfully . . . make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States . . .” The defendant in *Gilliland*, relying on the interpretive canon *ejusdem generis*, argued that the statute should be read to apply only to matters in which the Government has a financial or proprietary interest. In rejecting that argument, we noted that Congress had specifically amended the statute to cover “any matter within the jurisdiction of any department or agency of the United States,” thereby indicating “the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described.” Petitioner would elevate this statement to a holding that § 1001 does not apply where a perversion of governmental functions does not exist. But it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself. . . . And even the relied-upon dictum from *Gilliland* . . . acknowledges the reality that the reach of a statute often exceeds the precise evil to be eliminated. There is no inconsistency whatever between the proposition that Congress intended “to protect the authorized functions of governmental departments and agencies from the perversion which might result” and the proposition that the statute forbids *all* “the deceptive practices described.”

The second line of defense that petitioner invokes for the “exculpatory no” doctrine is inspired by the Fifth Amendment. He argues that a literal reading of § 1001 violates the “spirit” of the Fifth Amendment because it places a “cornered suspect” in the “cruel trilemma” of admitting guilt, remaining silent, or falsely denying guilt. This “trilemma” is wholly of the guilty suspect’s own making, of course. An innocent person will not find himself in a similar quandary (as one commentator has put it, the innocent person lacks even a “lemma.”). And even the honest and contrite guilty person will not regard the third prong of the “trilemma” (the blatant lie) as an available option. . . . Whether or not the predicament of the wrongdoer run to ground tugs at the heartstrings, neither the text nor the spirit of the Fifth Amendment confers a privilege to lie. “[P]roper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a witness to remain silent, but not to swear falsely.” . . .

Petitioner repeats the argument made by many supporters of the “exculpatory no,” that the doctrine is necessary to eliminate the grave risk that § 1001 will become an instrument of prosecutorial abuse. The supposed danger is that overzealous prosecutors will use this provision as a means of “piling on” offenses—sometimes punishing the denial of wrongdoing more severely than the wrongdoing itself. The objectors’ principal grievance on this score, however, lies not with the hypothetical prosecutors but with Congress itself, which has decreed the obstruction of a legitimate investigation to be a separate offense, and a serious one. It is not for us to revise that judgment. . . .

In sum, we find nothing to support the “exculpatory no” doctrine except the many Court of Appeals decisions that have embraced it. . . . Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread. Because the plain language of § 1001 admits of no exception for an “exculpatory no,” we affirm the judgment of the Court of Appeals.

Justice GINSBURG, with whom Justice SOUTER joins, concurring in the judgment.

At the time of Brogan’s offense, § 1001 made it a felony “knowingly and willfully” to make “any false, fictitious or fraudulent statements or representations” in “any matter within the jurisdiction of any department or agency of the United States.” 18 U.S.C. § 1001 (1988 ed.). That encompassing formulation arms Government agents with authority not simply to apprehend lawbreakers, but to generate felonies, crimes of a kind that only a Government officer could prompt. . . .

[Section] 1001 may apply to encounters between agents and their targets “under extremely informal circumstances which do not sufficiently alert the person interviewed to the danger that false statements may lead to a felony conviction.” Because the questioning occurs in a noncustodial setting, the suspect is not informed of the right to remain silent. Unlike proceedings in which a false statement can be prosecuted as perjury, there may be no oath, no pause to concentrate the speaker’s mind on the importance of his or her answers. As in Brogan’s case, the target may not be informed that a false “No” is a criminal offense until *after* he speaks.

At oral argument, the Solicitor General forthrightly observed that § 1001 could even be used to “escalate completely innocent conduct into a felony.” More likely to occur, “if an investigator finds it difficult to prove some elements of a crime, she can ask questions about other elements to which she already knows the answers. If the suspect lies, she can then use the crime she has prompted as leverage or can seek prosecution for the lie as a substitute for the crime she cannot prove.” If the statute of limitations has run on an offense—as it had on four of the five payments Brogan was accused of accepting—the prosecutor can endeavor to revive the case by instructing an investigator to elicit a fresh denial of guilt. Prosecution in these circumstances is not an instance of Government “punishing the denial of wrongdoing more severely than the wrongdoing itself,” it is, instead, Government generation of a crime when the underlying suspected wrongdoing is or has become nonpunishable. It is doubtful Congress intended § 1001 to cast so large a net. . . .

The Court’s opinion does not instruct lower courts automatically to sanction prosecution or conviction under § 1001 in all instances of false denials made to criminal investigators. The Second Circuit, whose judgment the Court affirms, noted some reservations. That court left open the question whether “to violate Section 1001, a person must know that it is unlawful to make such a false statement.” And nothing . . . this Court said suggests that “the mere denial of criminal responsibility would be sufficient to prove such [knowledge].” Moreover, “a trier of fact might acquit on the ground that a denial

of guilt in circumstances indicating surprise or other lack of reflection was not the product of the requisite criminal intent,” and a jury could be instructed that it would be permissible to draw such an inference. Finally, under the statute currently in force, a false statement must be “material” to violate § 1001.

The controls now in place, however, do not meet the basic issue, *i.e.*, the sweeping generality of § 1001’s language. Thus, the prospect remains that an overzealous prosecutor or investigator aware that a person has committed some suspicious acts, but unable to make a criminal case—will create a crime by surprising the suspect, asking about those acts, and receiving a false denial. Congress alone can provide the appropriate instruction.

Lies to corporate counsel as crimes? In the 2000s, the Justice Department appeared to be experimenting with a controversial application of Section 1001 and the obstruction statutes in corporate crime investigations.

The government’s idea was that corporate employees could be charged with making false statements in a federal matter if they lied to company counsel conducting an internal investigation into criminal wrongdoing—on the theory that, under the current regime for investigating and negotiating corporate criminality, employees know that their statements to internal investigators will be provided to government agents and prosecutors and will likely influence their conduct.

Sanjay Kumar and Stephen Richards, former senior executives of New York-based Computer Associates, were indicted on this theory in 2004, based on allegedly having crafted a false story for others in the management group to provide to investigators from an outside law firm, with the hope of curtailing an investigation into accounting fraud. Kumar and Richards moved to dismiss the obstruction charges and the trial court denied their motions to dismiss, finding the legal theory sufficient to warrant trial. Kumar and Richards then pled guilty. Similarly, in 2006, the Justice Department charged Greg Singleton, a Houston-based energy trader, with obstruction of justice for lying to his employer’s own investigators in a matter involving energy price manipulation. Singleton pled guilty in the case and the obstruction issues were never litigated.

Although it appears that the Justice Department has not pressed this theory in recent years, it is not known whether the Department has threatened or warned witnesses of the possibility of the theory’s continued application. What would be the implications for the government, corporations, and individuals if the Justice Department were to press this legal theory in the future?

Problem 9-2

Consider the question of prosecutorial discretion. To take 2022 as an example, the federal government prosecuted 11 cases of perjury and 495 cases of false statements nationally. How many times would you estimate that each of these crimes was committed? How should one estimate those numbers? How might one assess whether the government is prosecuting too many, too few, or the right number of perjury and false statements cases? What criteria should prosecutors use for selecting which such cases to prosecute as criminal lies?

10. CIVIL REGULATORY ENFORCEMENT; WHISTLEBLOWING

In nearly every area of corporate crime, there is overlap between criminal liability and some form of civil regulatory enforcement, often conducted through a specialized government agency. Every prosecutor and defense attorney working a case in this field must be familiar with the civil regulations and enforcement apparatus that work alongside any relevant criminal provisions.

There is not space here to cover an array of different civil enforcement regimes (those of the EPA, FTC, FDA, DOD, FCC, FAA, and so on through Washington's alphabet soup). The purpose of this chapter is to provide a sense of the civil-criminal overlap by introducing the basic features of one of those regimes: the one governing transactions in securities, administered by the SEC.

The SEC is not a prosecutor and has no authority to bring criminal charges. It must proceed under its own statutory grants of authority. Both the Securities Act of 1933 and the Exchange Act of 1934 grant the SEC extensive civil enforcement powers. The substantive scope of those enforcement provisions extends over all violations of all provisions of the '33 and '34 acts. Of course, those prohibitions include the edicts against securities fraud covered in chapters 3 and 4—and a good deal of SEC enforcement activity is based on that substantive legal theory (fraud). Many cases are also brought to enforce the FCPA, which likewise grants the SEC enforcement powers and which we have also studied.

A. The SEC's Powers: A Brief Summary

The '33 and '34 Acts authorize the SEC to pursue enforcement action on two primary tracks, at the SEC's option:

(1) An **administrative proceeding** brought within the confines and authority of the agency itself, litigated before an administrative law judge who is employed by the Commission. These administrative proceedings are also referred to as "cease and desist proceedings."

(2) A **lawsuit** filed in United States District Court for injunctive and other relief.

As you read through the statutes below, make lists of the *remedies* that the SEC can obtain through each of these two paths. Again, those remedies don't include imprisonment, but they can be quite potent.

Perhaps the most important power the SEC has been granted by Congress is the subpoena power, as it is the power to get cases going in the first place. SEC enforcement lawyers can subpoena testimony under oath "before the Commission" (which is actually something just like a deposition that takes place in a conference room with lawyers present for both sides) as well as documents. Much of SEC practice is conducted during

this investigative phase, as government and defense counsel skirmish over the scope of subpoenas, who will be called to testify, what questions will be asked, and the like.

Importantly, in civil proceedings, there is no Fifth Amendment right to not have one's refusal to answer questions used against one. In other words, a witness can "take the Fifth" when subpoenaed to testify before the SEC in order to protect herself in potential parallel criminal proceedings, but that silence can be used as evidence against her in any SEC litigation.

Over roughly a decade prior to 2024, the defense bar had been complaining that the SEC was choosing administrative proceedings over federal court lawsuits more often than it used to, allegedly to exploit the "home court advantage" said to exist in litigating before its own administrative law judges (ALJs). Litigants and advocacy groups began pressing a variety of constitutional challenges to administrative adjudication that had the potential to upend not only SEC administrative enforcement but also forms of administrative adjudication in other federal agencies.

The Supreme Court has now ruled, in *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), that the imposition of money penalties in administrative proceedings based on allegations of securities fraud violates the right to a jury trial under the Seventh Amendment of the Constitution. The constitutional text speaks of "suits at common law." The Court reasoned that a cause of action for money based on securities fraud laws that grew out of common law fraud doctrine, even if brought by a public enforcer under a statute, is the sort of case the Seventh Amendment was meant to cover. In the wake of *Jarkesy*, the SEC will be unable to seek money penalties in ALJ proceedings, at least if the case is based on a theory of fraud. It will be some time before we know how much of the SEC's administrative docket will shift to district court lawsuits and how much of it, involving non-monetary sanctions and/or non-fraud cases, will remain within the agency process.

A last introductory point about SEC enforcement procedure. The Commission long ago decided to afford defendants something called a "*Wells* notice" or a "*Wells* proceeding." Under this procedure, potential SEC defendants, unlike most potential criminal defendants, receive advance notice of charges the SEC is considering bringing. Lawyers can then file what amounts to a brief, attempting to persuade the SEC not to bring the charges. The Commissioners themselves, who must vote on every enforcement action, review defendants' *Wells* submissions along with the materials that the SEC's enforcement attorneys prepare to justify their recommendations of action.³

³ For more depth, but not too much, on SEC enforcement—which can merit a separate law school course—consider reading Chapter 15 of the most recent edition of *Understanding Securities Law* (LexisNexis) by Mark Steinberg.

B. Statutes

As discussed in Chapter 3, the '34 Act regulates the exchanges and trading markets. Its key enforcement provisions, which are the most common vehicles for SEC enforcement proceedings, are excerpted below. The '33 Act, which regulates the process of initial offerings, has similar enforcement provisions that are not provided here.

Selected Enforcement Provisions of the Securities Exchange Act of 1934

Section 21 (15 U.S.C. § 78u). Investigations and actions

(a) Authority and discretion of Commission to investigate violations

- (1) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated, or, as to any act or practice, or omission to act, while associated with a member, formerly associated with a member, the rules of a registered clearing agency in which such person is a participant, or, as to any act or practice, or omission to act, while a participant, was a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm, a person associated with such a firm, or, as to any act, practice, or omission to act, while associated with such firm, a person formerly associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this chapter, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates . . .

(b) Attendance of witnesses; production of records

For the purpose of any such investigation, or any other proceeding under this chapter, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the

production of any such records may be required from any place in the United States or any State at any designated place of hearing.

- (c) Judicial enforcement of investigative power of Commission; refusal to obey subpoena; criminal sanctions

In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpoena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than \$1,000 or to imprisonment for a term of not more than one year, or both.

- (d) Injunction proceedings; authority of court to prohibit persons from serving as officers and directors; money penalties in civil actions

- (1) Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any

provision of this chapter or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter.

- (2) Authority of court to prohibit persons from serving as officers and directors

In any proceeding under paragraph (1) of this subsection, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated section 78j(b) of this title or the rules or regulations thereunder from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 78l of this title or that is required to file reports pursuant to section 78o(d) of this title if the person's conduct demonstrates unfitness to serve as an officer or director of any such issuer.

- (3) Money penalties in civil actions

- (A) Authority of Commission

Whenever it shall appear to the Commission that any person has violated any provision of this chapter, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 78u-3 of this title, other than by committing a violation subject to a penalty pursuant to section 78u-1 of this title, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.

- (B) Amount of penalty

- (i) First tier

The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (I) \$5,000 for a natural person or \$50,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation.

- (ii) Second tier

Notwithstanding clause (i), the amount of penalty for each such violation shall not exceed the greater of (I) \$50,000 for a natural person or \$250,000 for any other

person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(iii) Third tier

Notwithstanding clauses (i) and (ii), the amount of penalty for each such violation shall not exceed the greater of (I) \$100,000 for a natural person or \$500,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if—

(aa) the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(bb) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons . . .

(D) Special provisions relating to a violation of a cease-and-desist order

In an action to enforce a cease-and-desist order entered by the Commission pursuant to section 78u-3 of this title, each separate violation of such order shall be a separate offense, except that in the case of a violation through a continuing failure to comply with the order, each day of the failure to comply shall be deemed a separate offense . . .

(5) Equitable relief

In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors⁴. . . .

⁴ Federal courts have long held that “equitable relief” within the meaning of this statute can include an order requiring the violator to disgorge all profits gained as a result of the violation (“disgorgement”). The SEC commonly seeks this remedy. In *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), the Supreme Court held that the remedy of disgorgement is a form of “penalty,” not a

(7) Disgorgement.—

In any action or proceeding brought by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may order, disgorgement.

Section 21C (15 U.S.C. § 78u-3). Cease-and-desist proceedings

(a) Authority of Commission

If the Commission finds, after notice and opportunity for hearing, that any person is violating, has violated, or is about to violate any provision of this chapter, or any rule or regulation thereunder, the Commission may publish its findings and enter an order requiring such person, and any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation. Such order may, in addition to requiring a person to cease and desist from committing or causing a violation, require such person to comply, or to take steps to effect compliance, with such provision, rule, or regulation, upon such terms and conditions and within such time as the Commission may specify in such order. Any such order may, as the Commission deems appropriate, require future compliance or steps to effect future compliance, either permanently or for such period of time as the Commission may specify, with such provision, rule, or regulation with respect to any security, any issuer, or any other person.

(b) Hearing

The notice instituting proceedings pursuant to subsection (a) of this section shall fix a hearing date not earlier than 30 days nor later than 60 days after service of the notice unless an earlier or a later date is set by the Commission with the consent of any respondent so served. . . .

(c) Authority to enter order requiring accounting and disgorgement

In any cease-and-desist proceeding under subsection (a) of this section, the Commission may enter an order requiring accounting and disgorgement, including reasonable interest. The Commission is authorized to adopt rules, regulations, and orders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement this subsection.

remedial sanction as the SEC argued, and is thus subject to the 5-year statute of limitations that applies to SEC actions seeking to impose penalties.

- (f) Authority of the Commission to prohibit persons from serving as officers or directors

In any cease-and-desist proceeding under subsection (a) of this section, the Commission may issue an order to prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who has violated section 78j(b) of this title or the rules or regulations thereunder, from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 78l of this title, or that is required to file reports pursuant to section 78o(d) of this title, if the conduct of that person demonstrates unfitness to serve as an officer or director of any such issuer.

Section 21B (15 U.S.C. § 78u-2). Civil remedies in administrative proceedings

- (a) Commission authority to assess money penalties

- (1) In general

In any proceeding instituted pursuant to sections 78o(b)(4), 78o(b)(6), 78o-4, 78o-5, 78o-6, 78o-7, or 78q-1 of this title against any person, the Commission or the appropriate regulatory agency may impose a civil penalty if it finds, on the record after notice and opportunity for hearing, that such penalty is in the public interest and that such person—

- (A) has willfully violated any provision of the Securities Act of 1933 [15 U.S.C.A. § 77a et seq.], the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 et seq.], the Investment Advisers Act of 1940 [15 U.S.C.A. § 80b-1 et seq.], or this chapter, or the rules or regulations thereunder, or the rules of the Municipal Securities Rulemaking Board;
- (B) has willfully aided, abetted, counseled, commanded, induced, or procured such a violation by any other person;
- (C) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission or with any other appropriate regulatory agency under this chapter, or in any proceeding before the Commission with respect to registration, any statement which was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein; or
- (D) has failed reasonably to supervise, within the meaning of section 78o(b)(4)(E) of this title, with a view to preventing violations of the provisions of such statutes, rules and

regulations, another person who commits such a violation, if such other person is subject to his supervision;

(2) Cease-and-desist proceedings

In any proceeding instituted under section 78u-3 of this title against any person, the Commission may impose a civil penalty, if the Commission finds, on the record after notice and opportunity for hearing, that such person—

- (A) is violating or has violated any provision of this chapter, or any rule or regulation issued under this chapter; or
- (B) is or was a cause of the violation of any provision of this chapter, or any rule or regulation issued under this chapter.

(b) Maximum amount of penalty

(1) First tier

The maximum amount of penalty for each act or omission described in subsection (a) of this section shall be \$5,000 for a natural person or \$50,000 for any other person.

(2) Second tier

Notwithstanding paragraph (1), the maximum amount of penalty for each such act or omission shall be \$50,000 for a natural person or \$250,000 for any other person if the act or omission described in subsection (a) of this section involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(3) Third tier

Notwithstanding paragraphs (1) and (2), the maximum amount of penalty for each such act or omission shall be \$100,000 for a natural person or \$500,000 for any other person if—

- (A) the act or omission described in subsection (a) of this section involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and
- (B) such act or omission directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the act or omission.

(c) Determination of public interest

In considering under this section whether a penalty is in the public interest, the Commission or the appropriate regulatory agency may consider—

- (1) whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement;
 - (2) the harm to other persons resulting either directly or indirectly from such act or omission;
 - (3) the extent to which any person was unjustly enriched, taking into account any restitution made to persons injured by such behavior;
 - (4) whether such person previously has been found by the Commission, another appropriate regulatory agency, or a self-regulatory organization to have violated the Federal securities laws, State securities laws, or the rules of a self-regulatory organization, has been enjoined by a court of competent jurisdiction from violations of such laws or rules, or has been convicted by a court of competent jurisdiction of violations of such laws or of any felony or misdemeanor described in section 78o(b)(4)(B) of this title;
 - (5) the need to deter such person and other persons from committing such acts or omissions; and
 - (6) such other matters as justice may require . . .
- (e) Authority to enter order requiring accounting and disgorgement

In any proceeding in which the Commission or the appropriate regulatory agency may impose a penalty under this section, the Commission or the appropriate regulatory agency may enter an order requiring accounting and disgorgement, including reasonable interest. The Commission is authorized to adopt rules, regulations, and orders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement this subsection. . .

C. Parallel Proceedings

The following D.C. Circuit decision is a leading case on whether subjects of overlapping civil and criminal investigations have any way to complain about being attacked by the government on two fronts at once. See how the D.C. Circuit answers this question.

SEC v. DRESSER INDUSTRIES, INC., 628 F.2d 1368 (D.C. Cir. 1980) (en banc)

J. SKELLY WRIGHT, Chief Judge:

Dresser Industries, Inc. (Dresser) appeals from a decision of the District Court requiring obedience to a subpoena duces tecum issued by the Securities and Exchange Commission (SEC) on April 21, 1978, and denying Dresser's motion to quash the subpoena. The subpoena was issued in connection with an SEC investigation into Dresser's use of corporate funds to make what are euphemistically called "questionable foreign payments," and into the adequacy of Dresser's disclosures of such payments under the securities laws.

The principal issue facing this en banc court is whether Dresser is entitled to special protection against this SEC subpoena because of a parallel investigation into the same questionable foreign payments now being conducted by a federal grand jury under the guidance of the United States Department of Justice (Justice). Dresser argues principally that the SEC subpoena abuses the civil discovery process of the SEC for the purpose of criminal discovery and infringes the role of the grand jury in independently investigating allegations of criminal wrongdoing. . . .

Illegal and questionable corporate payments surfaced as a major public problem in late 1973, when several major scandals implicated prominent American corporations in improper use of corporate funds to influence government officials in the United States and foreign countries. The exposure of these activities disrupted public faith in the integrity of our political system and eroded international trust in the legitimacy of American corporate operations abroad. SEC investigation revealed that many corporate officials were falsifying financial records to shield questionable foreign and domestic payments from exposure to the public and even, in many cases, to corporate directors and accountants. Since the completeness and accuracy of corporate financial reporting is the cornerstone of federal regulation of the securities markets, such falsification became a matter of grave concern to the SEC.

Beginning in the spring of 1974 the SEC brought a series of injunctive actions against certain American corporations. It obtained consent decrees prohibiting future violations of the securities laws and establishing internal corporate procedures for investigation, disclosure, and prevention of illegal corporate payments. However, the problem of questionable foreign payments proved so widespread that the SEC devised a "Voluntary Disclosure Program" to encourage corporations to conduct investigations of their past conduct and make appropriate disclosures without direct SEC coercion. Participation in the Voluntary Disclosure Program would not insulate a corporation from an SEC enforcement action, but the Commission would be less likely to exercise its discretion to initiate enforcement actions against participants. The most important elements of the Voluntary Disclosure Program were (1) an independent committee of the corporation would conduct a thorough investigation into questionable foreign and domestic payments made by the corporation; (2) the committee would disclose the results of this investigation to the board of directors in full; (3) the corporation would disclose the substance of the report to the public and the SEC on Form 8-K; and (4) the corporation would issue a policy statement prohibiting future questionable and illegal payments and maintenance of false or incomplete records in connection with them. Except in

“egregious cases” the SEC would not require that public disclosures include specific names, dates, and places. Rather, the disclosures might be “generic” in form. Thus companies participating in the Voluntary Disclosure Program would ordinarily be spared the consequences to their employees, property, and business that might result from public disclosure of specific instances of foreign bribery or kickbacks. However, companies participating in the Voluntary Disclosure Program had to agree to grant SEC requests for access to the final report and to the unexpurgated underlying documentations.

On January 27, 1976 an attorney and other representatives of Dresser met with members of the SEC staff to discuss a proposed filing. At the meeting Dresser agreed to conduct an internal inquiry into questionable foreign payments, in accordance with the terms of the Voluntary Disclosure Program. The next day Dresser submitted a Form 8-K describing, in generic terms, one questionable foreign payment. On November 11, 1976 Dresser filed a second Form 8-K reporting the results of the internal investigation. On February 10, 1977 the company supplemented this report with a third Form 8-K concerning a questionable payment not reported in the earlier reports. The reports concerned Dresser’s foreign activities after November 1, 1973. All disclosures were in generic, not specific, terms.

As part of its general monitoring program, the SEC staff requested access to the documents underlying Dresser’s report. On July 15, 1977 Dresser refused to grant such access. The company argued that allowing the staff to make notes or copies might subject its documents to public disclosure through the Freedom of Information Act. Dresser stated that such disclosure could endanger certain of its employees working abroad. During the ensuing discussions with the staff Dresser attempted to impose conditions of confidentiality upon any SEC examination of its documents, but the staff did not agree. Instead, it issued a recommendation to the Commission for a formal order of investigation in the Dresser case. This recommendation was predicated on the staff’s conclusions that Dresser:

1. may have used corporate funds for non-corporate purposes;
2. may have made false and misleading statements concerning the existence of and circumstances surrounding material obligations of Dresser to certain foreign governments and to other entities; and
3. may have made false entries and caused false entries to be made upon the books and records of Dresser, and its affiliates and subsidiaries with respect to, among other things, payments to foreign government officials.

Moreover, the staff reported that Dresser’s proxy soliciting materials, reports, and statements may have been misleading with respect to the potential risks involved in its conduct of business through questionable foreign payments, and may have included false

statements in connection with such payments. Dresser vigorously opposed issuance of an order of investigation.

Meanwhile, the Department of Justice had established a task force on transnational payments to investigate possible criminal violations arising from illegal foreign payments. Two SEC attorneys participated in the task force. In the summer of 1977 the Justice task force requested access to SEC files on the approximately 400 companies, including Dresser, that had participated in the Voluntary Disclosure Program. Pursuant to Commission authorization the SEC staff transmitted all such files to the Justice task force in August 1977. After its preliminary investigation of the Form 8-K's submitted by Dresser under the Voluntary Disclosure Program, Justice presented Dresser's case to a grand jury in the District of Columbia on January 25, 1978.

Before any summons or subpoena had issued in either the SEC or the grand jury investigation, Dresser filed suit in the Southern District of Texas against the SEC and Justice to enjoin any further investigation of it by either agency. While Dresser's suit was pending in the Southern District of Texas, the District of Columbia grand jury subpoenaed Dresser's documents on April 21, 1978. At roughly the same time the SEC issued a formal order of private investigation, authorizing the staff to subpoena the documents and to obtain other relevant evidence. Pursuant to that order the staff issued a subpoena duces tecum, returnable on May 4, 1978. This subpoena covered substantially the same documents and materials subpoenaed by the grand jury, and more. Dresser did not respond to the subpoena. . . .

Then, on June 30, 1978, the District Court (Flannery, J.) issued a memorandum opinion and order rejecting all of Dresser's objections to the SEC subpoena and requiring Dresser to comply with the subpoena within ten days after notice from the SEC. Rehearing was denied on July 15. This appeal followed. . . .

The civil and regulatory laws of the United States frequently overlap with the criminal laws, creating the possibility of parallel civil and criminal proceedings, either successive or simultaneous. In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence. . . .

The Constitution, therefore, does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings. Nevertheless, a court may decide in its discretion to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions "when the interests of justice seem () to require such action, sometimes at the request of the prosecution, . . . sometimes at the request of the defense(.)" *United States v. Kordel*. The court must make such determinations in the light of the particular circumstances of the case.

Other than where there is specific evidence of agency bad faith or malicious governmental tactics, the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter.

The noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case. If delay of the noncriminal proceeding would not seriously injure the public interest, a court may be justified in deferring it. . . . In some such cases, however, the courts may adequately protect the government and the private party by merely deferring civil discovery or entering an appropriate protective order. *Gordon v. FDIC*. The case at bar is a far weaker one for staying the administrative investigation. No indictment has been returned; no Fifth Amendment privilege is threatened; Rule 16(b) has not come into effect; and the SEC subpoena does not require Dresser to reveal the basis for its defense.

The case at bar concerns enforcement of the securities laws of the United States, especially the Securities Act of 1933 ('33 Act), 48 Stat. 74, 15 U.S.C. § 77a et seq. (1976), and the Securities Exchange Act of 1934 ('34 Act), 48 Stat. 881, 15 U.S.C. § 78a et seq. (1976). These statutes explicitly empower the SEC to investigate possible infractions of the securities laws with a view to both civil and criminal enforcement, and to transmit the fruits of its investigations to Justice in the event of potential criminal proceedings. . . .

Under the same subsection of the '34 Act the SEC may "transmit such evidence as may be available concerning such acts or practices . . . to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter."

Effective enforcement of the securities laws requires that the SEC and Justice be able to investigate possible violations simultaneously. Dissemination of false or misleading information by companies to members of the investing public may distort the efficient workings of the securities markets and injure investors who rely on the accuracy and completeness of the company's public disclosures. If the SEC suspects that a company has violated the securities laws, it must be able to respond quickly: it must be able to obtain relevant information concerning the alleged violation and to seek prompt judicial redress if necessary. Similarly, Justice must act quickly if it suspects that the laws have been broken. Grand jury investigations take time, as do criminal prosecutions. If Justice moves too slowly the statute of limitations may run, witnesses may die or move away, memories may fade, or enforcement resources may be diverted. The SEC cannot always wait for Justice to complete the criminal proceedings if it is to obtain the necessary prompt civil remedy; neither can Justice always await the conclusion of the civil proceeding without endangering its criminal case. Thus we should not block parallel investigations by these agencies in the absence of "special circumstances" in which the nature of the proceedings demonstrably prejudices substantial rights of the investigated party or of the government. . . .

The investigation of Dresser based as it was on the staff's conclusion that Dresser may have engaged in conduct seriously contravening the securities laws falls squarely within the Commission's explicit investigatory authority. . . .

Since the validity of summonses or subpoenas “depend(s) ultimately on whether they were among those authorized by Congress,” *United States v. LaSalle Nat’l Bank*, we conclude that this subpoena is enforceable under the rule of that case.

Fulfillment of the SEC’s civil enforcement responsibilities requires this conclusion. Unlike the IRS, which can postpone collection of taxes for the duration of parallel criminal proceedings without seriously injuring the public, the SEC must often act quickly, lest the false or incomplete statements of corporations mislead investors and infect the markets. Thus the Commission must be able to investigate possible securities infractions and undertake civil enforcement actions even after Justice has begun a criminal investigation. For the SEC to stay its hand might well defeat its purpose. . . .

No one would suggest that the grand jurors, unassisted by accountants, lawyers, or others schooled in the arcana of corporate financial accounting, could sift through the masses of Dresser’s corporate documents and arrive at a coherent picture of the company’s foreign payments and disclosure practices. In this area, as in many areas of great complexity, the grand jurors are assisted guided and influenced, in fact not only by the United States Attorneys assigned to the investigation, but also by experts provided by the federal regulatory agencies with experience in the particular subject areas. This expert assistance is permitted under Rule 6(e), and it promotes the efficiency and rationality of the criminal investigative process. In this case two SEC agents have been assigned to Justice’s task force on transnational payments to assist in the investigation of companies possibly involved in illegal foreign payments. There can be little doubt that the grand jury’s deliberations will be influenced by the work of these SEC agents. Any additional influence that might arise as a result of enforcement of the SEC subpoena and transmittal of documents to Justice thereafter is likely to be inconsequential. . . .

We conclude that the danger that enforcement of this subpoena might infringe the role of the grand jury is too speculative and remote at this point to justify so extreme an action as denying enforcement of this subpoena.

In essence, Dresser has launched this attack on the parallel SEC and Justice proceedings in order to obtain protection against the bare SEC proceeding, which it fears will result in public disclosure of sensitive corporate documents. The prejudice Dresser claims it will suffer from the parallel nature of the proceedings is speculative and undefined if indeed Dresser would suffer any prejudice from it at all. Any entitlement to confidential treatment of its documents must arise under the laws pertaining to the SEC; the fortuity of a parallel grand jury investigation cannot expand Dresser’s rights in this SEC enforcement action. . . .

Congress understands and approves of the “close working relationship” between the agencies in their investigative capacities. Since such a “close working relationship” will govern the activities of the agencies in enforcing the laws against questionable foreign payments under the new statute, it would be impractical for us to attempt to screen the agencies from each other when they are investigating the same sort of offense under the former statutes.

Congress manifestly did not intend that the SEC be forbidden to share information with Justice at this stage of the investigation. Under the panel majority's theory of the case the SEC would be foreclosed from sharing the fruits of its investigation with Justice as soon as Justice begins its own investigation through a grand jury. Only by waiting until the close of the SEC proceeding before initiating its own grand jury investigation could Justice obtain access to the evidence procured by the SEC. In view of Congress' concern that the agencies share information "at the earliest stage of any investigation in order to insure that the evidence needed for a criminal prosecution does not become stale," S. Rep. No. 114, and that the agencies avoid "a costly duplication of effort," H.R. Rep. No. 640, it would be unreasonable to prevent a sharing of information at this point in the investigation. . . .

In the present case the SEC plainly has a legitimate noncriminal purpose for its investigation of Dresser. It follows that the investigation is in good faith, in the absence of complicating factors. There is, therefore, no reason to impose a protective order such as that imposed by the panel majority.

Finally, we note that the panel's modification would serve no compelling purpose, and might interfere with enforcement of the securities laws by the SEC and Justice. As the Second Circuit has said, the procedure permitting the SEC to communicate with Justice during the preliminary stages of an investigation has "significant advantages.":

Allowing early participation in the case by the United States Attorney minimizes statute of limitations problems. The more time a United States Attorney has, the easier it is for him to become familiar with the complex facts of a securities fraud case, to prepare the case, and to present it to a grand jury before expiration of the applicable statute of limitations. Earlier initiation of criminal proceedings moreover is consistent with a defendant's right to a speedy trial. . . .

The panel's modification would "interfere with this commendable example of inter-agency cooperation," to the detriment of securities law enforcement and in contravention of the will of Congress. On the other side of the balance, the panel's concern for preserving the limitations on criminal discovery is largely irrelevant at this stage of the proceedings, as Dresser agrees. Thus this would be an inappropriate situation to impose a "prophylactic" rule against cooperation between the agencies. We believe the courts can prevent any injustice that may arise in the particular circumstances of parallel investigations in the future.

The next, more recent case, while a single district court decision, provides an example of a court finding the government to have gone far enough to have crossed the outer limit described in *Dresser Industries*.

UNITED STATES v. SCRUSHY, 366 F.Supp.2d 1134 (N.D. Ala. 2005)

BOWDRE, J., District Court Judge:

[The defendant Richard Scrushy was the former CEO of HealthSouth, a large public company based in Birmingham, Alabama which the government investigated for accounting fraud during the same era as the Enron prosecutions.]

This matter comes before the court on the Defendant's "Motion to Suppress Defendant's S.E.C. Deposition and for Exclusion of Tape-Recorded Conversations" filed on April 7, 2005. The Government responded on April 8, 2005. The court conducted a hearing on this matter on April 11, 2005. For the reasons discussed below, the motion to suppress the S.E.C. deposition is GRANTED. As a consequence of the suppression of the S.E.C. testimony and the lack of any other evidence, Counts 30, 31, and 32, the perjury counts based on that testimony, will be dismissed with prejudice at the appropriate time. . . .

The Defendant filed this motion as a direct result of the trial testimony of Neil Seiden, Senior Accountant with the S.E.C. Department of Enforcement, Atlanta, given in open court on April 5, 2005. During Mr. Seiden's testimony, the defense and the court learned for the first time that the S.E.C. had cooperated with the United States Attorney's office in the taking of Mr. Scrushy's testimony in Birmingham, Alabama, on March 14, 2003. In fact, Government counsel had affirmatively represented to the court on April 5, 2005, the day of Mr. Seiden's testimony, that Mr. Scrushy's deposition had been moved from Atlanta to Birmingham at the request of Mr. Scrushy's attorneys and not because of any request from the U.S. Attorney's office. These representations proved false. The court does not believe, however, that Government counsel deliberately misrepresented the facts to the court.

Mr. Seiden testified on April 5, 2005, that Mr. Scrushy's deposition had been scheduled to take place on Friday March 14, 2003, in Atlanta, Georgia and until Wednesday, March 12—two days before the scheduled deposition—his office received a call from the U.S. Attorney's office that lasted fifteen to twenty minutes. He further testified that, as a result of this call, the location of the deposition was changed from Atlanta to Birmingham. Although Mr. Seiden testified that Mr. Scrushy's attorneys had previously requested the change, he also testified that "[t]he U.S. Attorney's office asked us—had a preference that we take Mr. Scrushy's testimony in Birmingham. . . ." This answer that revealed the U.S. Attorney's office, in fact, had input into the location of the Defendant's deposition—as defense counsel had suspected but Government counsel had explicitly denied—raised legal questions concerning the admissibility of the Defendant's S.E.C. testimony. The court recessed early and sought the guidance of legal briefs from both sides, which the court has received and reviewed, on the admissibility of that deposition.

On April 11, 2005, the court conducted a hearing on the motion where additional testimony was elicited from Mr. Seiden. Specifically, Mr. Seiden testified that on March 12, 2003, around 3:30 p.m., a conference call was held between the U.S. Attorney's office in Birmingham and the S.E.C. office in Atlanta. On the call were Mr. Seiden, Ron

Crawford, and Robert Lough for the S.E.C.; George Martin and Pat Meadows from the U.S. Attorney's office; and Agent Gerry Kelly of the F.B.I.

During that call, Mr. Martin revealed to the S.E.C. investigators that Weston Smith and Bill Owens had disclosed to the U.S. Attorney's office that a massive fraud had been occurring at HealthSouth since its inception that exceeded one billion dollars and that Mr. Scrushy allegedly knew of the fraud. Mr. Seiden was then asked to be present at the subsequent interviews of Mr. Smith and Mr. Owens scheduled for that Friday. Mr. Seiden recounted that conversation saying, "And they said, well, we really want Neil *to participate* on Friday. . . . [W]e would really like Neil to sit in and *participate* in the interviews, because we need his accounting help on this." Mr. Seiden was requested to move the deposition of Mr. Scrushy to Birmingham so that he (Seiden) would be available to participate in the interviews. Mr. Martin or Mr. Meadows suggested that Mr. Scrushy might be more comfortable on his own turf, and more inclined to testify truthfully. Mr. Martin then stated that "if [Mr. Scrushy] lies, then he will be lying in our district." Prior to learning about the massive accounting fraud at HealthSouth in the March 12th phone conference and the request by the U.S. Attorney's office to move the deposition, the S.E.C.'s preference was to conduct the testimony in Atlanta, and Mr. Seiden, up to that point, knew of no reason to move the deposition to Birmingham.

The assistant U.S. attorneys requested Mr. Seiden specifically NOT to ask Mr. Scrushy about certain areas, including cash; property, plant and equipment ("PP&E"); and accounts payable. Mr. Seiden asked whether he could inquire about income statements or earnings per share and Mr. Martin told him that he could not do so.

Mr. Seiden received directions from his supervisor that he was to honor the United States Attorney's request, and he did so. As instructed by the U.S. Attorney's office, Mr. Seiden waited for Mr. Scrushy's attorneys to raise again their request that his deposition be moved to Birmingham because the U.S. Attorney's office did not want to let "them" know that the government knew about the fraud. According to Mr. Seiden, "them" referred to Mr. Scrushy and his attorneys. Mr. Seiden testified upon questioning by the court that, prior to the March 12, 2003, conversation with the U.S. Attorney's office, that he knew of no reason to move the deposition to Birmingham as previously requested by Mr. Scrushy's counsel. He stated that the deposition was moved because Mr. Scrushy's counsel pointed out that the room in Atlanta was too small; the S.E.C. wanted more time to question Mr. Scrushy because of the revelation of fraud from the U.S. Attorney's office; and because of the request from the U.S. Attorney's office.

Prior to Mr. Scrushy's deposition, according to Mr. Seiden, the decision had been made that Mr. Seiden would be available to participate in the interviews of Mr. Smith and Mr. Owens. Regardless of where Mr. Scrushy's deposition was taken, Mr. Seiden testified: "I apparently was out of there one way or the other, I apparently was going to Birmingham on Thursday, one way or the other."

At the deposition on March 14, 2003, Mr. Seiden did not advise Mr. Scrushy or his attorneys of the existence of the criminal investigation into the fraud at HealthSouth, or

of Mr. Smith's and Mr. Owens' cooperation with the Department of Justice. Mr. Scrushy was asked a series of questions at his deposition based on information learned in the March 12th phone call. Mr. Seiden testified that, had it not been for the March 12th call from the U.S. Attorney's office, these questions would not have been asked at this deposition.

At the conclusion of Mr. Scrushy's deposition, Mr. Seiden and Mr. Lough went directly to the U.S. Attorney's office. On the next day, Saturday, March 15, 2003, Mr. Seiden participated in the interview of Weston Smith, and on Sunday, March 16, he participated in the interview of Bill Owens.

The Government asserts that the SEC civil investigation and the Department of Justice criminal investigation involved different criminal conduct. However, the testimony of Mr. Seiden elicited by Government counsel reflected a serious overlap in those investigations. Both the criminal investigation and the SEC investigation concerned aspects of accounting fraud at HealthSouth. According to the Formal Order of Investigation, the SEC investigation included "any false statements or omissions in HealthSouth's quarterly reports or press releases relating to any historical revenues or future revenues."

The issue before this court is whether the Government departed from the proper administration of criminal justice in procuring the Defendant's deposition testimony. The court finds that the Government clearly so departed. The civil action and the criminal investigation improperly merged on March 12, 2003, when the U.S. Attorney's office called the S.E.C. office, gave the S.E.C. advice or "preferences" regarding the content of the deposition and its location, and recruited Neil Seiden to participate in the interviews of Bill Owens and Weston Smith in the criminal investigation.

Counsel for both sides agree on some of the basic principles of law that must guide the court in its decision. Federal courts have supervisory authority over the manner in which Federal agents exercise their power. *Rea v. United States*; *United States v. Parrott*. However, a defendant cannot succeed on a theory of a "perjury trap" when the questions relate to a *legitimate, parallel* investigation. *United States v. Waldon*. The question to which neither side could cite any controlling law is what distinguishes a legitimate, parallel investigation from an improper one. The court could find no controlling authority on this critical point. . . .

In the instant case, the Government had both notice and direct input. Mr. Seiden received explicit directions from the U.S. Attorney's office concerning tailoring his examination of Mr. Scrushy. He was told areas to avoid to keep Mr. Scrushy in the dark regarding the criminal investigation, and Mr. Seiden specifically included questions in the examination that he would not have included had the U.S. Attorney's office not contacted the S.E.C. and discussed the criminal investigation. Further, the deposition was moved to Birmingham at the U.S. Attorney's request, thus changing the venue of the subsequent perjury charges from the Northern District of Georgia to the Northern District of Alabama.

The Government's assertion that the civil testimony should not be suppressed because the taking of the civil deposition could not be imputed to law enforcement is disingenuous at best. Mr. Seiden is a member of the enforcement division of the S.E.C. His job is to enforce the laws that regulate securities. He is employed by the United States Government—the same United States Government whose Department of Justice is prosecuting this case. Further, he crossed over to the criminal investigation as a result of the phone conversation on March 12, 2003. The actions by Mr. Seiden in changing the venue of the deposition to accommodate the U.S. Attorney's office, extending the length of the deposition, and asking additional questions that otherwise would not have been asked after learning of the criminal investigation are properly imputed to the Government for purposes of this motion.

Despite the Government's assertions that the S.E.C. civil investigation was separate from and parallel to the Justice Department's criminal investigation, the facts belie that assertion. To be parallel, by definition, the separate investigations should be like the side-by-side train tracks that never intersect. By contrast, as of March 12, 2003, at 3:30 p.m., the S.E.C. civil investigation merged with the Justice Department criminal investigation. One of the reasons for that conference call was to recruit Mr. Seiden to participate in the criminal investigation. He was asked in that call to be present at and participate in the interviews of Mr. Smith and Mr. Owens. He, in fact, participated in those interviews that were originally scheduled for Friday, March 14—the same day as Mr. Scrushy's deposition—and that actually occurred in the two days following Mr. Scrushy's deposition. The need to have Mr. Seiden available to the Government was one of the reasons why Mr. Martin or Mr. Meadows stated the Government's "preference" that Mr. Scrushy's testimony be taken in Birmingham. . . .

When a defendant *knows* that he has been charged with a crime, or that a criminal investigation has targeted him, he can take actions to prevent the providing of information in an administrative or civil proceeding that could later be used against him in the criminal case. When a defendant does not know about the criminal investigation, the danger of prejudice increases. Failing to advise Mr. Scrushy or his attorneys about the criminal investigation of which he was a target, and that the deposition had been moved to accommodate the need of the U.S. Attorney's office to bring into the criminal investigation one of the very S.E.C. investigators who was questioning Mr. Scrushy, *and* the change of the deposition's location for venue purposes cannot be said to be in keeping with the proper administration of justice. Our justice system cannot function properly in the face of such cloak and dagger activities by those charged with upholding the integrity of the justice system. . . .

Because the Government manipulated the simultaneous investigations for its own purposes, including the transfer of Mr. Scrushy's deposition into this district for venue purposes, the court finds that the utilization of Mr. Scrushy's deposition in this case departs from the proper administration of justice. Therefore, the S.E.C. testimony must be excluded. The Government represented on the Record to the court that it has no evidence of perjury apart from Mr. Scrushy's S.E.C. deposition. As a result, the perjury

counts, Counts 30, 31, and 32, of the Superseding Indictment based on that testimony will be dismissed at the appropriate time. . . .

D. SEC Settlements

The overwhelming majority of SEC enforcement actions conclude in settlements of the sort described in the following case. Should judges have any substantive role in reviewing such settlements? One influential district judge thought so, but was then reversed as you can see here.

SEC v. CITIGROUP GLOBAL MARKETS INC., 827 F. Supp. 2d 328 (S.D.N.Y. 2011)

JED S. RAKOFF, U.S.D.J.

On October 19, 2011, the U.S. Securities and Exchange Commission (the “S.E.C”) filed this lawsuit, accusing defendant Citigroup Global Markets Inc. (“Citigroup”) of a substantial securities fraud. According to the S.E.C.’s Complaint, after Citigroup realized in early 2007 that the market for mortgage-backed securities was beginning to weaken, Citigroup created a billion-dollar Fund (known as “Class v Funding III”) that allowed it to dump some dubious assets on misinformed investors. This was accomplished by Citigroup’s misrepresenting that the Fund’s assets were attractive investments rigorously selected by an independent investment adviser, whereas in fact Citigroup had arranged to include in the portfolio a substantial percentage of negatively projected assets and had then taken a short position in those very assets it had helped select. Having structured the Fund as a vehicle for unloading these dubious assets on unwitting investors, Citigroup realized net profits of around \$160 million, whereas the investors, as the S.E.C. later revealed, lost more than \$700 million.

In a parallel Complaint filed the same day against Citigroup employee Brian Stoker, *see U.S. Securities and Exchange Commission v. Brian H. Stoker*, the S.E.C. alleged that Citigroup knew in advance that it would be difficult to sell the Fund if Citigroup disclosed its intention to use it as a vehicle to unload its hand-picked set of negatively projected assets. Specifically, paragraph 25 of the Stoker Complaint alleges (in language some of which is notably missing from the Citigroup Complaint) that:

Citigroup knew it would be difficult to place the liabilities of [the Fund] if it disclosed to investors its intention to use the vehicle to short a hand-picked set of [poorly rated assets] By contrast, Citigroup knew that representing to investors that an experienced third-party investment adviser had selected the portfolio would facilitate the placement of the [Fund’s] liabilities.

Although this would appear to be tantamount to an allegation of knowing and fraudulent intent (“scienter,” in the lingo of securities law), the S.E.C, for reasons of its own, chose

to charge Citigroup only with negligence, in violation of Sections 17(a)(2) and (3) of the Securities Act, 15 U.S.C. § 77q(a)(2) and (3).

Simultaneously with the filing of its Complaint against Citigroup, the S.E.C. presented to the Court for its signature a “Final Judgment As To Defendant Citigroup Global Markets Inc.” (the “Consent Judgment”), together with a Consent of Defendant Citigroup Global Markets Inc. (the “Consent”) that recited that Citigroup consented to the entry of the Consent Judgment “[w]ithout admitting or denying the allegations of the complaint. . . .” The Consent Judgment (I) “permanently restrained and enjoined” Citigroup and its agents, employees, etc., from future violations of Sections 17(a)(2) and (3) of the Securities Act, (II) required Citigroup to disgorge to the S.E.C. Citigroup’s \$160 million in profits, plus \$30 million in interest thereon, and to pay to the S.E.C. a civil penalty in the amount of \$95 million, and (III) required Citigroup to undertake for a period of three years, subject to enforcement by the Court, certain internal measures designed to prevent recurrences of the securities fraud here perpetrated.

Upon receipt of these submissions, the Court, by Order dated October 27, 2011, put some questions to the parties concerning the proposed Consent Judgment, to which the parties responded both in writing, and orally. Since then, the Court has spent long hours trying to determine whether, in view of the substantial deference due the S.E.C. in matters of this kind, the Court can somehow approve this problematic Consent Judgment. In the end, the Court concludes that it cannot approve it, because the Court has not been provided with any proven or admitted facts upon which to exercise even a modest degree of independent judgment.

The Court turns first to the standard of review. In its original Memorandum in support of the proposed Consent Judgment, filed before the case had been assigned to any judge, the S.E.C. expressly endorsed the standard of review set forth by this Court in its *Bank of America* decisions, i.e., “whether the proposed Consent Judgment . . . is fair, reasonable, adequate, and in the public interest.” Memorandum By Plaintiff Securities and Exchange Commission in Support of Proposed Settlement (quoting with approval *SEC v. Bank of America Corp.* (“Bank of America I”)); *see also SEC v. Bank of America Corp.* (“Bank of America II”). This was also the S.E.C.’s stated position in another, intervening proceeding before this Court, *SEC v. Vitesse Semiconductor Corp.* In its most recent filing in this case, however, the S.E.C. partly reverses its previous position and asserts that, while the Consent Judgment must still be shown to be fair, adequate, and reasonable, “the public interest . . . is not part of [the] applicable standard of judicial review.” This is erroneous. A large part of what the S.E.C. requests, in this and most other such consent judgments, is injunctive relief, both broadly, in the request for an injunction forbidding future violations, and more narrowly, in the request that the Court enforce future prophylactic measures (here, for a three-year period). The Supreme Court has repeatedly made clear, however, that a court cannot grant the extraordinary remedy of injunctive relief without considering the public interest. *See, e.g., eBay, Inc. v. MercExchange* (“According to well-established principles of equity, a plaintiff seeking a permanent injunction . . . must demonstrate . . . that the public interest would not be

disserved by a permanent injunction.”). Indeed, the Court has held that “In exercising their discretion, courts should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Winter v. Natural Resources Defense Council, Inc.* (quoting *Weinberger v. Romero-Barcelo*). Similarly, the Second Circuit has repeatedly stated, most recently in *Salinger v. Colting*, that a court “must ensure that the public interests would not be disserved by the issuance” of an injunction.

As a fall-back, the S.E.C. suggests that, if the public interest must be taken into account, the S.E.C. is the sole determiner of what is in the public interest in regard to Consent Judgments settling S.E.C. cases. *See* SEC Mem. (citing *SEC v. Randolph*). That, again, is not the law. Although in its somewhat delphic decision in *Randolph* the Ninth Circuit found that, on the facts of that case, there was no difference between the requirement of reasonableness and the requirement of being in the public interest, it was emphatic in upholding “the appropriateness of a requirement that the decree be in the public interest.” More pertinently, the D.C. Circuit, in *United States v. Trucking Employers, Inc.*, reaffirmed that “prior to approving a consent decree a court must satisfy itself of the settlement’s ‘overall fairness to beneficiaries and consistency with the public interest.’” *Id.* (quoting *United States v. Allegheny Ludlum Industries*). As these and similar authorities make plain, a court, while giving substantial deference to the views of an administrative body vested with authority over a particular area, must still exercise a modicum of independent judgment in determining whether the requested deployment of its injunctive powers will serve, or disserve, the public interest. Anything less would not only violate the constitutional doctrine of separation of powers but would undermine the independence that is the indispensable attribute of the federal judiciary.

As a practical matter, moreover, and as *Randolph* implies, the requirement that a consent judgment be in the public interest is not meaningfully severable from the requirements, still acknowledged by the S.E.C., that the consent judgment be fair, reasonable, and adequate; for all these requirements inform each other. For example, before the Court determines whether the proposed Consent Judgment is adequate, it must answer a preliminary question: adequate for what purpose? The answer, at least in part, is that the settlement must be adequate to ensure that the public interest is protected. *See Randolph* (“the SEC ought to always be required to serve the public interest”). The same analysis applies to the determination of the fairness of the settlement. Before the Court determines whether the settlement is fair, it must ask a preliminary question: fair to whom? As the holding of *Trucking Employers* quoted above makes plain, the answer is fair to the parties and to the public. . . .

Here, the S.E.C.’s long-standing policy—hallowed by history, but not by reason—of allowing defendants to enter into Consent Judgments without admitting or denying the underlying allegations, deprives the Court of even the most minimal assurance that the substantial injunctive relief it is being asked to impose has any basis in fact. There is little real doubt that Citigroup contests the factual allegations of the Complaint. In colloquy with the Court, counsel for Citigroup expressly reconfirmed that his client was not admitting the allegations of the Complaint. He also noted, correctly, that he was

free—notwithstanding the S.E.C.’s gag order precluding Citigroup from contesting the S.E.C.’s allegations in the media—to fully contest the facts in any parallel litigation; and he strongly hinted that Citigroup would do just that.

The S.E.C., by contrast, took the position that, because Citigroup did not expressly deny the allegations, the Court, and the public, somehow knew the truth of the allegations. This is wrong as a matter of law and unpersuasive as a matter of fact. As a matter of law, an allegation that is neither admitted nor denied is simply that, an allegation. It has no evidentiary value and no collateral estoppel effect. It is precisely for this reason that the Second Circuit held long ago, in *Lipsky v. Commonwealth United Corp.*, that “a consent judgment between a federal agency and a private corporation which is not the result of an actual adjudication of any of the issues . . . cannot be used as evidence in subsequent litigation.” It follows that the allegations of the complaint that gives rise to the consent judgment are not evidence of anything either. Indeed the *Lipsky* court went so far as to hold that “neither [an S.E.C.] complaint nor reference to [such] a complaint which results in a consent judgment may properly be cited in the pleadings” in a parallel private action and must instead be stricken.

As for common experience, a consent judgment that does not involve any admissions and that results in only very modest penalties is just as frequently viewed, particularly in the business community, as a cost of doing business imposed by having to maintain a working relationship with a regulatory agency, rather than as any indication of where the real truth lies. This, indeed, is Citigroup’s position in this very case. . . .

It is harder to discern from the limited information before the Court what the S.E.C. is getting from this settlement other than a quick headline. By the S.E.C.’s own account, Citigroup is a recidivist and yet, in terms of deterrence, the \$95 million civil penalty that the Consent Judgment proposes is pocket change to any entity as large as Citigroup. While the S.E.C. claims that it is devoted, not just to the protection of investors but also to helping them recover their losses, the proposed Consent Judgment, in the form submitted to the Court, does not commit the S.E.C. to returning any of the total of \$285 million obtained from Citigroup to the defrauded investors but only suggests that the S.E.C. “may” do so. In any event, this still leaves the defrauded investors substantially short-changed. To be sure, at oral argument, the S.E.C. reaffirmed its long-standing purported support for private civil actions designed to recoup investors’ losses. But in actuality, the combination of charging Citigroup only with negligence and then permitting Citigroup to settle without either admitting or denying the allegations deals a double blow to any assistance the defrauded investors might seek to derive from the S.E.C. litigation in attempting to recoup their losses through private litigation, since private investors not only cannot bring securities claims based on negligence, *see, e.g., Ernst & Ernst v. Hochfelder*, but also cannot derive any collateral estoppel assistance from Citigroup’s non-admission/non-denial of the S.E.C.’s allegations. Nor, as noted, does the public, especially the business public, have any reason to credit those allegations, which remain entirely unproven. . . .

An application of judicial power that does not rest on facts is worse than mindless, it is inherently dangerous. The injunctive power of the judiciary is not a free-roving remedy to be invoked at the whim of a regulatory agency, even with the consent of the regulated. If its deployment does not rest on facts—cold, hard, solid facts, established either by admissions or by trials—it serves no lawful or moral purpose and is simply an engine of oppression.

Finally, in any case like this that touches on the transparency of financial markets whose gyrations have so depressed our economy and debilitated our lives, there is an overriding public interest in knowing the truth. In much of the world, propaganda reigns, and truth is confined to secretive, fearful whispers. Even in our nation, apologists for suppressing or obscuring the truth may always be found. But the S.E.C., of all agencies, has a duty, inherent in its statutory mission, to see that the truth emerges; and if it fails to do so, this Court must not, in the name of deference or convenience, grant judicial enforcement to the agency's contrivances.

Accordingly, the Court refuses to approve the proposed Consent Judgment. Instead, the Court hereby consolidates this case with the Stoker action, adopts the Case Management Order in that action as equally applicable to the instant case, and directs the parties to be ready to try this case on July 16, 2012.

SEC v. CITIGROUP GLOBAL MARKETS, INC., 752 F.3d 285 (2d Cir. 2014)

POOLER, Circuit Judge:

The United States Securities and Exchange Commission (“S.E.C.”) in conjunction with Citigroup Global Markets, Inc. (“Citigroup”) appeals from the November 28, 2011 order of the United States District Court for the Southern District of New York (Rakoff, *J.*) refusing to approve a consent decree entered into by the parties and instead setting a trial date. . . . We now hold that the district court abused its discretion by applying an incorrect legal standard in assessing the consent decree and setting a date for trial. . . .

Our Court recognizes a “strong federal policy favoring the approval and enforcement of consent decrees.” *Wang*. “To be sure, when the district judge is presented with a proposed consent judgment, he is not merely a ‘rubber stamp.’” *S.E.C. v. Levine*. The district court here found it was “required, even after giving substantial deference to the views of the administrative agency, to be satisfied that it is not being used as a tool to enforce an agreement that is unfair, unreasonable, inadequate, or in contravention of the public interest.” *Citigroup I*. Other district courts in our Circuit view “[t]he role of the Court in reviewing and approving proposed consent judgments in S.E.C. enforcement actions [as] ‘restricted to assessing whether the settlement is fair, reasonable and adequate within the limitations Congress has imposed on the S.E.C. to recover investor losses.’” *S.E.C. v. CR Intrinsic Investors, LLC* (quoting *S.E.C. v. Cioffi*); see also *United States v. Peterson* (“A district court has the duty to determine whether a consent decree based on a proposed settlement is ‘fair and reasonable.’”).

The “fair, reasonable, adequate and in the public interest” standard invoked by the district court finds its origins in a variety of cases. Our Court previously held, in the context of assessing a plan for distributing the proceeds of a proposed disgorgement order, that “once the district court satisfies itself that the distribution of proceeds in a proposed S.E.C. disgorgement plan is fair and reasonable, its review is at an end.” *Wang*. The Ninth Circuit—in circumstances similar to those presented here, a proposed consent decree aimed at settling an S.E.C. enforcement action—noted that “[u]nless a consent decree is unfair, inadequate, or unreasonable, it ought to be approved.” *S.E.C. v. Randolph*.

Today we clarify that the proper standard for reviewing a proposed consent judgment involving an enforcement agency requires that the district court determine whether the proposed consent decree is fair and reasonable, with the additional requirement that the “public interest would not be disserved,” *eBay, Inc. v. MercExchange*, in the event that the consent decree includes injunctive relief. Absent a substantial basis in the record for concluding that the proposed consent decree does not meet these requirements, the district court is required to enter the order. . . .

A court evaluating a proposed S.E.C. consent decree for fairness and reasonableness should, at a minimum, assess (1) the basic legality of the decree, *see Benjamin v. Jacobson* (terminating existing consent decrees as required by the Prison Litigation Reform Act); (2) whether the terms of the decree, including its enforcement mechanism, are clear, *see, e.g., Angela R. ex rel. Hesselbein v. Clinton* (district court abused its discretion by approving consent decree that did not properly define the enforcement mechanisms); (3) whether the consent decree reflects a resolution of the actual claims in the complaint; and (4) whether the consent decree is tainted by improper collusion or corruption of some kind. *Cf. Kozlowski v. Coughlin* (“Before entering a consent judgment, the district court must be certain that the decree 1) springs from and serves to resolve a dispute within the court’s subject-matter jurisdiction, 2) comes within the general scope of the case made by the pleadings, and 3) furthers the objectives of the law upon which the complaint was based.” (internal quotation marks and alternations omitted)). Consent decrees vary, and depending on the decree a district court may need to make additional inquiry to ensure that the consent decree is fair and reasonable. The primary focus of the inquiry, however, should be on ensuring the consent decree is procedurally proper, using objective measures similar to the factors set out above, taking care not to infringe on the S.E.C.’s discretionary authority to settle on a particular set of terms.

It is an abuse of discretion to require, as the district court did here, that the S.E.C. establish the “truth” of the allegations against a settling party as a condition for approving the consent decrees. *Citigroup I*. Trials are primarily about the truth. Consent decrees are primarily about pragmatism. “[C]onsent decrees are normally compromises in which the parties give up something they might have won in litigation and waive their rights to litigation.” *United States v. ITT Continental Baking Co.* Thus, a consent decree “must be construed as . . . written, and not as it might have been written had the plaintiff

established his factual claims and legal theories in litigation.” *United States v. Armour & Co.* Consent decrees provide parties with a means to manage risk. “The numerous factors that affect a litigant’s decision whether to compromise a case or litigate it to the end include the value of the particular proposed compromise, the perceived likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt.” *Citigroup III*; see also *Randolph* (“Compromise is the essence of settlement. Even if the Commission’s case against [defendants] is strong, proceeding to trial would still be costly. The S.E.C.’s resources are limited, and that is why it often uses consent decrees as a means of enforcement.” (citation omitted)). These assessments are uniquely for the litigants to make. It is not within the district court’s purview to demand “cold, hard, solid facts, established either by admissions or by trials,” *Citigroup I*, as to the truth of the allegations in the complaint as a condition for approving a consent decree.

As part of its review, the district court will necessarily establish that a factual basis exists for the proposed decree. In many cases, setting out the colorable claims, supported by factual averments by the S.E.C., neither admitted nor denied by the wrongdoer, will suffice to allow the district court to conduct its review. Other cases may require more of a showing, for example, if the district court’s initial review of the record raises a suspicion that the consent decree was entered into as a result of improper collusion between the S.E.C. and the settling party. We need not, and do not, delineate the precise contours of the factual basis required to obtain approval for each consent decree that may pass before the court. It is enough to state that the district court here, with the benefit of copious submissions by the parties, likely had a sufficient record before it on which to determine if the proposed decree was fair and reasonable. On remand, if the district court finds it necessary, it may ask the S.E.C. and Citigroup to provide additional information sufficient to allay any concerns the district court may have regarding improper collusion between the parties. . . .

The job of determining whether the proposed S.E.C. consent decree best serves the public interest, however, rests squarely with the S.E.C., and its decision merits significant deference:

[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: “Our Constitution vests such responsibilities in the public branches.”

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc. (quoting *TVA v. Hill*); see also *In re Cuyahoga Equip. Corp.* (“Appellate courts ordinarily defer to the agency’s expertise and the voluntary agreement of the parties in proposing the settlement.”).

The district court correctly recognized that it was required to consider the public interest in deciding whether to grant the injunctive relief in the proposed injunction. However,

the district court made no findings that the injunctive relief proposed in the consent decree would disserve the public interest, in part because it defined the public interest as “an overriding interest in knowing the truth.” The district court’s failure to make the proper inquiry constitutes legal error. On remand, the district court should consider whether the public interest would be disserved by entry of the consent decree. For example, a consent decree may disserve the public interest if it barred private litigants from pursuing their own claims independent of the relief obtained under the consent decree. What the district court may not do is find the public interest disserved based on its disagreement with the S.E.C.’s decisions on discretionary matters of policy, such as deciding to settle without requiring an admission of liability.

To the extent the district court withheld approval of the consent decree on the ground that it believed the S.E.C. failed to bring the proper charges against Citigroup, that constituted an abuse of discretion. In comparing the complaint filed by the S.E.C. against Citigroup with the complaint filed by the S.E.C. against Stoker, the district court noted that “[a]lthough this would appear to be tantamount to an allegation of knowing and fraudulent intent (‘*scienter*,’ in the lingo of securities law), the S.E.C., for reasons of its own, chose to charge Citigroup only with negligence, in violation of Sections 17(a)(2) and (3) of the Securities Act, 15 U.S.C. § 77q(a)(2) and (3).” The exclusive right to choose which charges to levy against a defendant rests with the S.E.C. *See, e.g., United States v. Microsoft Corp.* (“[T]he district court is not empowered to review the actions or behavior of the Department of Justice; the court is only authorized to review the decree itself.”); *see also Heckler v. Chaney* (“[A]n agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”). Nor can the district court reject a consent decree on the ground that it fails to provide collateral estoppel assistance to private litigants—that simply is not the job of the courts. . . .

For the reasons given above, we vacate the November 28, 2011 order of the district court and remand this case for further proceedings in accordance with this opinion.

Problem 10-1

(a)	Make a brief chart or table that summarizes the SEC’s enforcement powers on the following dimensions: (1) who can the SEC proceed against? (2) what kinds of proceedings can the SEC bring and in what fora? (3) what sanctions can the SEC impose for securities violations?
(b)	Who has the better argument in the matter of the SEC/Citi settlement—Judge Rakoff or the Second Circuit appellate panel? If you were the Chair of the SEC, how would you approach this issue? Consider, in this connection, the chart that follows this problem providing data on recent forms of SEC resolution.
(c)	What is the point of requiring an admission of wrongdoing in a civil settlement, assuming all penalties imposed are otherwise the same?

SEC Enforcement Outcomes 2010-2020

SEC ENFORCEMENT OUTCOMES (ABSOLUTE RESOLUTIONS, FY 2010-2020)						
	YEARS (2010-2015)					
	2010	2011	2012	2013	2014	2015
NEITHER ADMIT NOR DENY	45	47	33	30	38	75
ADMISSION OF GUILT	0	1	2	1	7	7
DEFENDANT PREVAILS	0	0	1	0	0	0
SEC DISMISSED CASE	1	0	1	1	1	0
OTHER	2	0	4	5	6	3
	YEARS (2016-2020)					
	2016	2017	2018	2019	2020	
NEITHER ADMIT NOR DENY	85	50	66	83	53	
ADMISSION OF GUILT	8	10	5	8	5	
DEFENDANT PREVAILS	1	0	0	0	0	
SEC DISMISSED CASE	0	1	1	0	0	
OTHER	3	5	2	4	3	

E. Whistleblowers and SEC Enforcement

Generally speaking, whistleblower laws in the U.S. follow one or both of two models: (1) statutory protections against employers retaliating against whistleblowers, often providing whistleblowers with a cause of action for damages in such circumstances (“anti-retaliation” provisions); (2) financial rewards for whistleblowers who provide information that leads to successful enforcement recoveries (“bounty” provisions). The following are prominent examples of each form of statutory regime, in the context of securities regulation.

18 U.S.C. § 1514A. Civil action to protect against retaliation in fraud cases (“Sarbanes-Oxley whistleblower protection law”)

(a) Whistleblower Protection for Employees of Publicly Traded Companies.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section

15(d) of the (15 U.S.C. 78o(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c), or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348 [Title 18's mail, wire, and securities fraud statutes], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

(b) Enforcement Action.—

(1) In general.—A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by—

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. . . .

(c) Remedies.—

(1) In general.—An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

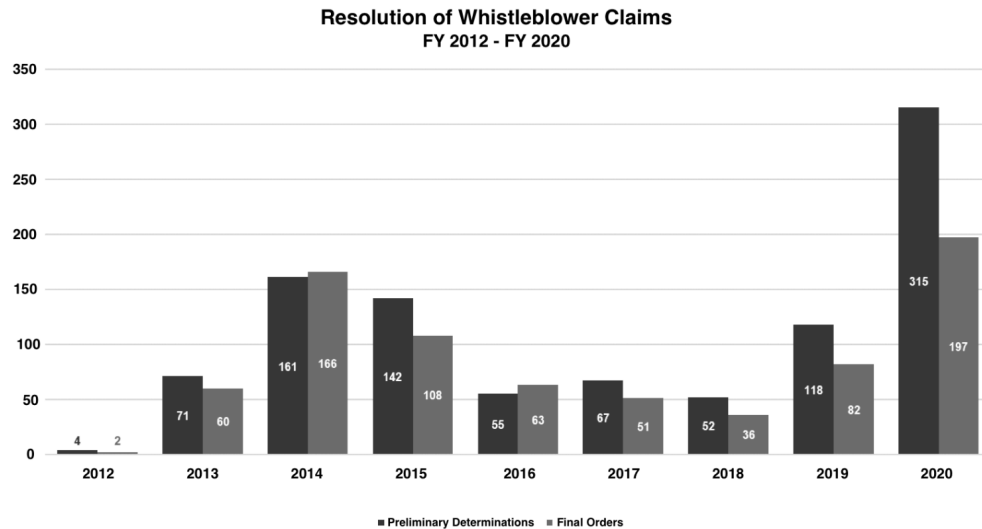
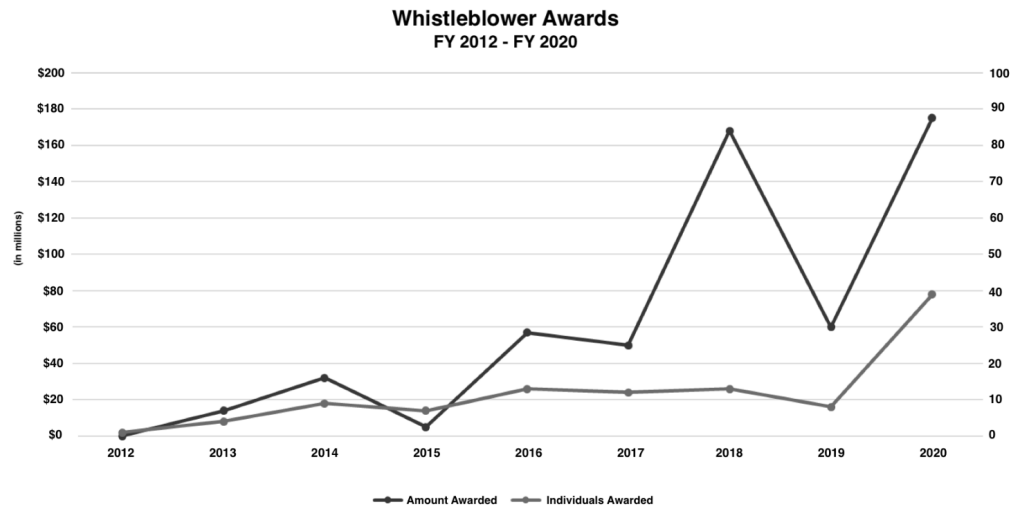
(2) Compensatory damages.—Relief for any action under paragraph (1) shall include—

- (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;
- (B) the amount of back pay, with interest; and
- (C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees. . . .

The following aspect of the 2009 Dodd-Frank legislation, enacted in the wake of the financial crisis of 2008, is potentially game-changing in the world of securities enforcement. According to an SEC annual report (2020) on its whistleblower program:

Over the past ten years, the whistleblower program has been a critical component of the Commission’s efforts to detect wrongdoing and protect investors in the marketplace, particularly where fraud is concealed or difficult to detect. Enforcement actions from whistleblower tips have resulted in more than \$2.5 billion in ordered financial remedies, including more than \$1.4 billion in disgorgement of which almost \$750 million has been, or is scheduled to be, returned to harmed investors. Recognizing the importance of rewarding meritorious whistleblowers in a timely manner, we have made efforts to streamline and substantially accelerate the evaluation of claims for whistleblower awards. These efforts paid off. Fiscal Year 2020 was a record-breaking year for the whistleblower program. The Commission issued awards totaling approximately \$175 million to 39 individuals, both greater than any other year in the program’s history.

Importantly, the Division also issued substantially more preliminary determinations, which set forth its assessment of whether a claim should be approved or denied and, if approved, the proposed award amount, and final Commission orders of awards and denials. In Fiscal Year 2020, the Division issued 315 preliminary determinations, a more than 95% increase over the next highest year, and the Commission issued 197 final orders, an approximately 19% increase over the next highest year.



Criticisms of the whistleblower regime for SEC enforcement have begun to arise, in large part because the SEC has taken the position that, when it makes awards, it will not release identifying information about the conduct, people, or companies involved. The program is thus very opaque. Public information includes the amount and frequency of awards but little else. Journalists at least have begun pushing back. See John Holland, *SEC Enriches Fraudsters, Lawyers As Secrecy Shrouds Tips Program*, BLOOMBERG LAW, July 26, 2022.

As you read and analyze the statutes and regulations that make up the Dodd-Frank whistleblower regime, think about (1) who is able to take advantage of this whistleblower regime and who is not, and (2) how this regime might change incentives and processes in SEC enforcement.

15 U.S.C. § 78u–6. Securities whistleblower incentives and protection (“Dodd-Frank whistleblower law”)

(a) Definitions

In this section the following definitions shall apply:

(1) Covered judicial or administrative action

The term “covered judicial or administrative action” means any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding \$1,000,000.

(2) Fund

The term “Fund” means the Securities and Exchange Commission Investor Protection Fund.

(3) Original information

The term “original information” means information that—

- (A) is derived from the independent knowledge or analysis of a whistleblower;
- (B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and
- (C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

(4) Monetary sanctions

The term “monetary sanctions”, when used with respect to any judicial or administrative action, means—

- (A) any monies, including penalties, disgorgement, and interest, ordered to be paid; and
- (B) any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246 (b)), as a result of such action or any settlement of such action.

(5) Related action

The term “related action”, when used with respect to any judicial or administrative action brought by the Commission under the securities laws, means any judicial or administrative action brought by an entity described in subclauses (I) through (IV) of subsection (h)(2)(D)(i) that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action.

(6) Whistleblower

The term “whistleblower” means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.

(b) Awards

(1) In general

In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to—

- (A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and
- (B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions. . . .

(c) Determination of amount of award; denial of award

(1) Determination of amount of award

(A) Discretion

The determination of the amount of an award made under subsection (b) shall be in the discretion of the Commission.

(B) Criteria

In determining the amount of an award made under subsection (b), the Commission—

- (i) shall take into consideration—
 - (I) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;
 - (II) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;
 - (III) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws; and
 - (IV) such additional relevant factors as the Commission may establish by rule or regulation; and
 - (ii) shall not take into consideration the balance of the Fund.
- (2) Denial of award

No award under subsection (b) shall be made—

 - (A) to any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the Commission, a member, officer, or employee of—
 - (i) an appropriate regulatory agency;
 - (ii) the Department of Justice;
 - (iii) a self-regulatory organization;
 - (iv) the Public Company Accounting Oversight Board; or
 - (v) a law enforcement organization;
 - (B) to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section;
 - (C) to any whistleblower who gains the information through the performance of an audit of financial statements required under

the securities laws and for whom such submission would be contrary to the requirements of section 78j-1 of this title; or

- (D) to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require. . . .

(f) Appeals

Any determination made under this section, including whether, to whom, or in what amount to make awards, shall be in the discretion of the Commission. Any such determination, except the determination of the amount of an award if the award was made in accordance with subsection (b), may be appealed to the appropriate court of appeals of the United States not more than 30 days after the determination is issued by the Commission. The court shall review the determination made by the Commission in accordance with section 706 of title 5. . . .

(h) Protection of whistleblowers

(1) Prohibition against retaliation

(A) In general

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

- (i) in providing information to the Commission in accordance with this section;
- (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
- (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1 (m) of this title, section 1513 (e) of title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission. . . .

(B) Enforcement

(i) Cause of action

An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C). . . .

(C) Relief

Relief for an individual prevailing in an action brought under subparagraph (B) shall include—

- (i) reinstatement with the same seniority status that the individual would have had, but for the discrimination;
- (ii) 2 times the amount of back pay otherwise owed to the individual, with interest; and
- (iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees.

SEC Regulations Pursuant to Dodd-Frank Whistleblower Law

17 C.F.R. § 240.21F–4. Other definitions.

(a) Voluntary submission of information.

- (1) Your submission of information is made voluntarily within the meaning of §§ 240.21F–1 through 240.21F–17 of this chapter if you provide your submission before a request, inquiry, or demand that relates to the subject matter of your submission is directed to you or anyone representing you (such as an attorney):
 - (i) By the Commission;
 - (ii) In connection with an investigation, inspection, or examination by the Public Company Accounting Oversight Board, or any self-regulatory organization; or
 - (iii) In connection with an investigation by Congress, any other authority of the Federal government, or a state Attorney General or securities regulatory authority.
- (2) If the Commission or any of these other authorities direct a request, inquiry, or demand as described in paragraph (a)(1) of this section to you or your representative first, your submission will not be considered voluntary, and you will not be eligible for an award, even if your response is not compelled by subpoena or other applicable law. However, your submission of information to the Commission will be

considered voluntary if you voluntarily provided the same information to one of the other authorities identified above prior to receiving a request, inquiry, or demand from the Commission.

- (3) In addition, your submission will not be considered voluntary if you are required to report your original information to the Commission as a result of a pre-existing legal duty, a contractual duty that is owed to the Commission or to one of the other authorities set forth in paragraph (a)(1) of this section, or a duty that arises out of a judicial or administrative order.
- (b) Original information.
- (1) In order for your whistleblower submission to be considered original information, it must be:
 - (i) Derived from your independent knowledge or independent analysis;
 - (ii) Not already known to the Commission from any other source, unless you are the original source of the information;
 - (iii) Not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless you are a source of the information; and
 - (iv) Provided to the Commission for the first time after July 21, 2010 (the date of enactment of the Dodd–Frank Wall Street Reform and Consumer Protection Act).
 - (2) Independent knowledge means factual information in your possession that is not derived from publicly available sources. You may gain independent knowledge from your experiences, communications and observations in your business or social interactions.
 - (3) Independent analysis means your own analysis, whether done alone or in combination with others. Analysis means your examination and evaluation of information that may be publicly available, but which reveals information that is not generally known or available to the public.
 - (4) The Commission will not consider information to be derived from your independent knowledge or independent analysis in any of the following circumstances:
 - (i) If you obtained the information through a communication that was subject to the attorney-client privilege, unless disclosure

of that information would otherwise be permitted by an attorney pursuant to § 205.3(d)(2) of this chapter, the applicable state attorney conduct rules, or otherwise;

- (ii) If you obtained the information in connection with the legal representation of a client on whose behalf you or your employer or firm are providing services, and you seek to use the information to make a whistleblower submission for your own benefit, unless disclosure would otherwise be permitted by an attorney pursuant to § 205.3(d)(2) of this chapter, the applicable state attorney conduct rules, or otherwise; or
- (iii) In circumstances not covered by paragraphs (b)(4)(i) or (b)(4)(ii) of this section, if you obtained the information because you were:
 - (A) An officer, director, trustee, or partner of an entity and another person informed you of allegations of misconduct, or you learned the information in connection with the entity's processes for identifying, reporting, and addressing possible violations of law;
 - (B) An employee whose principal duties involve compliance or internal audit responsibilities, or you were employed by or otherwise associated with a firm retained to perform compliance or internal audit functions for an entity;
 - (C) Employed by or otherwise associated with a firm retained to conduct an inquiry or investigation into possible violations of law; or
 - (D) An employee of, or other person associated with, a public accounting firm, if you obtained the information through the performance of an engagement required of an independent public accountant under the Federal securities laws (other than an audit subject to § 240.21F-8(c)(4) of this chapter), and that information related to a violation by the engagement client or the client's directors, officers or other employees.
- (iv) If you obtained the information by a means or in a manner that is determined by a United States court to violate applicable Federal or state criminal law; or
- (v) Exceptions. Paragraph (b)(4)(iii) of this section shall not apply if:

- (A) You have a reasonable basis to believe that disclosure of the information to the Commission is necessary to prevent the relevant entity from engaging in conduct that is likely to cause substantial injury to the financial interest or property of the entity or investors;
 - (B) You have a reasonable basis to believe that the relevant entity is engaging in conduct that will impede an investigation of the misconduct; or
 - (C) At least 120 days have elapsed since you provided the information to the relevant entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or your supervisor, or since you received the information, if you received it under circumstances indicating that the entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or your supervisor was already aware of the information.
 - (vi) If you obtained the information from a person who is subject to this section, unless the information is not excluded from that person's use pursuant to this section, or you are providing the Commission with information about possible violations involving that person.
- (5) The Commission will consider you to be an original source of the same information that we obtain from another source if the information satisfies the definition of original information and the other source obtained the information from you or your representative. In order to be considered an original source of information that the Commission receives from Congress, any other authority of the Federal government, a state Attorney General or securities regulatory authority, any self-regulatory organization, or the Public Company Accounting Oversight Board, you must have voluntarily given such authorities the information within the meaning of these rules. You must establish your status as the original source of information to the Commission's satisfaction. In determining whether you are the original source of information, the Commission may seek assistance and confirmation from one of the other authorities described above, or from another entity (including your employer), in the event that you claim to be the original source of information that an authority or another entity provided to the Commission.
- (6) If the Commission already knows some information about a matter from other sources at the time you make your submission, and you are not an

original source of that information under paragraph (b)(5) of this section, the Commission will consider you an original source of any information you provide that is derived from your independent knowledge or analysis and that materially adds to the information that the Commission already possesses.

- (7) If you provide information to the Congress, any other authority of the Federal government, a state Attorney General or securities regulatory authority, any self-regulatory organization, or the Public Company Accounting Oversight Board, or to an entity's internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law, and you, within 120 days, submit the same information to the Commission pursuant to § 240.21F-9 of this chapter, as you must do in order for you to be eligible to be considered for an award, then, for purposes of evaluating your claim to an award under §§ 240.21F-10 and 240.21F-11 of this chapter, the Commission will consider that you provided information as of the date of your original disclosure, report or submission to one of these other authorities or persons. You must establish the effective date of any prior disclosure, report, or submission, to the Commission's satisfaction. The Commission may seek assistance and confirmation from the other authority or person in making this determination.
- (c) Information that leads to successful enforcement. The Commission will consider that you provided original information that led to the successful enforcement of a judicial or administrative action in any of the following circumstances:
 - (1) You gave the Commission original information that was sufficiently specific, credible, and timely to cause the staff to commence an examination, open an investigation, reopen an investigation that the Commission had closed, or to inquire concerning different conduct as part of a current examination or investigation, and the Commission brought a successful judicial or administrative action based in whole or in part on conduct that was the subject of your original information; or
 - (2) You gave the Commission original information about conduct that was already under examination or investigation by the Commission, the Congress, any other authority of the federal government, a state Attorney General or securities regulatory authority, any self-regulatory organization, or the PCAOB (except in cases where you were an original source of this information as defined in paragraph (b)(5) of this section), and your submission significantly contributed to the success of the action.
 - (3) You reported original information through an entity's internal whistleblower, legal, or compliance procedures for reporting allegations

of possible violations of law before or at the same time you reported them to the Commission; the entity later provided your information to the Commission, or provided results of an audit or investigation initiated in whole or in part in response to information you reported to the entity; and the information the entity provided to the Commission satisfies either paragraph (c)(1) or (c)(2) of this section. Under this paragraph (c)(3), you must also submit the same information to the Commission in accordance with the procedures set forth in § 240.21F–9 within 120 days of providing it to the entity. . . .

17 C.F.R. § 240.21F–5. Amount of award.

- (a) The determination of the amount of an award is in the discretion of the Commission.
- (b) If all of the conditions are met for a whistleblower award in connection with a Commission action or a related action, the Commission will then decide the percentage amount of the award applying the criteria set forth in § 240.21F–6 of this chapter and pursuant to the procedures set forth in §§ 240.21F–10 and 240.21F–11 of this chapter. The amount will be at least 10 percent and no more than 30 percent of the monetary sanctions that the Commission and the other authorities are able to collect. The percentage awarded in connection with a Commission action may differ from the percentage awarded in connection with a related action.
- (c) If the Commission makes awards to more than one whistleblower in connection with the same action or related action, the Commission will determine an individual percentage award for each whistleblower, but in no event will the total amount awarded to all whistleblowers in the aggregate be less than 10 percent or greater than 30 percent of the amount the Commission or the other authorities collect.

17 C.F.R. § 240.21F–6. Criteria for determining amount of award.

In exercising its discretion to determine the appropriate award percentage, the Commission may consider the following factors (and only the following factors) in relation to the facts and circumstances of each case in setting the dollar or percentage amount of the award. In the event that awards are determined for multiple whistleblowers in connection an action, these factors will be used to determine the relative allocation of awards among the whistleblowers.

- (a) Factors that may increase the amount of a whistleblower’s award. In determining whether to increase the amount of an award, the Commission will consider the following factors, which are not listed in order of importance.
 - (1) Significance of the information provided by the whistleblower. The Commission will assess the significance of the information provided by

a whistleblower to the success of the Commission action or related action. In considering this factor, the Commission may take into account, among other things:

- (i) The nature of the information provided by the whistleblower and how it related to the successful enforcement action, including whether the reliability and completeness of the information provided to the Commission by the whistleblower resulted in the conservation of Commission resources;
 - (ii) The degree to which the information provided by the whistleblower supported one or more successful claims brought in the Commission or related action.
- (2) Assistance provided by the whistleblower. The Commission will assess the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the Commission action or related action. In considering this factor, the Commission may take into account, among other things:
- (i) Whether the whistleblower provided ongoing, extensive, and timely cooperation and assistance by, for example, helping to explain complex transactions, interpreting key evidence, or identifying new and productive lines of inquiry;
 - (ii) The timeliness of the whistleblower's initial report to the Commission or to an internal compliance or reporting system of business organizations committing, or impacted by, the securities violations, where appropriate;
 - (iii) The resources conserved as a result of the whistleblower's assistance;
 - (iv) Whether the whistleblower appropriately encouraged or authorized others to assist the staff of the Commission who might otherwise not have participated in the investigation or related action;
 - (v) The efforts undertaken by the whistleblower to remediate the harm caused by the violations, including assisting the authorities in the recovery of the fruits and instrumentalities of the violations; and
 - (vi) Any unique hardships experienced by the whistleblower as a result of his or her reporting and assisting in the enforcement action.

- (3) Law enforcement interest. The Commission will assess its programmatic interest in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws. In considering this factor, the Commission may take into account, among other things:
 - (i) The degree to which an award enhances the Commission's ability to enforce the Federal securities laws and protect investors; and
 - (ii) The degree to which an award encourages the submission of high quality information from whistleblowers by appropriately rewarding whistleblowers' submission of significant information and assistance, even in cases where the monetary sanctions available for collection are limited or potential monetary sanctions were reduced or eliminated by the Commission because an entity self-reported a securities violation following the whistleblower's related internal disclosure, report, or submission.
 - (iii) Whether the subject matter of the action is a Commission priority, whether the reported misconduct involves regulated entities or fiduciaries, whether the whistleblower exposed an industry-wide practice, the type and severity of the securities violations, the age and duration of misconduct, the number of violations, and the isolated, repetitive, or ongoing nature of the violations; and
 - (iv) The dangers to investors or others presented by the underlying violations involved in the enforcement action, including the amount of harm or potential harm caused by the underlying violations, the type of harm resulting from or threatened by the underlying violations, and the number of individuals or entities harmed.
- (4) Participation in internal compliance systems. The Commission will assess whether, and the extent to which, the whistleblower and any legal representative of the whistleblower participated in internal compliance systems. In considering this factor, the Commission may take into account, among other things:
 - (i) Whether, and the extent to which, a whistleblower reported the possible securities violations through internal whistleblower, legal or compliance procedures before, or at the same time as, reporting them to the Commission; and

- (ii) Whether, and the extent to which, a whistleblower assisted any internal investigation or inquiry concerning the reported securities violations.
- (b) Factors that may decrease the amount of a whistleblower's award. In determining whether to decrease the amount of an award, the Commission will consider the following factors, which are not listed in order of importance.
 - (1) Culpability. The Commission will assess the culpability or involvement of the whistleblower in matters associated with the Commission's action or related actions. In considering this factor, the Commission may take into account, among other things:
 - (i) The whistleblower's role in the securities violations;
 - (ii) The whistleblower's education, training, experience, and position of responsibility at the time the violations occurred;
 - (iii) Whether the whistleblower acted with scienter, both generally and in relation to others who participated in the violations;
 - (iv) Whether the whistleblower financially benefitted from the violations;
 - (v) Whether the whistleblower is a recidivist;
 - (vi) The egregiousness of the underlying fraud committed by the whistleblower; and
 - (vii) Whether the whistleblower knowingly interfered with the Commission's investigation of the violations or related enforcement actions.
 - (2) Unreasonable reporting delay. The Commission will assess whether the whistleblower unreasonably delayed reporting the securities violations. In considering this factor, the Commission may take into account, among other things:
 - (i) Whether the whistleblower was aware of the relevant facts but failed to take reasonable steps to report or prevent the violations from occurring or continuing;
 - (ii) Whether the whistleblower was aware of the relevant facts but only reported them after learning about a related inquiry, investigation, or enforcement action; and
 - (iii) Whether there was a legitimate reason for the whistleblower to delay reporting the violations.

- (3) Interference with internal compliance and reporting systems. The Commission will assess, in cases where the whistleblower interacted with his or her entity's internal compliance or reporting system, whether the whistleblower undermined the integrity of such system. In considering this factor, the Commission will take into account whether there is evidence provided to the Commission that the whistleblower knowingly:
 - (i) Interfered with an entity's established legal, compliance, or audit procedures to prevent or delay detection of the reported securities violation;
 - (ii) Made any material false, fictitious, or fraudulent statements or representations that hindered an entity's efforts to detect, investigate, or remediate the reported securities violations; and
 - (iii) Provided any false writing or document knowing the writing or document contained any false, fictitious or fraudulent statements or entries that hindered an entity's efforts to detect, investigate, or remediate the reported securities violations.
-

As litigation relating to the SEC whistleblower program picks up—in part due to a large and active “whistleblower bar” that has been representing persons on a contingency fee basis—some case law is developing about who is covered by the Sarbanes-Oxley and Dodd-Frank regimes and under what circumstances.

MURRAY v. UBS SECURITIES, LLC, 144 S. Ct. 445 (2024)

Justice SOTOMAYOR delivered the opinion of the Court.

Under the whistleblower-protection provision of the Sarbanes-Oxley Act of 2002, no covered employer may “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of” protected whistleblowing activity. 18 U.S.C. § 1514A(a). When a whistleblower invokes this provision, he bears the initial burden of showing that his protected activity “was a contributing factor in the unfavorable personnel action alleged in the complaint.” 49 U.S.C. § 42121(b)(2)(B)(iii). The burden then shifts to the employer to show that it “would have taken the same unfavorable personnel action in the absence of” the protected activity. § 42121(b)(2)(B)(iv).

The question before this Court is whether the phrase “discriminate against an employee . . . because of” in § 1514A(a) requires a whistleblower additionally to prove that his employer acted with “retaliatory intent.” . . .

In 2011, petitioner Trevor Murray was employed as a research strategist at securities firm UBS, within the firm's commercial mortgage-backed securities (CMBS) business.

In that role, Murray was responsible for reporting on CMBS markets to current and future UBS customers. Securities and Exchange Commission (SEC) regulations required him to certify that his reports were produced independently and accurately reflected his own views. See 17 CFR § 242.501(a) (2022). Murray contends that, despite this requirement of independence, two leaders of the CMBS trading desk improperly pressured him to skew his reports to be more supportive of their business strategies, even instructing Murray to “clear [his] research articles with the desk” before publishing them.

Murray reported that conduct to his direct supervisor, Michael Schumacher, in December 2011 and again in January 2012, asserting that it was “unethical” and “illegal.” Schumacher expressed sympathy for Murray's situation but emphasized that it was “very important” that Murray not “alienate [his] internal client” (i.e., the trading desk). When Murray later informed Schumacher that the situation with the trading desk “was bad and getting worse,” as he was being left out of meetings and subjected to “constant efforts to skew [his] research,” Schumacher told him that he should just “write what the business line wanted.” Shortly after that exchange (and despite having given Murray a very strong performance review just a couple months earlier) Schumacher emailed his own supervisor and recommended that Murray “be removed from [UBS's] head count.” Schumacher recommended in the alternative that, if the CMBS trading desk wanted him, Murray could be transferred to a desk analyst position, where he would not have SEC certification responsibilities. The trading desk declined to accept Murray as a transfer, and UBS fired him in February 2012.

Murray then filed a complaint with the Department of Labor alleging that his termination violated § 1514A of Sarbanes-Oxley because he was fired in response to his internal reporting about fraud on shareholders. When the agency did not issue a final decision on his complaint within 180 days, Murray filed an action in federal court. . . .

Section 1514A's text does not reference or include a “retaliatory intent” requirement, and the provision's mandatory burden-shifting framework cannot be squared with such a requirement. While a whistleblower bringing a § 1514A claim must prove that his protected activity was a contributing factor in the unfavorable personnel action, he need not also prove that his employer acted with “retaliatory intent.” . . .

The Second Circuit and UBS both rely heavily on the word “discriminate” in § 1514A to impose a “retaliatory intent” requirement on whistleblower plaintiffs. As UBS acknowledges, the Second Circuit's holding was “expressly predicated” on the word “discriminate.” That word, however, cannot bear the weight that both the Second Circuit and UBS place on it.

Consider the statutory text: No employer subject to Sarbanes-Oxley “may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of” the employee's protected whistleblowing activity. § 1514A(a). To start, the placement of the word “discriminate” in the section's catchall provision suggests that it is meant to capture other

adverse employment actions that are not specifically listed, drawing meaning from the terms “discharge, demote, suspend, threaten, [and] harass” rather than imbuing those terms with a new or different meaning. Here, there is no dispute that Murray was “discharge[d],” and so it is not obvious that the “or in any other manner discriminate” clause has any relevance to his claim. According to UBS, though, “discriminate” in the catchall provision relates back to and characterizes “discharge,” such that “to be actionable, discharge must be a ‘manner’ of discriminating.” Accepting this statutory construction argument “for argument’s sake,” as this Court did in *Bostock v. Clayton County*, the question is whether the word “discriminate” inherently requires retaliatory intent. It does not.

In *Babb v. Wilkie*, this Court explained that the “normal definition” of “discrimination” is “differential treatment.” *Id.* (quoting *Jackson v. Birmingham Bd. of Ed.*). In *Bostock*, the Court likewise observed that “discriminate” typically means simply “[t]o make a difference in treatment or favor (of one as compared with others).” (quoting Webster’s New International Dictionary (2d ed. 1954)). Prohibited discrimination occurs when an employer “intentionally treats a person worse because of” a protected characteristic. In elaborating on the meaning of “discriminate,” *Bostock* made clear that a lack of “animosity” is “irrelevant” to a claim of discrimination under Title VII.

An animus-like “retaliatory intent” requirement is simply absent from the definition of the word “discriminate.” When an employer treats someone worse—whether by firing them, demoting them, or imposing some other unfavorable change in the terms and conditions of employment—“because of” the employee’s protected whistleblowing activity, the employer violates § 1514A. It does not matter whether the employer was motivated by retaliatory animus or was motivated, for example, by the belief that the employee might be happier in a position that did not have SEC reporting requirements. . . .

Statutory context confirms that the word “discriminate” does not import a “retaliatory intent” requirement: Requiring a whistleblower to prove his employer’s retaliatory animus would ignore the statute’s mandatory burden-shifting framework. The burden-shifting framework was conspicuously absent from the Second Circuit’s opinion, and UBS now insists that the statute’s burden shifting addresses only “causation, not intent.” Not so. Burden-shifting frameworks have long provided a mechanism for getting at intent in employment discrimination cases, and the contributing-factor burden-shifting framework is meant to be more lenient than most. . . .

The burden-shifting framework provides a means of getting at intent, and Congress here has decided that the plaintiff’s burden on intent is simply to show that the protected activity was a “contributing factor in the unfavorable personnel action.” 49 U.S.C. § 42121(b)(2)(B)(i); see 18 U.S.C. § 1514A(b)(2)(C) (explaining that an action brought in federal court “shall be governed by the legal burdens of proof set forth in section 42121(b)”). Once the employee makes that showing, the burden shifts to the employer to “demonstrat[e], by clear and convincing evidence, that the employer would have taken

the same unfavorable personnel action in the absence of that behavior.” 49 U.S.C. § 42121(b)(2)(B)(ii). . . .

To be sure, the contributing-factor framework that Congress chose here is not as protective of employers as a motivating-factor framework. That is by design. Congress has employed the contributing-factor framework in contexts where the health, safety, or well-being of the public may well depend on whistleblowers feeling empowered to come forward. This Court cannot override that policy choice by giving employers more protection than the statute itself provides. . . .

DIGITAL REALTY TRUST, INC. v. SOMERS, 138 S. Ct. 767 (2018)

Justice GINSBURG delivered the opinion of the Court.

Endeavoring to root out corporate fraud, Congress passed the Sarbanes–Oxley Act of 2002, 116 Stat. 745 (Sarbanes–Oxley), and the 2010 Dodd–Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 1376 (Dodd–Frank). Both Acts shield whistleblowers from retaliation, but they differ in important respects. Most notably, Sarbanes–Oxley applies to all “employees” who report misconduct to the Securities and Exchange Commission (SEC or Commission), any other federal agency, Congress, or an internal supervisor. 18 U.S.C. § 1514A(a)(1). Dodd–Frank delineates a more circumscribed class; it defines “whistleblower” to mean a person who provides “information relating to a violation of the securities laws to the Commission.” 15 U.S.C. § 78u–6(a)(6). A whistleblower so defined is eligible for an award if original information he or she provides to the SEC leads to a successful enforcement action. § 78u–6(b)–(g). And, most relevant here, a whistleblower is protected from retaliation for, *inter alia*, “making disclosures that are required or protected under” Sarbanes–Oxley, the Securities Exchange Act of 1934, the criminal anti-retaliation proscription at 18 U.S.C. § 1513(e), or any other law subject to the SEC’s jurisdiction. 15 U.S.C. § 78u–6(h)(1)(A)(iii).

The question presented: Does the anti-retaliation provision of Dodd–Frank extend to an individual who has not reported a violation of the securities laws to the SEC and therefore falls outside the Act’s definition of “whistleblower”? We answer that question “No”: To sue under Dodd–Frank’s anti-retaliation provision, a person must first “provid[e] . . . information relating to a violation of the securities laws to the Commission.” § 78u–6(a)(6). . . .

Section 78u–6 begins by defining a “whistleblower” as “any individual who provides . . . information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission.” § 78u–6(a)(6) (emphasis added). That definition, the statute directs, “shall apply” “[i]n this section”—*i.e.*, throughout § 78u–6. § 78u–6(a).

Section 78u–6 affords covered whistleblowers both incentives and protection. First, the section creates an award program for “whistleblowers who voluntarily provid[e] original

information to the Commission that le[ads] to the successful enforcement of [a] covered judicial or administrative action.” § 78u-6(b)(1). A qualifying whistleblower is entitled to a cash award of 10 to 30 percent of the monetary sanctions collected in the enforcement action. See § 78u-6(b)(1)(A)–(B).

Second, § 78u-6(h) prohibits an employer from discharging, harassing, or otherwise discriminating against a “whistleblower” “because of any lawful act done by the whistleblower” in three situations: first, “in providing information to the Commission in accordance with [§ 78u-6],” § 78u-6(h)(1)(A)(i); second, “in initiating, testifying in, or assisting in any investigation or . . . action of the Commission based upon” information provided to the SEC in accordance with § 78u-6, § 78u-6(h)(1)(A)(ii); and third, “in making disclosures that are required or protected under” either Sarbanes–Oxley, the Securities Exchange Act of 1934, the criminal anti-retaliation prohibition at 18 U.S.C. § 1513(e), or “any other law, rule, or regulation subject to the jurisdiction of the Commission,” § 78u-6(h)(1)(A)(iii). Clause (iii), by cross-referencing Sarbanes–Oxley and other laws, protects disclosures made to a variety of individuals and entities in addition to the SEC. For example, the clause shields an employee’s reports of wrongdoing to an internal supervisor if the reports are independently safeguarded from retaliation under Sarbanes–Oxley.

The recovery procedures under the anti-retaliation provisions of Dodd–Frank and Sarbanes–Oxley differ in critical respects. First, unlike Sarbanes–Oxley, which contains an administrative-exhaustion requirement and a 180-day administrative complaint-filing deadline, *see* 18 U.S.C. § 1514A(b)(1)(A), (2)(D), Dodd–Frank permits a whistleblower to sue a current or former employer directly in federal district court, with a default limitation period of six years, *see* § 78u-6(h)(1)(B)(i), (iii)(I)(aa). Second, Dodd–Frank instructs a court to award to a prevailing plaintiff double backpay with interest, *see* § 78u-6(h)(1)(C)(ii), while Sarbanes–Oxley limits recovery to actual backpay with interest, *see* 18 U.S.C. § 1514A(c)(2)(B). Like Sarbanes–Oxley, however, Dodd–Frank authorizes reinstatement and compensation for litigation costs, expert witness fees, and reasonable attorneys’ fees. *Compare* § 78u-6(h)(1)(C)(i), (iii), *with* 18 U.S.C. § 1514A(c)(2)(A), (C).

Congress authorized the SEC “to issue such rules and regulations as may be necessary or appropriate to implement the provisions of [§ 78u-6] consistent with the purposes of this section.” § 78u-6(j). Pursuant to this authority, the SEC published a notice of proposed rulemaking to “Implemen[t] the Whistleblower Provisions” of Dodd–Frank. 75 Fed. Reg. 70488 (2010). Proposed Rule 21F-2(a) defined a “whistleblower,” for purposes of both the award and anti-retaliation provisions of § 78u-6, as one or more individuals who “provide the Commission with information relating to a potential violation of the securities laws.” *Id.* (proposed 17 C.F.R. § 240.21F-2(a)). The proposed rule, the agency noted, “tracks the statutory definition of a ‘whistleblower’” by requiring information reporting to the SEC itself. 75 Fed. Reg. 70489.

In promulgating the final Rule, however, the agency changed course. Rule 21F–2, in finished form, contains two discrete “whistleblower” definitions. *See* 17 C.F.R. § 240.21F–2(a)–(b) (2017). For purposes of the award program, the Rule states that “[y]ou are a whistleblower if . . . you *provide the Commission* with information . . . relat[ing] to a possible violation of the Federal securities laws.” § 240.21F–2(a)(1) (emphasis added). The information must be provided to the SEC through its website or by mailing or faxing a specified form to the SEC Office of the Whistleblower. § 240.21F–9(a)(1)–(2).

“For purposes of the anti-retaliation protections,” however, the Rule states that “[y]ou are a whistleblower if . . . [y]ou possess a reasonable belief that the information you are providing relates to a possible securities law violation” and “[y]ou provide that information in a manner described in” clauses (i) through (iii) of § 78u–6(h)(1)(A). 17 C.F.R. § 240.21F–2(b)(1)(i)–(ii). “The anti-retaliation protections apply,” the Rule emphasizes, “whether or not you satisfy the requirements, procedures and conditions to qualify for an award.” § 240.21F–2(b)(1)(iii). An individual may therefore gain anti-retaliation protection as a “whistleblower” under Rule 21F–2 without providing information to the SEC, so long as he or she provides information in a manner shielded by one of the anti-retaliation provision’s three clauses. For example, a report to a company supervisor would qualify if the report garners protection under the Sarbanes–Oxley anti-retaliation provision. . . .

“When a statute includes an explicit definition, we must follow that definition,” even if it varies from a term’s ordinary meaning. *Burgess v. United States*. This principle resolves the question before us.

Our charge in this review proceeding is to determine the meaning of “whistleblower” in § 78u–6(h), Dodd–Frank’s anti-retaliation provision. The definition section of the statute supplies an unequivocal answer: A “whistleblower” is “any individual who provides . . . information relating to a violation of the securities laws *to the Commission*.” § 78u–6(a)(6) (emphasis added). Leaving no doubt as to the definition’s reach, the statute instructs that the “definitio[n] shall apply” “[i]n this section,” that is, throughout § 78u–6. § 78u–6(a)(6).

The whistleblower definition operates in conjunction with the three clauses of § 78u–6(h)(1)(A) to spell out the provision’s scope. The definition first describes *who* is eligible for protection—namely, a whistleblower who provides pertinent information “to the Commission.” § 78u–6(a)(6). The three clauses of § 78u–6(h)(1)(A) then describe what *conduct*, when engaged in by a whistleblower, is shielded from employment discrimination. *See* § 78u–6(h)(1)(A)(i)–(iii). An individual who meets both measures may invoke Dodd–Frank’s protections. But an individual who falls outside the protected category of “whistleblowers” is ineligible to seek redress under the statute, regardless of the conduct in which that individual engages. . . .

In sum, Dodd–Frank’s text and purpose leave no doubt that the term “whistleblower” in § 78u–6(h) carries the meaning set forth in the section’s definitional provision. The

disposition of this case is therefore evident: Somers did not provide information “to the Commission” before his termination, § 78u–6(a)(6), so he did not qualify as a “whistleblower” at the time of the alleged retaliation. He is therefore ineligible to seek relief under § 78u–6(h). . . .

Applying the whistleblower definition as written, Somers and the Solicitor General further protest, will create “an incredibly unusual statutory scheme”: “[I]dential misconduct”—*i.e.*, retaliating against an employee for internal reporting—will “go punished or not based on the happenstance of a separate report” to the SEC, of which the wrongdoer may “not even be aware.” The upshot, the Solicitor General warns, “would [be] substantially diminish[ed] Dodd–Fran[k] deterrent effect.”

Overlooked in this protest is Dodd–Frank’s core objective: to prompt reporting to the SEC. In view of that precise aim, it is understandable that the statute’s retaliation protections, like its financial rewards, would be reserved for employees who have done what Dodd–Frank seeks to achieve, *i.e.*, they have placed information about unlawful activity before the Commission to aid its enforcement efforts. . . .

LIU MENG-LIN v. SIEMENS AG, 763 F.3d 175 (2d Cir. 2014)

GERARD E. LYNCH, Circuit Judge:

The Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010), includes a provision, 15 U.S.C. § 78u–6(h), that prohibits employers from retaliating against whistleblower employees who make certain protected disclosures. The instant case requires us to determine whether § 78u–6(h) protects a foreign worker employed abroad by a foreign corporation where all events related to the disclosures occurred abroad. Because (1) legislation is presumed to apply only domestically unless there is evidence Congress intended otherwise; (2) there is no indication Congress intended the whistleblower protection provision to have extraterritorial application; and (3) the facts in the complaint unequivocally demonstrate that applying the statute in this case would constitute an extraterritorial application, we conclude that the district court properly dismissed the complaint.

Plaintiff-appellant Liu Meng-Lin, a citizen and resident of Taiwan, was employed as a compliance officer for the healthcare division of Siemens China Ltd., a Chinese corporation that is a wholly owned subsidiary of defendant-appellee Siemens AG (“Siemens”), a German corporation whose shares, at all relevant times, were listed on the New York Stock Exchange. According to his complaint, Liu discovered that Siemens employees were indirectly making improper payments to officials in North Korea and China in connection with the sale of medical equipment in those countries. Liu believed that these payments violated both company policy and U.S. anti-corruption measures. He therefore reported this conduct to his superiors through internal company procedures, including in a meeting with a high-ranking Siemens executive in Shanghai, China. Liu claims that as he sought to address these alleged violations, Siemens progressively restricted his authority as a compliance officer, demoted him, and ultimately fired him.

Liu does not plead that any of the events related to his firing—the allegedly corrupt conduct, Liu’s discovery of that conduct, Liu’s efforts to address the corrupt conduct through Siemens’s internal protocols, or his subsequent mistreatment by Siemens—occurred within the territorial jurisdiction of the United States.

Two months after Siemens fired him, Liu reported the allegedly corrupt conduct to the Securities and Exchange Commission (“SEC”), charging that Siemens had violated the Foreign Corrupt Practices Act (“FCPA”). Liu then brought this action in the United States District Court for the Southern District of New York (William H. Pauley III, *Judge*), alleging that by firing him Siemens had violated the antiretaliation provision of the Dodd-Frank Act, 15 U.S.C. § 78u–6(h)(1)(A). Siemens moved to dismiss the suit for failure to state a claim, Fed. R. Civ. P. 12(b)(6), asserting two separate defects in the complaint: that the antiretaliation provision does not apply extraterritorially, and that none of Liu’s disclosures were “required or protected” by a relevant statute as the antiretaliation provision requires. The district court granted Siemens’s motion to dismiss with prejudice on both grounds, holding (1) that on the facts pled, the complaint sought an extraterritorial application of the antiretaliation provision, which does not have extraterritorial reach, and (2) that Liu’s complaint failed to establish that he had made a disclosure to the SEC that was “required or protected” by any of the specific statutes enumerated in § 78u–6(h)(1)(A)(iii).

Liu timely appealed, and upon de novo review of the district court’s grant of the motion to dismiss, *Lundy v. Catholic Health Sys. of Long Island, Inc.*, we affirm on the ground that Liu seeks an extraterritorial application of the antiretaliation provision, and that that provision does not apply extraterritorially. . . .

“[I]t is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” *Morrison v. Nat’l Austl. Bank Ltd.*, quoting *EEOC v. Arabian Am. Oil Co. (“Aramco”)*. “This principle represents a canon of construction, or a presumption about a statute’s meaning, rather than a limit upon Congress’s power to legislate. It rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters.” The presumption that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none,” *Kiobel v. Royal Dutch Petroleum Co.*, quoting *Morrison* is rebutted only when the statute’s “text, history, and purposes . . . evince a ‘clear indication of extraterritoriality.’” *Id.* (quoting *Morrison*). Moreover, it is “well established that generic terms like ‘any’ or ‘every’ do not rebut the presumption against extraterritoriality,” nor do “fleeting reference[s]” to possible international ramifications of an otherwise domestic statute, *Morrison*.

We have read *Morrison* to “wholeheartedly embrace[] application of the presumption against extraterritoriality, finding that ‘unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, we must presume it is primarily concerned with domestic conditions.’” *Norex Petroleum Ltd. Access Indus., Inc.*, (quoting *Morrison*). We will “thus look for a ‘clear’ and ‘affirmative indication’

that a statute applies to conduct occurring outside the territorial jurisdiction of the United States before concluding that the presumption has been overcome.” *United States v. Weingarten*, quoting *Morrison*.

This case involves the reach of the antiretaliation provision of the Dodd-Frank Act, which directs, in relevant part, that

[n]o employer may discharge . . . or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower . . . in making disclosures that are required or protected under the Sarbanes–Oxley Act of 2002 . . . , this chapter, . . . and any other law, rule, or regulation subject to the jurisdiction of the [Securities and Exchange] Commission.

15 U.S.C. § 78u–6(h)(1)(A). To survive Siemens’s motion to dismiss, Liu must demonstrate either (1) that the facts alleged in his complaint state a domestic application of the antiretaliation provision of the Dodd-Frank Act, or (2) that the antiretaliation provision is intended to apply extraterritorially.

The first alternative need not detain us long. We have no occasion here to define the precise boundary between domestic and extraterritorial application of this relevant provision, or to delineate the types of contacts within the United States that would render an application of the statute domestic rather than extraterritorial because this case is extraterritorial by any reasonable definition. Liu is a resident of Taiwan employed by the Chinese subsidiary of a German company; he reported to superiors in China and Germany regarding allegedly corrupt activities that took place in China, North Korea, and Hong Kong; and his employers decided, apparently in China and/or Germany, to terminate his employment. In short, the whistleblower, his employer, and the other entities involved in the alleged wrongdoing are all foreigners based abroad, and the whistleblowing, the alleged corrupt activity, and the retaliation all occurred abroad. The facts alleged in the complaint reveal essentially no contact with the United States regarding either the wrongdoing or the protected activity.

Liu attempts to avoid this conclusion by pointing to one slim connection to the United States. He argues that “Siemens voluntarily elected to have a class of its securities publicly listed on the New York Stock Exchange and thereby voluntarily subjected itself to—and undertook to comply with—United States securities laws,” including the antiretaliation provision. Liu argues that because Siemens has securities listed on an American exchange, his case is “fundamentally distinguishable” from *Morrison*.

This argument is unavailing. *Morrison* addressed whether Australian purchasers of shares listed on an Australian stock exchange could rely on § 10(b) of the Securities Exchange Act of 1934 to sue the Australian bank that issued the shares. The Supreme Court concluded that § 10(b) did not have extraterritorial reach, but rather applied “only [to] transactions in securities listed on domestic exchanges, and domestic transactions in other securities.” *Morrison*. The Court reached this conclusion despite the fact that

“[t]here [were] listed on the New York Stock Exchange . . . the [defendant bank’s] American Depositary Receipts (ADRs), which represent the right to receive a specified number of” the Australian shares. *Morrison* thus decisively refutes Liu’s contention that the United States securities laws apply extraterritorially to the actions abroad of any company that has issued United States-listed securities.

Far from helping Liu, *Morrison* establishes that where a plaintiff can point only to the fact that a defendant has listed securities on a U.S. exchange, and the complaint alleges no further meaningful relationship between the harm and those domestically listed securities, the listing of securities alone is the sort of “fleeting” connection that “cannot overcome the presumption against extraterritoriality.” *See also In re Royal Bank of Scotland Grp. PLC Sec. Litig.* (“The idea that a foreign company is subject to U.S. [s]ecurities laws everywhere it conducts foreign transactions merely because it has ‘listed’ some securities in the United States is simply contrary to the spirit of *Morrison*.”). In short, “simply alleging that some domestic conduct occurred cannot support a claim of domestic application [because] ‘[i]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States.’” *Norex* (quoting *Morrison*).

Liu’s argument that the statute nevertheless applies to his case requires a somewhat lengthier discussion, but is equally unavailing. The support for the conclusion that the antiretaliation provision has no extraterritorial application is straightforward: there is absolutely nothing in the text of the provision, set forth above, or in the legislative history of the Dodd-Frank Act, that suggests that Congress intended the antiretaliation provision to regulate the relationships between foreign employers and their foreign employees working outside the United States. Given the presumption against extraterritoriality, and the absence of any direct evidence of a congressional intent to apply the relevant provision extraterritorially, Liu’s effort to cobble together indirect, circumstantial suggestions of extraterritorial application faces powerful headwinds.

Liu offers several arguments that the statutory language or context of the antiretaliation provision indirectly demonstrates that it is intended to have extraterritorial reach. None provides the “clear and affirmative indication,” *Weingarten*, required to overcome the presumption against extraterritoriality. First, Liu’s contention that the antiretaliation provision “contains very broad language that includes all employees” is of no avail. The plain text of the statute contains no hint that the antiretaliation provision is meant to apply extraterritorially, but rather simply indicates that “[n]o employer” may retaliate against a whistleblower, 15 U.S.C. § 78u–6(h)(1). That is precisely the sort of “generic” language that the Supreme Court has expressly stated is insufficient to overcome the presumption against extraterritorial application. *See Kiobel*.

Liu next points to other sections of the Dodd-Frank Act that do have some extraterritorial application to argue, in effect by association, that the antiretaliation provision also should be read to have extraterritorial reach. He points to § 929P(b) of the Dodd-Frank Act, 124

Stat. at 1864–65, which, inter alia, grants district courts jurisdiction where a suit brought by the SEC or the United States government

allege[s] a violation of the antifraud provisions of [the Securities Exchange Act of 1934] involving (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

15 U.S.C. § 78aa(b). Liu argues that “by specifically providing for extraterritorial jurisdiction in a related section of the statute, Congress clearly evidenced its intention to protect SEC whistleblowers located abroad.”

Liu’s argument inverts the ordinary canons of statutory interpretation. “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*. There is no exception to this general rule for language effecting extraterritorial application; to the contrary, the Supreme Court has specifically cautioned against acceptance of arguments such as Liu’s: “[W]hen a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms.” *Morrison*. That limitation is founded in “Congress’ awareness of the need to make a clear statement that a statute applies” extraterritorially through “express [] legislat[ion]” that enables such application. *Aramco*. As *Morrison* observes, it would be “superfluous” for a statute to note that a particular provision applies extraterritorially if the entire statute had extraterritorial reach. Since § 929P(b) identifies a particular provision of Dodd-Frank as having such reach, the logical inference is that the antiretaliation provision, enjoying no such explicit grant of extraterritorial application, has none, a conclusion which at least one district court has also reached. See *Asadi v. G.E. Energy (USA), LLC*.

Moreover, Liu’s argument fails even on its own terms. Liu does not explain his contention that § 929P(b)’s crisply delineated jurisdictional grant is somehow “related” to the whistleblower antiretaliation provision. In § 929P(b), Congress provided the district court with limited extraterritorial jurisdiction over specific types of antifraud suits brought by governmental entities when the conduct at issue has particular types of relationships to the United States. Liu is not a governmental actor, he has not pled facts of the sort that would confer jurisdiction under § 929P(b), and he cannot argue that the antiretaliation provision qualifies as an antifraud provision of the Securities Exchange Act. In sum, there is no colorable argument that the limited extraterritorial reach of § 929P(b) supports extraterritorial application of the antiretaliation provision in circumstances such as those alleged by Liu.

Liu next turns to the Dodd-Frank’s whistleblower bounty provision, 15 U.S.C. § 78u–6(b), to make a similar argument. The bounty provision allows the SEC, in its discretion, to make award payments to “whistleblowers who voluntarily provided original

information to the Commission that led to [a] successful enforcement” action. § 78u–6(b)(1). Liu asserts that the SEC regulations which define the eligibility for a whistleblower bounty suggest that the agency conceives of the bounty as having international reach. He cites a regulation providing that “you are not eligible [for an award] if: . . . You are . . . a member, officer, or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority.” 17 C.F.R. § 240.21F–8(c)(2). Liu further asserts that aspects of the agency’s discussion of the bounty provision included in the promulgation of the final rule, 76 Fed. Reg. 34300–01 (June 13, 2011), offer additional support for the idea that the bounty provision is meant to have extraterritorial reach. In particular, he points to the agency’s discussion of the tax filing procedures for an award payment to a foreign national, and the agency’s decision to *avoid* making a categorical determination as to whether a whistleblower’s possible violation of foreign laws should affect the eligibility for an award. . . .

[E]ven if we assume that the regulations clearly apply the bounty program to whistleblowers located abroad and that some deference would be due such an agency interpretation, it would not follow that Congress intended the antiretaliation provision to apply similarly. As with our analysis of § 929P(b), we must restrict an indication of extraterritorial application “to its terms,” *Morrison*; a regulation addressing the bounty provision cannot be taken to support the proposition that the antiretaliation provision should apply extraterritorially. 17 C.F.R. § 240.21F–8(c)(2) does not mention the antiretaliation provision, and indeed, other SEC regulations suggest that the requirements of the antiretaliation and bounty provisions are to be considered separately. Moreover, extraterritorial application of the bounty and antiretaliation provisions have far different international ramifications. Providing rewards to persons, foreign or domestic, who supply information about lawbreaking is far less intrusive into other countries’ sovereignty than seeking to regulate the employment practices of foreign companies with respect to the foreign nationals they employ in foreign countries. Applying the antiretaliation provision in circumstances such as Liu’s would effect such an intrusion. Thus, whatever their merits, none of the arguments that the *bounty* provision is meant to have extraterritorial reach provide any support for Liu’s claim that the *antiretaliation* provision is meant to have extraterritorial reach. . . .

Problem 10-2

Now that you have examined the very different Dodd-Frank securities law whistleblower regime, reconsider the question posed in chapter 6 when the False Claims Act was discussed: Are such “bounty” regimes beneficial on balance? What is the optimal way to structure such regimes? Would you modify the SEC regime if you could? How?

Consider this abstract summarizing the findings in a recent paper, Alexander Platt, *The Whistleblower Industrial Complex*, 40 YALE J. REG. 688 (2023):

Although the whistleblower programs (WBPs) created by Dodd-Frank have received universal acclaim, little is known about how they actually work. Last year, the Securities and Exchange Commission (SEC) received an average of 49 whistleblower tips every workday. Success depends on sifting through this avalanche of tips to determine which ones to investigate. To date, however, the tip-sifting process has been entirely shrouded in secrecy. . . . Using a new dataset comprised of information I obtained under the Freedom of Information Act, I find (among other things) that tipsters represented by lawyers significantly outperform unrepresented ones, repeat-player lawyers outperform first-timers, and lawyers who used to work at the SEC outperform just about everybody. The upshot is that the SEC and CFTC have effectively privatized the tip-sifting function that is at the core of the WBPs. Private lawyers have likely extracted hundreds of millions of dollars in fees and expenses from these programs, with a disproportionate share going to a concentrated group of well-connected, repeat players. Unlike traditional plaintiffs' side securities attorneys and attorneys who represent clients seeking government payments in many other contexts, private whistleblower lawyers operate free from virtually all public accountability, transparency, or regulation.

F. New Whistleblower Programs

The SEC's general structure for its whistleblowing program under the Dodd-Frank Act has been serving as a model for other experimentation with whistleblowing incentives, which have been catching on rapidly.

In 2022, Congress enacted legislation to allow the Treasury Department to reward individuals who provide information that leads to successful money laundering enforcement actions. 31 U.S.C. § 5323. The legislation was modeled after the Dodd-Frank SEC whistleblower regime. Requirements include: (1) that Treasury brings an action resulting over \$1 million of penalties; (2) that the whistleblower's information be "original" under a definition similar to the SEC program; and (3) that the whistleblower not be an excluded person from a number of categories similar to those the SEC program excludes. A qualifying whistleblower is eligible for an award of between 10 and 30 percent of Treasury's recovery, at Treasury's discretion. The legislation also includes anti-retaliation protection for whistleblowers.

In the non-statutory setting of policy making, DOJ's Criminal Division recently adopted the following two "pilot programs" for experimenting with encouraging persons with knowledge of certain forms of business crime to come forward in exchange for receiving (1) a non-prosecution guarantee (the U.S. Attorney's Office for the Southern District of New York has adopted a similar pilot nonprosecution program; its terms are available at https://www.justice.gov/d9/2024-05/sdny_wb_policy_effective_2-13-24.pdf); and/or (2) a financial reward consisting of a percentage of funds recovered by DOJ through its statutory forfeiture authorities. As of this edition it is not clear whether the Trump Administration will pursue these programs or abandon them.

U.S. Dep’t of Justice, The Criminal Division’s Pilot Program on Voluntary Self-Disclosures for Individuals (April 15, 2024)

The Department of Justice (Department) is dedicated to vigorously investigating and prosecuting federal criminal offenses, including crimes by, through, or related to corporations. Use of cooperating witnesses in investigations and prosecutions, discretionary grants of immunity, and entry into non-prosecution agreements (NPAs) in return for a person’s cooperation have long been a part of the federal criminal system and are addressed by the Department’s Justice Manual, *see* JM 9-27.600 *et seq.* (explaining, *inter alia*, criteria for entry of non-prosecution agreements with cooperating witnesses, including supervisory approval and that any such agreement be in the public interest); U.S.S.G. §§ 5K1.1, 5K2.16; Rule 35 of the Federal Rules of Criminal Procedure; and 18 U.S.C. §§ 6001-6003.

The prospect of an NPA may provide a strong incentive for individuals to bring to the Criminal Division’s and law enforcement’s attention actionable, original information about criminal conduct that might otherwise go undetected or be impossible to prove. The Criminal Division’s grant of an NPA to individuals who report misconduct to law enforcement in the context of corporate and white-collar criminal offenses also may be a particularly important incentive for companies to create compliance programs that encourage robust internal reporting of complaints, that help prevent, detect, and remediate misconduct before it begins or expands, and that allow companies to report misconduct when it occurs.

This Pilot Program provides transparency regarding the circumstances in which Criminal Division prosecutors will offer NPAs to individuals who voluntarily disclose original information about certain types of criminal conduct involving corporations, fully cooperate with authorities, and pay any applicable victim compensation, restitution, forfeiture, or disgorgement, including returning any ill-gotten gains.

The Pilot Program applies to Criminal Division investigations of the offenses outlined below and applies to disclosures made on or after April 15, 2024. The Pilot Program does not modify or amend existing Department or Division policies or directives, or provisions of the Justice Manual. While the Pilot Program is in effect, the Criminal Division will collect anonymized statistical data about relevant disclosures, for the purposes of determining whether to extend, modify, or end the Pilot Program. . . .

When an individual voluntarily self-discloses original information about criminal misconduct, including the complete extent of their own role in the misconduct, fully cooperates, and satisfies the other conditions set forth below, the reporting individual will receive an NPA.

1. The disclosure must be to the Criminal Division at NPA.Pilot@usdoj.gov.
2. The reporting individual must disclose original information, meaning non-public information not previously known to the Criminal Division or to any component of the

Department of Justice, and the information provided must relate to at least one of the following:

- o Violations by financial institutions, their insiders, or agents, including schemes involving money laundering, anti-money laundering, registration of money transmitting businesses, and fraud statutes, and fraud against or compliance with financial institution regulators;

- o Violations related to integrity of financial markets undertaken (1) by financial institutions, investment advisors, or investment funds, (2) by or through public companies or private companies with 50 or more employees, or (3) by any insiders or agents of any such entities;

- o Violations related to foreign corruption and bribery by, through, or related to public or private companies, including violations of the Foreign Corrupt Practices Act, violations of the Foreign Extortion Prevention Act, and violations of the money laundering statutes;

- o Violations related to health care fraud or illegal health care kickbacks committed by or through public companies or private companies with 50 or more employees;

- o Violations by or through public or private companies with 50 or more employees related to fraud against, or the deception of, the United States in connection with federally funded contracting, where such fraud does not involve health care or illegal health care kickbacks; and

- o Violations committed by or through public or private companies related to the payment of bribes or kickbacks to domestic public officials.

3. The disclosure must be voluntary, meaning (1) before any request, inquiry, or demand that relates to the subject matter of the submission is directed to the individual or anyone representing the individual (e.g., his or her legal representative) by the Department in connection with any investigation, or by a federal law enforcement, regulatory, or civil enforcement agency regarding the same misconduct; (2) where the individual has no preexisting obligation pursuant to an agreement in connection with a criminal prosecution or civil enforcement action to report the information to the Criminal Division, any Department component, or any federal law enforcement, regulatory, or civil enforcement agency; and (3) in the absence of any government investigation or threat of imminent disclosure to the government or the public.

4. The disclosure must be truthful and complete, meaning it must include all information known to the individual related to any misconduct in which the individual has participated and/or of which the individual is aware, including the complete extent of the individual's own role in the misconduct, and all matters about which the Department may inquire.

5. The reporting individual must agree to fully cooperate with and be willing and able to provide substantial assistance to the Department in its investigation of related conduct and prosecution of equally or more culpable individuals or entities including, but not limited to, providing truthful and complete testimony and evidence, whether in interviews, before a grand jury, or at any trial or other court proceeding; producing documents, records, and other evidence when called upon by the Criminal Division; and, if requested, working in a proactive manner under the supervision of, and in compliance with United States law enforcement officers and agents.

6. The reporting individual must agree to forfeit or disgorge any profit from the criminal wrongdoing and pay restitution or victim compensation.

7. The reporting individual: (1) has not engaged in criminal conduct involving violence, use of force, threats, substantial patient harm, any sex offense involving fraud, force, or coercion, or relating to a minor, or any offense involving terrorism; (2) is not the Chief Executive Officer (or equivalent) or Chief Financial Officer (or equivalent) of a public or private company or is not the organizer/leader of the scheme; (3) is not an elected or appointed foreign government official; (4) is not a domestic government official at any level, including any employee of a law enforcement agency; and (5) does not have a previous felony conviction or a conviction of any kind for conduct involving fraud or dishonesty.

Separate and apart from this Pilot Program, Criminal Division prosecutors retain discretion to offer an NPA to individuals in appropriate circumstances, including where individuals come forward pursuant to the Pilot Program but the criteria above are not met in full, in accordance with the Justice Manual and Criminal Division procedures.

Department of Justice Corporate Whistleblower Awards Pilot Program (August 1, 2024)

Introduction

The Attorney General is authorized to pay “awards for information or assistance leading to a civil or criminal forfeiture.” *See* 28 U.S.C. § 524(c). This document sets forth criteria that individuals must meet in order to qualify for payment of an award in the Department’s discretion as part of the Department’s Corporate Whistleblower Awards Pilot Program (Corporate Whistleblower Awards Pilot Program or Pilot Program).

Whistleblowers may be eligible for an award pursuant to the Corporate Whistleblower Awards Pilot relating to one or more designated program areas that leads to forfeiture exceeding \$1,000,000 in net proceeds, as outlined below. Any award is subject to the payment considerations outlined below. Additional guidance and procedures for submitting information and making a claim for an award are also outlined here. . . .

I. Eligibility for Submission and Definitions

1. Whistleblower Award Eligibility: An individual may be eligible for a whistleblower award if, alone or jointly with other individuals, they provide the Department with original information in writing pursuant to the conditions and procedures set forth below, and that information leads to criminal or civil forfeiture exceeding \$1,000,000 in net proceeds forfeited in connection with a successful prosecution, corporate criminal resolution, or civil forfeiture action related to corporate criminal conduct in the programmatic areas outlined below.

An individual is not eligible for an award under this program if:

- a. They are a company or another type of entity. A qualifying whistleblower must be an individual.
- b. They would be eligible for an award through another U.S. government or statutory whistleblower, *qui tam*, or similar program if they had reported the same scheme that they reported under this pilot program.
- c. They are, or were at the time they acquired the original information provided to the Department, an official, employee, or contractor of the Department or any law enforcement organization or a spouse, parent, child, or sibling of an official, employee, or contractor of the Department or they resided in the same household as an official, employee, or contractor of the Department.
- d. They are, or were at the time they acquired the original information provided to the Department, an elected or appointed foreign government official.
- e. They meaningfully participated in the criminal activity they reported, including by directing, planning, initiating, or knowingly profiting from that criminal activity.
- f. In their whistleblower submission, dealings with the Department, or dealings with another authority in connection with a related action, the individual knowingly and willfully made or makes any false, fictitious, or fraudulent statement or representation, withheld or withholds material or significant information, or used or uses any writing or document knowing that it contains any false, fictitious, or fraudulent statement or entry with intent to mislead or otherwise hinder the Department or another authority, or otherwise interfered or interferes with or obstructed or obstructs the Department's investigation.
- g. They acquired the original information from a person: (1) who is ineligible under paragraphs (c) through (f), unless they are providing the Department with information about possible violations involving

- that person; or (2) with the intent to evade any provision in this document.
- h. They provided information to the Department before the effective date of the Corporate Whistleblower Awards Pilot Program.
2. Original Information: An individual must provide, in writing, original information, meaning:
- a. Information that is derived from the individual's independent knowledge or independent analysis.
 - i. Independent knowledge means factual information in the individual's possession that is not derived from publicly available sources. The individual may gain independent knowledge from their experiences, communications, and observations in their business or social interactions.
 - ii. Independent analysis means the individual's own analysis, whether done alone or in combination with others. Analysis means the individual's examination and evaluation of information that may be publicly available, but which reveals information that is not generally known or available to the public.
 - b. Information that is non-public and previously not known to the Department. This assessment will focus on whether the information itself is original, non-public, and not previously known to the Department, regardless of whether the Department did or did not already have an investigation open related to the information provided.
 - c. Information that materially adds to the information the Department already possesses. Even if the Department already has information about a matter from other sources at the time an individual makes their submission, the Department will consider the individual an original source of any information they provide that is derived from their independent knowledge or analysis and that materially adds to the information that the Department already possesses, if they meet the other criteria for original information specified herein.
 - d. Original information that an individual first reported through an entity's internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law where the entity later reported to the Department the individual's information or the results of an investigation initiated in whole or in part in response to the individual's information, provided the individual also reports their information to the Department within 120 days of reporting internally. In that situation, for purposes of evaluating the claim for an award under this Corporate Whistleblower Awards Pilot Program, the Department will deem the date the individual provided original

information to the entity's internal reporting structure as the date of the individual's original disclosure to the Department.

- e. An individual's information is not original if:
 - i. They obtained the information through a communication that was subject to the attorney-client privilege, including any third parties' attorney-client privilege, unless disclosure of that information would otherwise be permitted by an attorney pursuant to the crime-fraud or other exceptions under the applicable state attorney conduct rules.
 - ii. They obtained the information in connection with the legal representation of a client on whose behalf they or their employer or firm are providing services, and they seek to use the information to make a whistleblower submission for their own benefit.
 - iii. The information they submitted is contained entirely in an allegation made in a judicial or administrative hearing, in a government report, hearing, audit, or investigation, or in the news media, unless they were a source of the information.
 - iv. They obtained the information because they were: (a) an officer, director, trustee, or partner of an entity and another person informed them of allegations of misconduct, or they learned the information in connection with the entity's processes for identifying, reporting, and addressing possible violations of law; (b) an employee whose principal duties involve compliance or internal audit responsibilities, or they were employed by or otherwise associated with a firm retained to perform compliance or internal audit functions for an entity, and the information relates to or is derived from these responsibilities or functions; (c) employed by or otherwise associated with a firm retained to conduct an inquiry or investigation into possible violations of law and the information relates to or derives from that retention; or (d) an employee of, or other person associated with, a public accounting firm, if they obtained the information through the performance of an engagement required of an independent public accountant and that information related to a violation by the engagement client or the client's directors, officers, or other employees (*but see* (vii) below).
 - v. They obtained the information or knew that the information was obtained by a means or in a manner that violates applicable federal or state criminal law.
 - vi. They obtained the information from a person who is subject to this section, unless the information is not excluded from that person's use pursuant to this section, or they are

providing the Department with information about possible violations involving that person.

- vii. However, the exceptions in Paragraph (iv) of this section shall not apply if an individual: (a) has a reasonable basis to believe that disclosure of the information to the Department is necessary to prevent the relevant individual or entity from engaging in criminal conduct that is likely to harm national security, result in crimes of violence, result in imminent harm to patients in connection with health care, or cause imminent financial or physical harm to others; (b) has a reasonable basis to believe that the relevant individual or entity is engaging in conduct that will impede an investigation of the misconduct; or (c) is someone described in (iv)(a) or (iv)(b) and at least 120 days have elapsed since they provided the information to the relevant entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or their supervisor, or since they received the information, if they received it under circumstances indicating that the entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or their supervisor was already aware of the information.

- 3. Subject Area: An individual's information must pertain to one of the following subject matter areas:
 - a. Violations by financial institutions, their insiders, or agents, including schemes involving money laundering, anti-money laundering compliance violations, registration of money transmitting businesses, and fraud statutes, and fraud against or non-compliance with financial institution regulators.
 - b. Violations related to foreign corruption and bribery by, through, or related to companies, including violations of the Foreign Corrupt Practices Act, violations of the Foreign Extortion Prevention Act, and violations of the money laundering statutes.
 - c. Violations committed by or through companies related to the payment of bribes or kickbacks to domestic public officials, including but not limited to federal, state, territorial, or local elected or appointed officials and officers or employees of any government department or agency.
 - d. Violations related to (a) federal health care offenses and related crimes involving private or other non-public health care benefit programs, where the overwhelming majority of claims are submitted to private or other non-public health care benefit programs, (b) fraud against patients, investors, and other non-governmental entities in the health care industry, where the overwhelming majority of the actual

or intended loss was to patients, investors, and other non-governmental entities, and (c) any other federal violations involving conduct related to health care not covered by the Federal False Claims Act, 31 U.S.C. § 3729, *et seq.*

4. Voluntary: An individual's submission must be voluntary.
 - a. An individual's submission of information is voluntary if it occurs:
 - i. before any request, inquiry, or demand that relates to the subject matter of the submission is directed to the individual or anyone representing them (*e.g.*, their legal representative) by the Department in connection with any investigation, by federal law enforcement, or by a civil enforcement agency regarding the same misconduct;
 - ii. where the individual has no preexisting obligation pursuant to an agreement in connection with a criminal prosecution or civil enforcement action to report the information to the Department, any Department component, or any federal law enforcement or civil enforcement agency; and
 - iii. in the absence of any government investigation or threat of imminent disclosure to the government or the public.
 - b. An individual's submission is not voluntary if the Department directed a request, inquiry, or demand to them or their representative before their submission, even if they respond to such a request voluntarily. However, if an individual voluntarily reported original information to their employer before receiving a request, inquiry, or demand from the Department, and they reported to the Department or they responded to the Department's request within 120 days of reporting the original information to their employer, their submission will still qualify as voluntary.
5. Truthful and Complete: An individual must provide truthful and complete information, meaning they must provide all information of which they have knowledge related to any misconduct, including misconduct in which they participated or of which they are aware, the complete extent of their own role, if any, in the misconduct, and all matters about which the Department may inquire.
 - a. To submit to the Pilot Program and be eligible for an award, the individual or their attorney must provide their information to the Department using the Intake Form available at www.justice.gov/corporatewhistleblower and declare under penalty of perjury that the information is true and correct to the best of the individual's knowledge.

- b. Information is not truthful and complete if the individual is involved in the misconduct but lies about, conceals, or mischaracterizes their role in the misconduct.
- 6. Cooperation: An individual must cooperate with the Department in its investigation of related conduct and criminal or civil actions. This includes but is not limited to providing truthful and complete testimony and evidence, whether in interviews, before a grand jury, or at any trial or other court proceeding; producing documents, records, and other evidence when called upon by the Department; and, if requested, working in a proactive manner under the supervision of, and in compliance with, United States law enforcement officers and agents.
- 7. Leading to Forfeiture: The information must lead to successful forfeiture exceeding \$1,000,000 in net proceeds forfeited by the Department in connection with a prosecution, corporate criminal resolution, or civil forfeiture action related to corporate criminal conduct in the programmatic areas outlined above.
 - a. There is successful forfeiture where the Department obtains a final order of forfeiture, civil judgment of forfeiture, or administrative declaration of forfeiture related to assets obtained as a result of an individual's submission, and those assets are deposited in the Assets Forfeiture Fund.
 - b. In assessing whether an individual's submission of original information led to a successful civil or criminal forfeiture, the Department will consider whether:
 - i. The individual provided the Department with original information that was sufficiently specific, credible, and timely to cause the Department to open an investigation, reopen an investigation that the Department had closed, or to inquire about different conduct as part of a current investigation, and that original information led the Department to obtain a successful forfeiture.
 - ii. The individual provided the Department with original information about conduct that was already under investigation by the Department, and their submission significantly contributed to the successful forfeiture.
 - iii. The individual reported original information through an entity's internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law before or at the same time they reported them to the Department; the entity later provided their information to the Department, or provided results of an investigation initiated in whole or in part in response to information they reported

to the entity; and the information the entity provided to the Department satisfies either paragraph (b)(i) or (b)(ii) of this section. An individual must also submit the same information to the Department within 120 days of providing it to the entity.

- c. As described below, any award is discretionary and will be based on the net proceeds of the forfeiture.
- d. If there is no successful forfeiture, no award will be available.

II. Additional Considerations for Payment of an Award

Where the information provided leads to forfeiture exceeding \$1,000,000 in total net proceeds forfeited in a successful prosecution, corporate criminal resolution, or civil forfeiture action in one of the programmatic areas of corporate enforcement described above, the whistleblower may be eligible for an award from the case as outlined below. Awards are entirely discretionary and an award is not guaranteed; however, as noted above, the Department intends, through the exercise of its discretion, to incentivize those with information about corporate criminal wrongdoing to report original information about criminal conduct that might otherwise go undetected or be difficult to prove. When assessing whether to make a discretionary award, the Department will consider the following.

1. Amount of Award. The determination of whether an individual is eligible for an award and the amount of an award is in the sole discretion of the Department.
 - a. If the Department makes awards to more than one whistleblower in connection with the same matter, the Department will determine an individual percentage award for each whistleblower, but in no event will the total amount awarded to all whistleblowers in the aggregate in each case be greater than that outlined below.
 - b. If the Department finalizes a successful forfeiture, the whistleblower(s) may be eligible for an award based on the following calculation for the matter:
 - i. An award of up to 30% of the first \$100 million in net proceeds forfeited;
 - ii. An award of up to 5% of any net proceeds forfeited between \$100 million and \$500 million.
 - iii. No award on net proceeds forfeited above \$500 million.
 - c. If the Department determines in its sole discretion that an award is appropriate and none of the considerations that may decrease an award are present, there is a presumption that the Department will award a whistleblower the maximum 30% of the first \$10 million in net proceeds forfeited.

- d. Awards, if paid, will be paid from the net proceeds of the total asset(s) forfeited in each case.
- 2. Payment Priority: In making awards, the Department will draw from net proceeds of the forfeiture of total asset(s) finally forfeited and deposited in the Assets Forfeiture Fund in conjunction with each successful prosecution, corporate criminal resolution, or civil forfeiture action. . . .

[Ed: the pilot program policy includes additional provisions related to criteria for determining the amount of the award and procedures for filing for an award; these are similar in form to those that apply under the SEC Dodd-Frank whistleblower program.]

Problem 10-3

Suppose you are an attorney at a law firm that sometimes represents and defends individuals concerned about potential criminal problems and that your firm also represents some such individuals in the posture of whistleblower. Nancy, a new client, comes to your office for an initial meeting and states that she works in the accounting department of a large public company and believes she has knowledge of fraud in the company's accounting practices. She asks you to explain what her options might be. How will you conduct this interview? What are the most important questions you will ask Nancy?

11. THE GRAND JURY

The grand jury is one of the most powerful tools in the federal prosecutor's arsenal. It has subpoena power, secrecy rules, court authority, ex parte structure, and a general solemnity that make it a very effective way to gather information, especially from people who do not want to share it.

As a matter of law, the grand jury has two functions: (1) to investigate possible criminal violations, and (2) to determine whether there is sufficient evidence to return an indictment (charge a crime). The two functions are of course closely related, since it is the power to charge that gives rise to the power to investigate.

More of corporate criminal practice occurs in the shadow of the grand jury than inside the grand jury (*i.e.*, "we can do this cooperatively or we can do it in the grand jury"). But that shadow is very important, so the practitioner must understand how things work if a matter or witness ends up, or could end up, in the grand jury. And, of course, in a contested case only the grand jury can level a charge, so there is always the possibility, however slight, that a case will fail in the grand jury and never get off the ground.

A. Statutes and Rules

The Fifth Amendment gives the right to have a charge considered and returned or rejected by a grand jury in federal court before being prosecuted for any felony. This right has not been incorporated against the states, though most states have grand juries.

Rule 6 of the Federal Rules of Criminal Procedure explains (some of) how the grand jury works and has important provisions about secrecy. Notice who and what are *not* covered by the secrecy rules.

U.S. Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rules of Criminal Procedure: Rule 6. "The Grand Jury"

(a) Summoning a Grand Jury.

(1) In General. When the public interest so requires, the court must order that one or more grand juries be summoned. A grand jury must have 16 to 23 members, and

the court must order that enough legally qualified persons be summoned to meet this requirement.

(2) Alternate Jurors. When a grand jury is selected, the court may also select alternate jurors. Alternate jurors must have the same qualifications and be selected in the same manner as any other juror. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror is subject to the same challenges, takes the same oath, and has the same authority as the other jurors.

(b) Objection to the Grand Jury or to a Grand Juror.

(1) Challenges. Either the government or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified.

(2) Motion to Dismiss an Indictment. A party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror's lack of legal qualification, unless the court has previously ruled on the same objection under Rule 6(b)(1). The motion to dismiss is governed by 28 U.S.C. § 1867(e). The court must not dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.

(c) Foreperson and Deputy Foreperson. The court will appoint one juror as the foreperson and another as the deputy foreperson. In the foreperson's absence, the deputy foreperson will act as the foreperson. The foreperson may administer oaths and affirmations and will sign all indictments. The foreperson—or another juror designated by the foreperson—will record the number of jurors concurring in every indictment and will file the record with the clerk, but the record may not be made public unless the court so orders.

(d) Who May Be Present.

(1) While the Grand Jury Is in Session. The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device.

(2) During Deliberations and Voting. No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.

(e) Recording and Disclosing the Proceedings.

(1) Recording the Proceedings. Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. But the validity of a prosecution is not affected by the

unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.

(2) Secrecy.

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

- (i)** a grand juror;
- (ii)** an interpreter;
- (iii)** a court reporter;
- (iv)** an operator of a recording device;
- (v)** a person who transcribes recorded testimony;
- (vi)** an attorney for the government; or
- (vii)** a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(3) Exceptions.

(A) Disclosure of a grand-jury matter—other than the grand jury's deliberations or any grand juror's vote—may be made to:

- (i)** an attorney for the government for use in performing that attorney's duty;
- (ii)** any government personnel—including those of a state, state subdivision, Indian tribe, or foreign government—that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or
- (iii)** a person authorized by 18 U.S.C. § 3322.

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401a), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any state, state subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only in a manner consistent with any guidelines issued by the Attorney General and the Director of National Intelligence.

(ii) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D), an attorney for the government must file, under seal, a notice with the court in the district where the grand jury convened stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

(iii) As used in Rule 6(e)(3)(D), the term "foreign intelligence information" means:

(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against—

- actual or potential attack or other grave hostile acts of a foreign power or its agent;
 - sabotage or international terrorism by a foreign power or its agent; or
 - clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent;
- or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to—

- the national defense or the security of the United States; or
- the conduct of the foreign affairs of the United States.

(E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter:

(i) preliminarily to or in connection with a judicial proceeding;

(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;

(iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation;

(iv) at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law; or

(v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(F) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte—as it may be when the government is the petitioner—the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:

(i) an attorney for the government;

(ii) the parties to the judicial proceeding; and

(iii) any other person whom the court may designate.

(G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(F) a reasonable opportunity to appear and be heard.

(4) Sealed Indictment. The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons.

(5) Closed Hearing. Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.

(6) Sealed Records. Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

(7) Contempt. A knowing violation of Rule 6, or of any guidelines jointly issued by the Attorney General and the Director of National Intelligence under Rule 6, may be punished as a contempt of court.

(f) Indictment and Return. A grand jury may indict only if at least 12 jurors concur. The grand jury—or its foreperson or deputy foreperson—must return the indictment to a magistrate judge in open court. To avoid unnecessary cost or delay, the magistrate judge may take the return by video teleconference from the court where the grand jury sits. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.

(g) Discharging the Grand Jury. A grand jury must serve until the court discharges it, but it may serve more than 18 months only if the court, having determined that an extension is in the public interest, extends the grand jury's service. An extension may be granted for no more than 6 months, except as otherwise provided by statute.

(h) Excusing a Juror. At any time, for good cause, the court may excuse a juror either temporarily or permanently, and if permanently, the court may impanel an alternate juror in place of the excused juror.

(i) "Indian Tribe" Defined. "Indian tribe" means an Indian tribe recognized by the Secretary of the Interior on a list published in the Federal Register under 25 U.S.C. § 479a-1.

B. Prosecutors and the Grand Jury

DOJ, in the following internal rules, tries to limit prosecutors in the grand jury more than the law requires. Notice the ways the DOJ does that. These guidelines recognize the powers of the grand jury and the potential for abuse that is mostly unreviewable. What kinds of abuses do these internal DOJ rules seek to prevent?

U.S. DEPARTMENT OF JUSTICE, JUSTICE MANUAL [Provisions on Grand Juries]**9-11.010. Introduction**

This chapter contains the Department's policy on grand jury practice. For a discussion of the law, and a list of resource materials on grand jury practice, see the Criminal Resource Manual.

In dealing with the grand jury, the prosecutor must always conduct himself or herself as an officer of the court whose function is to ensure that justice is done and that guilt shall not escape nor innocence suffer. The prosecutor must recognize that the grand jury is an independent body, whose functions include not only the investigation of crime and the initiation of criminal prosecution but also the protection of the citizenry from unfounded criminal charges. The prosecutor's responsibility is to advise the grand jury on the law and to present evidence for its consideration. In discharging these responsibilities, the prosecutor must be scrupulously fair to all witnesses and must do nothing to inflame or otherwise improperly influence the grand jurors.

9-11.101. Powers and Limitations of Grand Juries—The Functions of a Grand Jury

While grand juries are sometimes described as performing accusatory and investigatory functions, the grand jury's principal function is to determine whether or not there is probable cause to believe that one or more persons committed a certain Federal offense within the venue of the district court. Thus, it has been said that a grand jury has but two functions—to indict or, in the alternative, to return a "no-bill." *See* Wright, *Federal Practice and Procedure*, Criminal Section 110.

At common law, a grand jury enjoyed a certain power to issue reports alleging non-criminal misconduct. A special grand jury impaneled under Title 18 U.S.C. § 3331 is authorized, on the basis of a criminal investigation (but not otherwise), to fashion a report, potentially for public release, concerning either organized crime conditions in the district or the non-criminal misconduct in office of appointed public officers or employees. This is discussed at USAM 9-11.300 and USAM 9-11.330, and the Criminal Resource Manual. *See Jenkins v. McKeithen; Hannah v. Larche*. Whether a regular grand jury enjoys a comparable authority to issue a report is a difficult and complex question. *Cf. United States v. Briggs*. The Criminal Division of the Department of Justice should be consulted before any grand jury report is initiated, whether by a regular or special grand jury. *See also* USAM 9-11.330.

9-11.120. Power of a Grand Jury Limited by Its Function

The grand jury's power, although expansive, is limited by its function toward possible return of an indictment. *Costello v. United States*. Accordingly, the grand jury cannot be used solely to obtain additional evidence against a defendant who has already been indicted. *United States v. Woods, Hurt v. United States*. Nor can the grand jury be used solely for pre-trial discovery or trial preparation. *United States v. Star*. After indictment,

the grand jury may be used if its investigation is related to a superseding indictment of additional defendants or additional crimes by an indicted defendant. *In re Grand Jury Subpoena Duces Tecum, Dated January 2, 1985; In re Grand Jury Proceedings. . . .*

9-11.150. Subpoenaing Targets of the Investigation

A grand jury may properly subpoena a subject or a target of the investigation and question the target about his or her involvement in the crime under investigation. *See United States v. Wong; United States v. Washington; United States v. Mandujano; United States v. Dionisio.* However, in the context of particular cases such a subpoena may carry the appearance of unfairness. Because the potential for misunderstanding is great, before a known “target” (as defined in USAM 9-11.151) is subpoenaed to testify before the grand jury about his or her involvement in the crime under investigation, an effort should be made to secure the target’s voluntary appearance. If a voluntary appearance cannot be obtained, the target should be subpoenaed only after the grand jury and the United States Attorney or the responsible Assistant Attorney General have approved the subpoena. In determining whether to approve a subpoena for a “target,” careful attention will be paid to the following considerations:

- The importance to the successful conduct of the grand jury’s investigation of the testimony or other information sought;
- Whether the substance of the testimony or other information sought could be provided by other witnesses; and
- Whether the questions the prosecutor and the grand jurors intend to ask or the other information sought would be protected by a valid claim of privilege.

9-11.151. Advice of “Rights” of Grand Jury Witnesses

It is the policy of the Department of Justice to advise a grand jury witness of his or her rights if such witness is a “target” or “subject” of a grand jury investigation. See the Criminal Resource Manual at 160 for a sample target letter.

A “target” is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. An officer or employee of an organization which is a target is not automatically considered a target even if such officer’s or employee’s conduct contributed to the commission of the crime by the target organization. The same lack of automatic target status holds true for organizations which employ, or employed, an officer or employee who is a target.

A “subject” of an investigation is a person whose conduct is within the scope of the grand jury’s investigation.

The Supreme Court declined to decide whether a grand jury witness must be warned of his or her Fifth Amendment privilege against compulsory self-incrimination before the witness’s grand jury testimony can be used against the witness. *See United States v. Washington; United States v. Wong; United States v. Mandujano.* In *Mandujano* the

Court took cognizance of the fact that Federal prosecutors customarily warn “targets” of their Fifth Amendment rights before grand jury questioning begins. Similarly, in *Washington*, the Court pointed to the fact that Fifth Amendment warnings were administered as negating “any possible compulsion to self-incrimination which might otherwise exist” in the grand jury setting. *See Washington*.

Notwithstanding the lack of a clear constitutional imperative, it is the policy of the Department that an “Advice of Rights” form be appended to all grand jury subpoenas to be served on any “target” or “subject” of an investigation. *See* advice of rights below.

In addition, these “warnings” should be given by the prosecutor on the record before the grand jury and the witness should be asked to affirm that the witness understands them.

Although the Court in *Washington* held that “targets” of the grand jury’s investigation are entitled to no special warnings relative to their status as “potential defendant(s),” the Department of Justice continues its longstanding policy to advise witnesses who are known “targets” of the investigation that their conduct is being investigated for possible violation of Federal criminal law. This supplemental advice of status of the witness as a target should be repeated on the record when the target witness is advised of the matters discussed in the preceding paragraphs.

When a district court insists that the notice of rights not be appended to a grand jury subpoena, the advice of rights may be set forth in a separate letter and mailed to or handed to the witness when the subpoena is served.

Advice of Rights

- The grand jury is conducting an investigation of possible violations of Federal criminal laws involving: (State here the general subject matter of inquiry, e.g., conducting an illegal gambling business in violation of 18 U.S.C. § 1955).
- You may refuse to answer any question if a truthful answer to the question would tend to incriminate you.
- Anything that you do say may be used against you by the grand jury or in a subsequent legal proceeding.
- If you have retained counsel, the grand jury will permit you a reasonable opportunity to step outside the grand jury room to consult with counsel if you so desire.

Additional Advice to be Given to Targets: If the witness is a target, the above advice should also contain a supplemental warning that the witness’s conduct is being investigated for possible violation of federal criminal law.

9-11.152. Requests by Subjects and Targets to Testify Before the Grand Jury

It is not altogether uncommon for subjects or targets of the grand jury’s investigation, particularly in white-collar cases, to request or demand the opportunity to tell the grand jury their side of the story. While the prosecutor has no legal obligation to permit such

witnesses to testify, *United States v. Leverage Funding System, Inc.*; *United States v. Gardner*, a refusal to do so can create the appearance of unfairness. Accordingly, under normal circumstances, where no burden upon the grand jury or delay of its proceedings is involved, reasonable requests by a “subject” or “target” of an investigation, as defined above, to testify personally before the grand jury ordinarily should be given favorable consideration, provided that such witness explicitly waives his or her privilege against self-incrimination, on the record before the grand jury, and is represented by counsel or voluntarily and knowingly appears without counsel and consents to full examination under oath.

Such witnesses may wish to supplement their testimony with the testimony of others. The decision whether to accommodate such requests or to reject them after listening to the testimony of the target or the subject, or to seek statements from the suggested witnesses, is a matter left to the sound discretion of the grand jury. When passing on such requests, it must be kept in mind that the grand jury was never intended to be and is not properly either an adversary proceeding or the arbiter of guilt or innocence. *See, e.g., United States v. Calandra.*

9-11.153. Notification of Targets

When a target is not called to testify pursuant to USAM 9-11.150, and does not request to testify on his or her own motion (see USAM 9-11.152), the prosecutor, in appropriate cases, is encouraged to notify such person a reasonable time before seeking an indictment in order to afford him or her an opportunity to testify before the grand jury, subject to the conditions set forth in USAM 9-11.152. Notification would not be appropriate in routine clear cases or when such action might jeopardize the investigation or prosecution because of the likelihood of flight, destruction or fabrication of evidence, endangerment of other witnesses, undue delay or otherwise would be inconsistent with the ends of justice.

9-11.154. Advance Assertions of an Intention to Claim the Fifth Amendment Privilege Against Compulsory Self-Incrimination

A question frequently faced by Federal prosecutors is how to respond to an assertion by a prospective grand jury witness that if called to testify the witness will refuse to testify on Fifth Amendment grounds. If a “target” of the investigation and his or her attorney state in writing, signed by both, that the “target” will refuse to testify on Fifth Amendment grounds, the witness ordinarily should be excused from testifying unless the grand jury and the United States Attorney agree to insist on the appearance. In determining the desirability of insisting on the appearance of such a person, consideration should be given to the factors which justified the subpoena in the first place, i.e., the importance of the testimony or other information sought, its unavailability from other sources, and the applicability of the Fifth Amendment privilege to the likely areas of inquiry.

Some argue that unless the prosecutor is prepared to seek an order pursuant to 18 U.S.C. § 6003, the witness should be excused from testifying. However, such a broad rule would be improper and make it too convenient for witnesses to avoid testifying truthfully to their knowledge of relevant facts. Moreover, once compelled to appear, the witness may be willing and able to answer some or all of the grand jury's questions without incriminating himself or herself.

9-11.155. Notification to Targets when Target Status Ends

The United States Attorney has the discretion to notify an individual, who has been the target of a grand jury investigation, that the individual is no longer considered to be a target by the United States Attorney's Office. Such a notification should be provided only by the United States Attorney having cognizance over the grand jury investigation.

Discontinuation of target status may be appropriate when:

- The target previously has been notified by the government that he or she was a target of the investigation; and,
- The criminal investigation involving the target has been discontinued without an indictment being returned charging the target, or the government receives evidence in a continuing investigation that conclusively establishes that target status has ended as to this individual.

There may be other circumstances in which the United States Attorney may exercise discretion to provide such notification such as when government action has resulted in public knowledge of the investigation.

The United States Attorney may decline to issue such notification if the notification would adversely affect the integrity of the investigation or the grand jury process, or for other appropriate reasons. No explanation need be provided for declining such a request.

If the United States Attorney concludes that the notification is appropriate, the language of the notification may be tailored to the particular case. In a particular case, for example, the language of the notification may be drafted to preclude the target from using the notification as a "clean bill of health" or testimonial.

The delivering of such a notification to a target or the attorney for the target shall not preclude the United States Attorney's Office or the grand jury having cognizance over the investigation (or any other grand jury) from reinstituting such an investigation without notification to the target, or the attorney for the target, if, in the opinion of that or any other grand jury, or any United States Attorney's Office, circumstances warrant such a reinstitution. . . .

9-11.233. Presentation of Exculpatory Evidence

In *United States v. Williams*, the Supreme Court held that the Federal courts' supervisory powers over the grand jury did not include the power to make a rule allowing the

dismissal of an otherwise valid indictment where the prosecutor failed to introduce substantial exculpatory evidence to a grand jury. It is the policy of the Department of Justice, however, that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person. While a failure to follow the Department's policy should not result in dismissal of an indictment, appellate courts may refer violations of the policy to the Office of Professional Responsibility for review.

C. The Judicial Branch and the Grand Jury

The following case deals with the question of how bad things have to get for a court to actually dismiss a case because of misconduct by the government in the grand jury. Why is the scope of judicial review of such grand jury-related conduct not broader?

BANK OF NOVA SCOTIA v. UNITED STATES, 487 U.S. 250 (1988)

Justice KENNEDY delivered the opinion of the Court.

The issue presented is whether a district court may invoke its supervisory power to dismiss an indictment for prosecutorial misconduct in a grand jury investigation, where the misconduct does not prejudice the defendants.

In 1982, after a 20-month investigation conducted before two successive grand juries, eight defendants, including petitioners William A. Kilpatrick, Declan J. O'Donnell, Sheila C. Lerner, and The Bank of Nova Scotia, were indicted on 27 counts. The first 26 counts charged all defendants with conspiracy and some of them with mail and tax fraud. Count 27 charged Kilpatrick with obstruction of justice. . . .

We hold that, as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants.

In the exercise of its supervisory authority, a federal court "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hastings*. Nevertheless, it is well established that "[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions." *Thomas v. Arn*. To allow otherwise "would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." *United States v. Payner*. Our previous cases have not addressed explicitly whether this rationale bars exercise of a supervisory authority where, as here, dismissal of the indictment would conflict with the harmless-error inquiry mandated by the Federal Rules of Criminal Procedure.

We now hold that a federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a). Rule 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The Rule was promulgated pursuant to 18 U.S.C.

§ 687 (1946 ed.) (currently codified, as amended, at 18 U.S.C. § 3771), which invested us with authority “to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict. . . .” Like its present-day successor, § 687 provided that after a Rule became effective “all laws in conflict therewith shall be of no further force and effect.” It follows that Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule’s mandate than they do to disregard constitutional or statutory provisions. The balance struck by the Rule between societal costs and the rights of the accused may not casually be overlooked “because a court has elected to analyze the question under the supervisory power.” *United States v. Payner*. . . .

Having concluded that our customary harmless-error inquiry is applicable where, as in the cases before us, a court is asked to dismiss an indictment prior to the conclusion of the trial, we turn to the standard of prejudice that courts should apply in assessing such claims. We adopt for this purpose, at least where dismissal is sought for nonconstitutional error, the standard articulated by Justice O’CONNOR in her concurring opinion in *United States v. Mechanik*. Under this standard, dismissal of the indictment is appropriate only “if it is established that the violation substantially influenced the grand jury’s decision to indict,” or if there is “grave doubt” that the decision to indict was free from the substantial influence of such violations. *United States v. Mechanik*. . . .

To be distinguished from the cases before us are a class of cases in which indictments are dismissed, without a particular assessment of the prejudicial impact of the errors in each case, because the errors are deemed fundamental. These cases may be explained as isolated exceptions to the harmless-error rule. We think, however, that an alternative and more clear explanation is that these cases are ones in which the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice. *See Rose v. Clark*. These cases are exemplified by *Vasquez v. Hillery*, where we held that racial discrimination in selection of grand jurors compelled dismissal of the indictment. In addition to involving an error of constitutional magnitude, other remedies were impractical and it could be presumed that a discriminatorily selected grand jury would treat defendants unfairly. *See United States v. Mechanik*. We reached a like conclusion in *Ballard v. United States*, where women had been excluded from the grand jury. The nature of the violation allowed a presumption that the defendant was prejudiced, and any inquiry into harmless error would have required unguided speculation. Such considerations are not presented here, and we review the alleged errors to assess their influence, if any, on the grand jury’s decision to indict in the factual context of the cases before us.

Though the standard we have articulated differs from that used by the Court of Appeals, we reach the same conclusion and affirm its decision reversing the order of dismissal. We review the record to set forth the basis of our agreement with the Court of Appeals that prejudice has not been established.

The District Court found that the Government had violated Federal Rule of Criminal Procedure 6(e) by: (1) disclosing grand jury materials to Internal Revenue Service employees having civil tax enforcement responsibilities; (2) failing to give the court prompt notice of such disclosures; (3) disclosing to potential witnesses the names of targets of the investigation; and (4) instructing two grand jury witnesses, who had represented some of the defendants in a separate investigation of the same tax shelters, that they were not to reveal the substance of their testimony or that they had testified before the grand jury. The court also found that the Government had violated Federal Rule of Criminal Procedure 6(d) in allowing joint appearances by IRS agents before the grand jury for the purpose of reading transcripts to the jurors.

The District Court further concluded that one of the prosecutors improperly argued with an expert witness during a recess of the grand jury after the witness gave testimony adverse to the Government. It also held that the Government had violated the witness immunity statute, 18 U.S.C. §§ 6002, 6003, by the use of “pocket immunity” (immunity granted on representation of the prosecutor rather than by order of a judge), and that the Government caused IRS agents to mischaracterize testimony given in prior proceedings. Furthermore, the District Court found that the Government violated the Fifth Amendment by calling a number of witnesses for the sole purpose of having them assert their privilege against self-incrimination and that it had violated the Sixth Amendment by conducting postindictment interviews of several high-level employees of The Bank of Nova Scotia. Finally, the court concluded that the Government had caused IRS agents to be sworn as agents of the grand jury, thereby elevating their credibility.

As we have noted, no constitutional error occurred during the grand jury proceedings. The Court of Appeals concluded that the District Court’s findings of Sixth Amendment postindictment violations were unrelated to the grand jury’s independence and decisionmaking process because the alleged violations occurred *after* the indictment. We agree that it was improper for the District Court to cite such matters in dismissing the indictment. The Court of Appeals also found that no Fifth Amendment violation occurred as a result of the Government’s calling seven witnesses to testify despite an avowed intention to invoke their Fifth Amendment privilege. We agree that, in the circumstances of these cases, calling the witnesses was not error. The Government was not required to take at face value the unsworn assertions made by these witnesses outside the grand jury room. Once a witness invoked the privilege on the record, the prosecutors immediately ceased all questioning. Throughout the proceedings, moreover, the prosecution repeated the caution to the grand jury that it was not to draw any adverse inference from a witness’ invocation of the Fifth Amendment.

In the cases before us we do not inquire whether the grand jury’s independence was infringed. Such an infringement may result in grave doubt as to a violation’s effect on the grand jury’s decision to indict, but we did not grant certiorari to review this conclusion. We note that the Court of Appeals found that the prosecution’s conduct was not “a significant infringement on the grand jury’s ability to exercise independent judgment,” and we accept that conclusion here. Finally, we note that we are not faced

with a history of prosecutorial misconduct, spanning several cases, that is so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness of the process which resulted in the indictment.

We must address, however, whether, despite the grand jury's independence, there was any misconduct by the prosecution that otherwise may have influenced substantially the grand jury's decision to indict, or whether there is grave doubt as to whether the decision to indict was so influenced. Several instances of misconduct found by the District Court—that the prosecutors manipulated the grand jury investigation to gather evidence for use in civil audits; violated the secrecy provisions of Rule 6(e) by publicly identifying the targets and the subject matter of the grand jury investigation; and imposed secrecy obligations in violation of Rule 6(e) upon grand jury witnesses—might be relevant to an allegation of a purpose or intent to abuse the grand jury process. Here, however, it is plain that these alleged breaches could not have affected the charging decision. We have no occasion to consider them further.

We are left to consider only the District Court's findings that the prosecutors: (1) fashioned and administered unauthorized "oaths" to IRS agents in violation of Rule 6(c); (2) caused the same IRS agents to "summarize" evidence falsely and to assert incorrectly that all the evidence summarized by them had been presented previously to the grand jury; (3) deliberately berated and mistreated an expert witness for the defense in the presence of some grand jurors; (4) abused its authority by providing "pocket immunity" to 23 grand jury witnesses; and (5) permitted IRS agents to appear in tandem to present evidence to the grand jury in violation of Rule 6(d). We consider each in turn.

The Government administered oaths to IRS agents, swearing them in as "agents" of the grand jury. Although the administration of such oaths to IRS agents by the Government was unauthorized, there is ample evidence that the jurors understood that the agents were aligned with the prosecutors. At various times a prosecutor referred to the agents as "my agent(s)," and, in discussions with the prosecutors, grand jurors referred to the agents as "your guys" or "your agents." There is nothing in the record to indicate that the oaths administered to the IRS agents caused their reliability or credibility to be elevated, and the effect, if any, on the grand jury's decision to indict was negligible.

The District Court found that, to the prejudice of petitioners, IRS agents gave misleading and inaccurate summaries to the grand jury just prior to the indictment. Because the record does not reveal any prosecutorial misconduct with respect to these summaries, they provide no ground for dismissing the indictment. The District Court's finding that the summaries offered by IRS agents contained evidence that had not been presented to the grand jury in prior testimony boils down to a challenge to the reliability or competence of the evidence presented to the grand jury. We have held that an indictment valid on its face is not subject to such a challenge. *United States v. Calandra*. To the extent that a challenge is made to the accuracy of the summaries, the mere fact that evidence itself is unreliable is not sufficient to require a dismissal of the indictment. See *Costello v. United States* (holding that a court may not look behind the indictment to

determine if the evidence upon which it was based is sufficient). In light of the record, the finding that the prosecutors knew the evidence to be false or misleading, or that the Government caused the agents to testify falsely, is clearly erroneous. Although the Government may have had doubts about the accuracy of certain aspects of the summaries, this is quite different from having knowledge of falsity.

The District Court found that a prosecutor was abusive to an expert defense witness during a recess and in the hearing of some grand jurors. Although the Government concedes that the treatment of the expert tax witness was improper, the witness himself testified that his testimony was unaffected by this misconduct. The prosecutors instructed the grand jury to disregard anything they may have heard in conversations between a prosecutor and a witness, and explained to the grand jury that such conversations should have no influence on its deliberations. In light of these ameliorative measures, there is nothing to indicate that the prosecutor's conduct toward this witness substantially affected the grand jury's evaluation of the testimony or its decision to indict.

The District Court found that the Government granted "pocket immunity" to 23 witnesses during the course of the grand jury proceedings. Without deciding the propriety of granting such immunity to grand jury witnesses, we conclude the conduct did not have a substantial effect on the grand jury's decision to indict, and it does not create grave doubt as to whether it affected the grand jury's decision. Some prosecutors told the grand jury that immunized witnesses retained their Fifth Amendment privilege and could refuse to testify, while other prosecutors stated that the witnesses had no Fifth Amendment privilege, but we fail to see how this could have had a substantial effect on the jury's assessment of the testimony or its decision to indict. The significant point is that the jurors were made aware that these witnesses had made a deal with the Government.

Assuming the Government had threatened to withdraw immunity from a witness in order to manipulate that witness' testimony, this might have given rise to a finding of prejudice. There is no evidence in the record, however, that would support such a finding. The Government told a witness' attorney that if the witness "testified for Mr. Kilpatrick, all bets were off." The attorney, however, ultimately concluded that the prosecution did not mean to imply that immunity would be withdrawn if his client testified for Kilpatrick, but rather that his client would be validly subject to prosecution for perjury. Although the District Court found that the Government's statement was interpreted by the witness to mean that if he testified favorably for Kilpatrick his immunity would be withdrawn, neither Judge Winner nor Judge Kane made a definitive finding that the Government improperly threatened the witness. The witness may have felt threatened by the prosecutor's statement, but his subjective fear cannot be ascribed to governmental misconduct and was, at most, a consideration bearing on the reliability of his testimony.

Finally, the Government permitted two IRS agents to appear before the grand jury at the same time for the purpose of reading transcripts. Although allowing the agents to read to the grand jury in tandem was a violation of Rule 6(d), it was not prejudicial. The agents gave no testimony of their own during the reading of the transcripts. The grand jury was instructed not to ask any questions and the agents were instructed not to answer any questions during the readings. There is no evidence that the agents' reading in tandem enhanced the credibility of the testimony or otherwise allowed the agents to exercise undue influence.

In considering the prejudicial effect of the foregoing instances of alleged misconduct, we note that these incidents occurred as isolated episodes in the course of a 20-month investigation, an investigation involving dozens of witnesses and thousands of documents. In view of this context, those violations that did occur do not, even when considered cumulatively, raise a substantial question, much less a grave doubt, as to whether they had a substantial effect on the grand jury's decision to charge.

Errors of the kind alleged in these cases can be remedied adequately by means other than dismissal. For example, a knowing violation of Rule 6 may be punished as a contempt of court. *See* Fed. Rule Crim. Proc. 6(e)(2). In addition, the court may direct a prosecutor to show cause why he should not be disciplined and request the bar or the Department of Justice to initiate disciplinary proceedings against him. The court may also chastise the prosecutor in a published opinion. Such remedies allow the court to focus on the culpable individual rather than granting a windfall to the unprejudiced defendant.

We conclude that the District Court had no authority to dismiss the indictment on the basis of prosecutorial misconduct absent a finding that petitioners were prejudiced by such misconduct. The prejudicial inquiry must focus on whether any violations had an effect on the grand jury's decision to indict. If violations did substantially influence this decision, or if there is grave doubt that the decision to indict was free from such substantial influence, the violations cannot be deemed harmless. The record will not support the conclusion that petitioners can meet this standard. The judgment of the Court of Appeals is affirmed.

This next case addresses the grand jury's subpoena power and the limited basis on which one can challenge such a subpoena and try to resist compliance.

UNITED STATES v. R. ENTERPRISES, INC., 498 U.S. 292 (1991)

Justice O'CONNOR delivered the opinion of the Court.

This case requires the Court to decide what standards apply when a party seeks to avoid compliance with a subpoena *duces tecum* issued in connection with a grand jury investigation.

Since 1986, a federal grand jury sitting in the Eastern District of Virginia has been investigating allegations of interstate transportation of obscene materials. In early 1988,

the grand jury issued a series of subpoenas to three companies—Model Magazine Distributors, Inc. (Model), R. Enterprises, Inc., and MFR Court Street Books, Inc. (MFR). Model is a New York distributor of sexually oriented paperback books, magazines, and videotapes. R. Enterprises, which distributes adult materials, and MFR, which sells books, magazines, and videotapes, are also based in New York. All three companies are wholly owned by Martin Rothstein. The grand jury subpoenas sought a variety of corporate books and records and, in Model's case, copies of 193 videotapes that Model had shipped to retailers in the Eastern District of Virginia. All three companies moved to quash the subpoenas, arguing that the subpoenas called for production of materials irrelevant to the grand jury's investigation and that the enforcement of the subpoenas would likely infringe their First Amendment rights. . . .

The grand jury occupies a unique role in our criminal justice system. It is an investigatory body charged with the responsibility of determining whether or not a crime has been committed. Unlike this Court, whose jurisdiction is predicated on a specific case or controversy, the grand jury "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. Morton Salt Co.* The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush. "A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'" *Branzburg v. Hayes* (quoting *United States v. Stone*).

A grand jury subpoena is thus much different from a subpoena issued in the context of a prospective criminal trial, where a specific offense has been identified and a particular defendant charged. "[T]he identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning." *Blair v. United States*. In short, the Government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause because the very purpose of requesting the information is to ascertain whether probable cause exists. See *Hale v. Henkel*.

This Court has emphasized on numerous occasions that many of the rules and restrictions that apply at a trial do not apply in grand jury proceedings. This is especially true of evidentiary restrictions. The same rules that, in an adversary hearing on the merits, may increase the likelihood of accurate determinations of guilt or innocence do not necessarily advance the mission of a grand jury, whose task is to conduct an *ex parte* investigation to determine whether or not there is probable cause to prosecute a particular defendant. In *Costello v. United States*, this Court declined to apply the rule against hearsay to grand jury proceedings. Strict observance of trial rules in the context of a grand jury's preliminary investigation "would result in interminable delay but add nothing to the assurance of a fair trial." In *United States v. Calandra*, we held that the Fourth Amendment exclusionary rule does not apply to grand jury proceedings.

Permitting witnesses to invoke the exclusionary rule would “delay and disrupt grand jury proceedings” by requiring adversary hearings on peripheral matters, and would effectively transform such proceedings into preliminary trials on the merits. The teaching of the Court’s decisions is clear: A grand jury “may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.”

This guiding principle renders suspect the Court of Appeals’ holding that the standards announced in *Nixon* as to subpoenas issued in anticipation of trial apply equally in the grand jury context. The multifactor test announced in *Nixon* would invite procedural delays and detours while courts evaluate the relevancy and admissibility of documents sought by a particular subpoena. We have expressly stated that grand jury proceedings should be free of such delays. “Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public’s interest in the fair and expeditious administration of the criminal laws.” *United States v. Dionisio. Accord, Calandra*. Additionally, application of the *Nixon* test in this context ignores that grand jury proceedings are subject to strict secrecy requirements. *See* Fed. Rule Crim. Proc. 6(e). Requiring the Government to explain in too much detail the particular reasons underlying a subpoena threatens to compromise “the indispensable secrecy of grand jury proceedings.” *United States v. Johnson*. Broad disclosure also affords the targets of investigation far more information about the grand jury’s internal workings than the Federal Rules of Criminal Procedure appear to contemplate.

The investigatory powers of the grand jury are nevertheless not unlimited. *See Branzburg; Calandra*. Grand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass. In this case, the focus of our inquiry is the limit imposed on a grand jury by Federal Rule of Criminal Procedure 17(c), which governs the issuance of subpoenas *duces tecum* in federal criminal proceedings. The Rule provides that “[t]he court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.”

This standard is not self-explanatory. As we have observed, “what is reasonable depends on the context.” *New Jersey v. T.L.O.* In *Nixon*, this Court defined what is reasonable in the context of a jury trial. We determined that, in order to require production of information prior to trial, a party must make a reasonably specific request for information that would be both relevant and admissible at trial. But, for the reasons we have explained above, the *Nixon* standard does not apply in the context of grand jury proceedings. In the grand jury context, the decision as to what offense will be charged is routinely not made until after the grand jury has concluded its investigation. One simply cannot know in advance whether information sought during the investigation will be relevant and admissible in a prosecution for a particular offense.

To the extent that Rule 17(c) imposes some reasonableness limitation on grand jury subpoenas, however, our task is to define it. In doing so, we recognize that a party to whom a grand jury subpoena is issued faces a difficult situation. As a rule, grand juries do not announce publicly the subjects of their investigations. A party who desires to challenge a grand jury subpoena thus may have no conception of the Government's purpose in seeking production of the requested information. Indeed, the party will often not know whether he or she is a primary target of the investigation or merely a peripheral witness. Absent even minimal information, the subpoena recipient is likely to find it exceedingly difficult to persuade a court that "compliance would be unreasonable." As one pair of commentators has summarized it, the challenging party's "unenviable task is to seek to persuade the court that the subpoena that has been served on [him or her] could not possibly serve any investigative purpose that the grand jury could legitimately be pursuing." 1 S. Beale & W. Bryson, *Grand Jury Law and Practice* § 6:28 (1986).

Our task is to fashion an appropriate standard of reasonableness, one that gives due weight to the difficult position of subpoena recipients but does not impair the strong governmental interests in affording grand juries wide latitude, avoiding minitrials on peripheral matters, and preserving a necessary level of secrecy. We begin by reiterating that the law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority. *See United States v. Mechanik* ("The grand jury proceeding is accorded a presumption of regularity, which generally may be dispelled only upon particularized proof of irregularities in the grand jury process"). *See also Hamling v. United States; United States v. Johnson*. Consequently, a grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance. Indeed, this result is indicated by the language of Rule 17(c), which permits a subpoena to be quashed only "on motion" and "if *compliance* would be unreasonable." To the extent that the Court of Appeals placed an initial burden on the Government, it committed error. Drawing on the principles articulated above, we conclude that where, as here, a subpoena is challenged on relevancy grounds, the motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation. Respondents did not challenge the subpoenas as being too indefinite nor did they claim that compliance would be overly burdensome. *See App. in In re Grand Jury 87-3 Subpoena Duces Tecum*. The Court of Appeals accordingly did not consider these aspects of the subpoenas, nor do we.

It seems unlikely, of course, that a challenging party who does not know the general subject matter of the grand jury's investigation, no matter how valid that party's claim, will be able to make the necessary showing that compliance would be unreasonable. After all, a subpoena recipient "cannot put his whole life before the court in order to show that there is no crime to be investigated," *Marston's, Inc. v. Strand*. Consequently, a court may be justified in a case where unreasonableness is alleged in requiring the Government to reveal the general subject of the grand jury's investigation before requiring the challenging party to carry its burden of persuasion. We need not resolve

this question in the present case, however, as there is no doubt that respondents knew the subject of the grand jury investigation pursuant to which the business records subpoenas were issued. In cases where the recipient of the subpoena does not know the nature of the investigation, we are confident that district courts will be able to craft appropriate procedures that balance the interests of the subpoena recipient against the strong governmental interests in maintaining secrecy, preserving investigatory flexibility, and avoiding procedural delays. For example, to ensure that subpoenas are not routinely challenged as a form of discovery, a district court may require that the Government reveal the subject of the investigation to the trial court *in camera*, so that the court may determine whether the motion to quash has a reasonable prospect for success before it discloses the subject matter to the challenging party.

Applying these principles in this case demonstrates that the District Court correctly denied respondents' motions to quash. It is undisputed that all three companies—Model, R. Enterprises, and MFR—are owned by the same person, that all do business in the same area, and that one of the three, Model, has shipped sexually explicit materials into the Eastern District of Virginia. The District Court could have concluded from these facts that there was a reasonable possibility that the business records of R. Enterprises and MFR would produce information relevant to the grand jury's investigation into the interstate transportation of obscene materials. Respondents' blanket denial of any connection to Virginia did not suffice to render the District Court's conclusion invalid. A grand jury need not accept on faith the self-serving assertions of those who may have committed criminal acts. Rather, it is entitled to determine for itself whether a crime has been committed. *See Morton Salt Co.*

Both in the District Court and in the Court of Appeals, respondents contended that these subpoenas sought records relating to First Amendment activities, and that this required the Government to demonstrate that the records were particularly relevant to its investigation. The Court of Appeals determined that the subpoenas did not satisfy Rule 17(c) and thus did not pass on the First Amendment issue. We express no view on this issue and leave it to be resolved by the Court of Appeals.

The judgment is reversed insofar as the Court of Appeals quashed the subpoenas issued to R. Enterprises and MFR, and the case is remanded for further proceedings consistent with this opinion.

The next case deals with the question of whether the prosecutor must present exculpatory evidence to the grand jury as a matter of constitutional law (as opposed to the requirements of professional or internal DOJ rules). If not, why not?

UNITED STATES v. WILLIAMS, 504 U.S. 36 (1992)

Justice SCALIA delivered the opinion of the Court.

The question presented in this case is whether a district court may dismiss an otherwise valid indictment because the Government failed to disclose to the grand jury “substantial exculpatory evidence” in its possession.

On May 4, 1988, respondent John H. Williams, Jr., a Tulsa, Oklahoma, investor, was indicted by a federal grand jury on seven counts of “knowingly mak[ing] [a] false statement or report . . . for the purpose of influencing . . . the action [of a federally insured financial institution],” in violation of 18 U.S.C. § 1014 (1988 ed., Supp. II). According to the indictment, between September 1984 and November 1985 Williams supplied four Oklahoma banks with “materially false” statements that variously overstated the value of his current assets and interest income in order to influence the banks’ actions on his loan requests.

Williams’ misrepresentation was allegedly effected through two financial statements provided to the banks, a “Market Value Balance Sheet” and a “Statement of Projected Income and Expense.” The former included as “current assets” approximately \$6 million in notes receivable from three venture capital companies. Though it contained a disclaimer that these assets were carried at cost rather than at market value, the Government asserted that listing them as “current assets”—*i.e.*, assets quickly reducible to cash—was misleading, since Williams knew that none of the venture capital companies could afford to satisfy the notes in the short term. The second document—the Statement of Projected Income and Expense—allegedly misrepresented Williams’ interest income, since it failed to reflect that the interest payments received on the notes of the venture capital companies were funded entirely by Williams’ own loans to those companies. The Statement thus falsely implied, according to the Government, that Williams was deriving interest income from “an independent outside source.”

Shortly after arraignment, the District Court granted Williams’ motion for disclosure of all exculpatory portions of the grand jury transcripts. *See Brady v. Maryland*. Upon reviewing this material, Williams demanded that the District Court dismiss the indictment, alleging that the Government had failed to fulfill its obligation under the Tenth Circuit’s prior decision in *United States v. Page* to present “substantial exculpatory evidence” to the grand jury. His contention was that evidence which the Government had chosen not to present to the grand jury—in particular, Williams’ general ledgers and tax returns, and Williams’ testimony in his contemporaneous Chapter 11 bankruptcy proceeding—disclosed that, for tax purposes and otherwise, he had regularly accounted for the “notes receivable” (and the interest on them) in a manner consistent with the Balance Sheet and the Income Statement. This, he contended, belied an intent to mislead the banks, and thus directly negated an essential element of the charged offense. . . .

Respondent does not contend that the Fifth Amendment itself obliges the prosecutor to disclose substantial exculpatory evidence in his possession to the grand jury. Instead, building on our statement that the federal courts “may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress,” *United States v. Hasting*, he argues that imposition of the Tenth Circuit’s disclosure rule is supported by the courts’ “supervisory power.” We think not. *Hasting*, and the cases that rely upon the principle it expresses, deal strictly with the courts’ power to control their own procedures. See, e.g., *Jencks v. United States*; *McNabb v. United States*. That power has been applied not only to improve the truth-finding process of the trial, see, e.g., *Mesarosh v. United States*, but also to prevent parties from reaping benefit or incurring harm from violations of substantive or procedural rules (imposed by the Constitution or laws) governing matters apart from the trial itself, see, e.g., *Weeks v. United States*. Thus, *Bank of Nova Scotia v. United States*, makes clear that the supervisory power can be used to dismiss an indictment because of misconduct before the grand jury, at least where that misconduct amounts to a violation of one of those “few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury’s functions,” *United States v. Mechanik*.

We did not hold in *Bank of Nova Scotia*, however, that the courts’ supervisory power could be used, not merely as a means of enforcing or vindicating legally compelled standards of prosecutorial conduct before the grand jury, but as a means of *prescribing* those standards of prosecutorial conduct in the first instance—just as it may be used as a means of establishing standards of prosecutorial conduct before the courts themselves. It is this latter exercise that respondent demands. Because the grand jury is an institution separate from the courts, over whose functioning the courts do not preside, we think it clear that, as a general matter at least, no such “supervisory” judicial authority exists, and that the disclosure rule applied here exceeded the Tenth Circuit’s authority.

“[R]ooted in long centuries of Anglo-American history,” *Hannah v. Larche*, the grand jury is mentioned in the Bill of Rights, but not in the body of the Constitution. It has not been textually assigned, therefore, to any of the branches described in the first three Articles. It “is a constitutional fixture in its own right.” *United States v. Chanen* (quoting *Nixon v. Sirica*). In fact the whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people. See *Stirone v. United States*; *Hale v. Henkel*; G. Edwards, *The Grand Jury* (1906). Although the grand jury normally operates, of course, in the courthouse and under judicial auspices, its institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm’s length. Judges’ direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office. See *United States v. Calandra*; Fed. Rule Crim. Proc. 6(a).

The grand jury’s functional independence from the Judicial Branch is evident both in the scope of its power to investigate criminal wrongdoing and in the manner in which that power is exercised. “Unlike [a] [c]ourt, whose jurisdiction is predicated upon a specific

case or controversy, the grand jury ‘can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not.’” *United States v. R. Enterprises, Inc.* (quoting *United States v. Morton Salt Co.*). It need not identify the offender it suspects, or even “the precise nature of the offense” it is investigating. *Blair v. United States*. The grand jury requires no authorization from its constituting court to initiate an investigation, *see Hale*, nor does the prosecutor require leave of court to seek a grand jury indictment. And in its day-to-day functioning, the grand jury generally operates without the interference of a presiding judge. *See Calandra*. It swears in its own witnesses, Fed. Rule Crim. Proc. 6(c), and deliberates in total secrecy, *see United States v. Sells Engineering, Inc.*

True, the grand jury cannot compel the appearance of witnesses and the production of evidence, and must appeal to the court when such compulsion is required. *See, e.g., Brown v. United States*. And the court will refuse to lend its assistance when the compulsion the grand jury seeks would override rights accorded by the Constitution, *see, e.g., Gravel v. United States* (grand jury subpoena effectively qualified by order limiting questioning so as to preserve Speech or Debate Clause immunity), or even testimonial privileges recognized by the common law, *see In re Grand Jury Investigation of Hugle* (same with respect to privilege for confidential marital communications). Even in this setting, however, we have insisted that the grand jury remain “free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it.” *United States v. Dionisio*. Recognizing this tradition of independence, we have said that the Fifth Amendment’s “constitutional guarantee *presupposes* an investigative body ‘acting independently of either prosecuting attorney or judge’”. . . (quoting *Stirone*).

No doubt in view of the grand jury proceeding’s status as other than a constituent element of a “criminal prosecutio[n],” U.S. Const., Amdt. 6, we have said that certain constitutional protections afforded defendants in criminal proceedings have no application before that body. The Double Jeopardy Clause of the Fifth Amendment does not bar a grand jury from returning an indictment when a prior grand jury has refused to do so. *See Ex parte United States; United States v. Thompson*. We have twice suggested, though not held, that the Sixth Amendment right to counsel does not attach when an individual is summoned to appear before a grand jury, even if he is the subject of the investigation. *See United States v. Mandujano; In re Groban; see also* Fed. Rule Crim. Proc. 6(d). And although “the grand jury may not force a witness to answer questions in violation of [the Fifth Amendment’s] constitutional guarantee” against self-incrimination, *Calandra* (citing *Kastigar v. United States*), our cases suggest that an indictment obtained through the use of evidence previously obtained in violation of the privilege against self-incrimination “is nevertheless valid.” *Calandra; see Lawn v. United States; United States v. Blue*.

Given the grand jury’s operational separateness from its constituting court, it should come as no surprise that we have been reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure. Over the years, we have

received many requests to exercise supervision over the grand jury's evidence-taking process, but we have refused them all, including some more appealing than the one presented today. In *United States v. Calandra*, a grand jury witness faced questions that were allegedly based upon physical evidence the Government had obtained through a violation of the Fourth Amendment; we rejected the proposal that the exclusionary rule be extended to grand jury proceedings, because of "the potential injury to the historic role and functions of the grand jury." In *Costello v. United States*, we declined to enforce the hearsay rule in grand jury proceedings, since that "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules."

These authorities suggest that any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings. See *United States v. Chanen*. It certainly would not permit judicial reshaping of the grand jury institution, substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself. Cf., e.g., *United States v. Payner* (supervisory power may not be applied to permit defendant to invoke third party's Fourth Amendment rights); see generally Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. (1984). As we proceed to discuss, that would be the consequence of the proposed rule here.

Respondent argues that the Court of Appeals' rule can be justified as a sort of Fifth Amendment "common law," a necessary means of assuring the constitutional right to the judgment "of an independent and informed grand jury," *Wood v. Georgia*. Respondent makes a generalized appeal to functional notions: Judicial supervision of the quantity and quality of the evidence relied upon by the grand jury plainly facilitates, he says, the grand jury's performance of its twin historical responsibilities, i.e., bringing to trial those who may be justly accused and shielding the innocent from unfounded accusation and prosecution. See, e.g., *Stirone v. United States*. We do not agree. The rule would neither preserve nor enhance the traditional functioning of the institution that the Fifth Amendment demands. To the contrary, requiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body.

It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge. See *United States v. Calandra*. That has always been so; and to make the assessment it has always been thought sufficient to hear only the prosecutor's side. As Blackstone described the prevailing practice in 18th-century England, the grand jury was "only to hear evidence on behalf of the prosecution[,] for the finding of an indictment is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined." 4 W. Blackstone, *Commentaries* (1769); see also 2 M. Hale, *Pleas of the Crown* (1st Am. ed. 1847). So also in the United States. According to the description of an early American

court, three years before the Fifth Amendment was ratified, it is the grand jury's function not "to enquire . . . upon what foundation [the charge may be] denied," or otherwise to try the suspect's defenses, but only to examine "upon what foundation [the charge] is made" by the prosecutor. *Respublica v. Shaffer*; see also F. Wharton, *Criminal Pleading and Practice* § 360 (8th ed. 1880). As a consequence, neither in this country nor in England has the suspect under investigation by the grand jury ever been thought to have a right to testify or to have exculpatory evidence presented. See 2 Hale; *United States ex rel. McCann v. Thompson*.

Imposing upon the prosecutor a legal obligation to present exculpatory evidence in his possession would be incompatible with this system. If a "balanced" assessment of the entire matter is the objective, surely the first thing to be done—rather than requiring the prosecutor to say what he knows in defense of the target of the investigation—is to entitle the target to tender his own defense. To require the former while denying (as we do) the latter would be quite absurd. It would also be quite pointless, since it would merely invite the target to circumnavigate the system by delivering his exculpatory evidence to the prosecutor, whereupon it would *have* to be passed on to the grand jury—unless the prosecutor is willing to take the chance that a court will not deem the evidence important enough to qualify for mandatory disclosure. See, e.g., *United States v. Law Firm of Zimmerman & Schwartz, P.C.* (duty to disclose exculpatory evidence held satisfied when prosecution tendered to the grand jury defense-provided exhibits, testimony, and explanations of the governing law). *United States v. Brown*.

Respondent acknowledges (as he must) that the "common law" of the grand jury is not violated if the *grand jury itself* chooses to hear no more evidence than that which suffices to convince it an indictment is proper. Cf. *Thompson*. Thus, had the Government offered to familiarize the grand jury in this case with the five boxes of financial statements and deposition testimony alleged to contain exculpatory information, and had the grand jury rejected the offer as pointless, respondent would presumably agree that the resulting indictment would have been valid. Respondent insists, however, that courts must require the modern prosecutor to alert the grand jury to the nature and extent of the available exculpatory evidence, because otherwise the grand jury "merely functions as an arm of the prosecution." We reject the attempt to convert a nonexistent duty of the grand jury itself into an obligation of the prosecutor. The authority of the prosecutor to seek an indictment has long been understood to be "coterminous with the authority of the grand jury to entertain [the prosecutor's] charges." *United States v. Thompson*. If the grand jury has no obligation to consider all "substantial exculpatory" evidence, we do not understand how the prosecutor can be said to have a binding obligation to present it.

There is yet another respect in which respondent's proposal not only fails to comport with, but positively contradicts, the "common law" of the Fifth Amendment grand jury. Motions to quash indictments based upon the sufficiency of the evidence relied upon by the grand jury were unheard of at common law in England, see, e.g., *People v. Restenblatt*. And the traditional American practice was described by Justice Nelson, riding circuit in 1852, as follows:

No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof, or whether there was a deficiency in respect to any part of the complaint. . . . *United States v. Reed*.

We accepted Justice Nelson’s description in *Costello v. United States*, where we held that “[i]t would run counter to the whole history of the grand jury institution” to permit an indictment to be challenged “on the ground that there was inadequate or incompetent evidence before the grand jury.” And we reaffirmed this principle recently in *Bank of Nova Scotia*, where we held that “the mere fact that evidence itself is unreliable is not sufficient to require a dismissal of the indictment,” and that “a challenge to the reliability or competence of the evidence presented to the grand jury” will not be heard. It would make little sense, we think, to abstain from reviewing the evidentiary support for the grand jury’s judgment while scrutinizing the sufficiency of the prosecutor’s presentation. A complaint about the quality or adequacy of the evidence can always be recast as a complaint that the prosecutor’s presentation was “incomplete” or “misleading.” Our words in *Costello* bear repeating: Review of facially valid indictments on such grounds “would run counter to the whole history of the grand jury institution[,] [and] [n]either justice nor the concept of a fair trial requires [it].”

Echoing the reasoning of the Tenth Circuit in *United States v. Page*, respondent argues that a rule requiring the prosecutor to disclose exculpatory evidence to the grand jury would, by removing from the docket unjustified prosecutions, save valuable judicial time. That depends, we suppose, upon what the ratio would turn out to be between unjustified prosecutions eliminated and grand jury indictments challenged—for the latter as well as the former consume “valuable judicial time.” We need not pursue the matter; if there is an advantage to the proposal, Congress is free to prescribe it. For the reasons set forth above, however, we conclude that courts have no authority to prescribe such a duty pursuant to their inherent supervisory authority over their own proceedings. The judgment of the Court of Appeals is accordingly reversed, and the cause is remanded for further proceedings consistent with this opinion. . . .

Problem 11-1

- (a) You are retained to represent Shirley, who comes to your office for an initial interview. Shirley explains that she works as a trader at a medium-sized hedge fund that is privately held and is owned and operated principally by Edgar. Shirley says that she has conducted some trades in the last year, with Edgar's approval, on the basis of tips she sometimes gets from a scientist she met who works in the pharmaceutical industry. Shirley shows you a grand jury subpoena directing her to appear for testimony in two weeks and produce "any and all documents relating to trading in securities related to the pharmaceutical industry." She says, "A guy in a suit handed this to me yesterday" and starts with the question, "What is a grand jury?" Provide Shirley with the most comprehensive legal advice you can supply based upon what you have learned to this point. What are the next questions you would want to ask Shirley in order to further assist her?
- (b) A mock grand jury examination in the classroom can provide some sense of what the grand jury process is like. One or more students can be assigned as the prosecutors to question Shirley. One or more can be assigned to give testimony as Shirley. One or more can be assigned to act as Shirley's lawyer. One can be assigned to act as grand jury foreperson. In preparation, think about what you would ask as the prosecutor, how you would answer as the witness, and how you would advise the witness as her lawyer (if you are Shirley, you will of course need to fill out the facts of the trading situation a bit in your own mind so that you can answer a series of questions).

12. FIFTH AMENDMENT AND INDIVIDUALS

As is well known, the Fifth Amendment to the U.S. Constitution protects one from being made to be a witness against oneself in a criminal case. One might say that there are two major strands of law (and fact pattern) that flow from this basic idea.

One is the area of police interaction with citizens in the interrogation process. Think *Miranda* and mainly street crime. (For the skeptic, this is Fifth Amendment law for poor people who do not have lawyers, make bad decisions about talking to the police, and are often tricked or frightened into providing evidence against themselves.)

The other is the area of immunity grants and testimony before grand juries, at trial, and in other judicial and quasi-judicial contexts. It is the second strand of Fifth Amendment thinking that is most relevant to corporate crime and that this chapter will examine. (For the skeptic, this is Fifth Amendment law for well-off people who have lawyers and negotiate with the government to get something in exchange for waiving their Fifth Amendment rights.)

Why does the Constitution contain this right? What value(s) might it be designed, or interpreted, to further?

A. Constitution, Statutes, and Procedural Options

The government can do what it is not allowed to do under the Constitution as long as it follows the rules set forth in immunity statutes. The idea is that the Fifth Amendment right has been “supplanted”—i.e., not taken away but replaced in full—by the grant of immunity.

U.S. Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; **nor shall be compelled in any criminal case to be a witness against himself**, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

- (1) a court or grand jury of the United States,
- (2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. § 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any designated Assistant Attorney General or Deputy Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

18 U.S.C. § 6005. Congressional proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to either House of Congress, or any committee, or any subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that—

(1) in the case of a proceeding before or ancillary to either House of Congress, the request for such an order has been approved by an affirmative vote of a majority of the Members present of that House;

(2) in the case of a proceeding before or ancillary to a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and

(3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.

(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

Punishment for contempt is a key part of the framework here, along with the perjury statutes which we have already examined. The idea is to empower the judicial process to acquire truthful testimony (information) by the combined effect of: (1) supplanting the Fifth Amendment right with immunity, (2) getting the witness to tell the truth by threatening perjury charges for false testimony, and (3) preventing the witness from simply refusing to testify. All three are necessary to make the investigative engine run.

18 U.S.C. § 401. Power of Court

A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 402. Contempt Constituting Crimes

Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was

committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by a fine under this title or imprisonment, or both.

. . . in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of \$1,000, nor shall such imprisonment exceed the term of six months.

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

Federal Rule of Criminal Procedure 42. Criminal Contempt

(a) DISPOSITION AFTER NOTICE. Any person who commits criminal contempt may be punished for that contempt after prosecution on notice.

(1) *Notice.* The court must give the person notice in open court, in an order to show cause, or in an arrest order. The notice must:

(A) state the time and place of the trial;

(B) allow the defendant a reasonable time to prepare a defense; and

(C) state the essential facts constituting the charged criminal contempt and describe it as such.

(2) *Appointing a Prosecutor.* The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt.

(3) *Trial and Disposition.* A person being prosecuted for criminal contempt is entitled to a jury trial in any case in which federal law so provides and must be released or detained as Rule 46 provides. If the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents. Upon a finding or verdict of guilty, the court must impose the punishment.

(b) SUMMARY DISPOSITION. Notwithstanding any other provision of these rules, the court (other than a magistrate judge) may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies; a magistrate judge may summarily punish a person as provided in 28 U.S.C. § 636(e). The contempt order must recite the facts, be signed by the judge, and be filed with the clerk.

The following is an example of an immunity order issued by a United States District Court. Pay careful attention to its language.

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
UNITED STATES OF AMERICA,
Plaintiff,
v.
HUBERT ROTTEVEEL,
Defendant.**

CASE NO. 2:11-CR-00447 WBS

**ORDER PURSUANT TO 18 U.S.C. §§ 6002-6003 GRANTING IMMUNITY
AND REQUIRING TESTIMONY**

NOW, THEREFORE, IT IS ORDERED pursuant to 18 U.S.C. § 6002 that Manuel Romero give testimony or provide other information which he refuses to give or to provide information with respect to the purchase of real property and loan applications and other documentation submitted on his behalf to lending institutions with respect to the charged fraud scheme in the above-referenced case, in this case on the basis of his privilege against self-incrimination as to all matters about which he may be asked to testify in this trial.

IT IS FURTHER ORDERED that no testimony or other information compelled under this order, or any information directly or indirectly derived from such testimony or other information, shall be used against Manuel Romero in any criminal case, except that Manuel Romero shall not be exempted by this order from prosecution for perjury, giving a false statement pursuant to this order, or otherwise failing to comply with this order, and that immunity granted herein is co-extensive with 18 U.S.C. § 6002.

IT IS SO ORDERED

HON. WILLIAM B. SCHUB, United States District Judge

The foregoing constitutional and statutory regime sets up the following sequence for the well-represented individual (let's call her Agnes) who may have criminal exposure in a corporate investigation. Much of this chapter explores in greater depth how the law sets up this sequence through the combined effects of (1) the Fifth Amendment, (2) the immunity statutes, (3) the perjury, obstruction, and false statements statutes, and (4) the contempt laws. A common sequence in a corporate investigation is as follows:

1. A request from government agents or prosecutors for a voluntary interview is conveyed to Agnes through her counsel. Agreeing to answer questions in response will

effect a complete waiver of Agnes's Fifth Amendment privilege, with nothing guaranteed in return.

2. If Agnes refuses to be interviewed without protecting her rights ("invokes the Fifth"), prosecutors may offer to interview Agnes under a "proffer" agreement, which will be discussed further in chapter 16 (a proffer agreement is most commonly a prelude to a cooperation and plea agreement). This agreement would provide Agnes with immunity from direct use of her interview statements against her, but not immunity from her statements being used against her indirectly as leads to other evidence or to contradict or cross-examine Agnes at any later trial (referred to as derivative use). The proffer agreement also provides Agnes no protection against prosecution for any false statements she might make in the interview. If there is any chance that Agnes will be charged and want to contest the case at trial, an interview under such an agreement may make it impossible for her to testify effectively in her own defense.

3. If Agnes refuses to be interviewed under a proffer agreement (continues to rely on her full Fifth Amendment right), the prosecutors will have to decide whether to afford full immunity (use plus derivative use) to Agnes. This can be done by letter agreement (a contract signed by both parties) or by serving Agnes with a grand jury subpoena and then obtaining a court immunity order per the statutory procedure above. Agnes will prefer a court order if she fears prosecution in other jurisdictions because a letter agreement will bind only the prosecutor's office that signed it. Prosecutors will be very hesitant to immunize Agnes if it is early in their investigation and they are not yet sure about Agnes's level of criminal exposure. Taking testimony under derivative use immunity can make later prosecution of a witness very difficult or impossible, as we will see in this chapter.

4. If Agnes testifies or is interviewed under an immunity agreement or order, she can still be prosecuted for perjury, obstruction of justice, and false statements if she lies.

5. In a rare case (usually involving violent organized crime or intense political pressure), Agnes might refuse to testify even in the face of an immunity order. If she does so, she can be held in *civil* contempt by a judge and jailed until such time as she changes her mind and agrees to comply with the order to testify. Furthermore, Agnes can be prosecuted for *criminal* contempt and punished with prison time regardless of whether she relented during civil detention. Civil contempt is not considered punishment but rather a remedy to accomplish compliance with a court order. The act of contempt, however, is also considered a crime warranting punishment.

6. Alternatively, as will be explored in chapter 16, prosecutors with a strong case against Agnes may seek to persuade her to enter into a plea and cooperation agreement under which she would waive her Fifth Amendment privilege and agree to testify in exchange for a guarantee that she will not face any charges beyond limited ones set forth in the agreement.

B. Prosecutorial Conduct

With immunity, we again have an area of enormous prosecutorial power and freedom of decision making. Prosecutors have the ability to apply to the court for immunity, but the court has almost no discretion to deny an immunity application under the statutes, so power to grant immunity *de facto* rests with the prosecutor. Why is this power so significant?

The DOJ has provided additional guidelines for prosecutors seeking to exercise this power. Are there any factors that prosecutors should consider that are not included in the following guidelines?

U.S. DEPARTMENT OF JUSTICE, JUSTICE MANUAL (Excerpts)

9-23.140. Authority to Initiate Immunity Requests

Assistant United States Attorneys, with the approval of the United States Attorney or, in his or her absence, a supervisory Assistant United States Attorney, and Department attorneys, with the approval of an appropriate Assistant Attorney General or Deputy Assistant Attorney General of DOJ, may initiate requests to compel testimony under the use immunity statute.

9-23.210. Decision to Request Immunity—The Public Interest

Section 6003(b) of Title 18, United States Code, authorizes a United States Attorney to request immunity when, in his/her judgment, the testimony or other information that is expected to be obtained from the witness “may be necessary to the public interest.” Some of the factors that should be weighed in making this judgment include:

- A. The importance of the investigation or prosecution to effective enforcement of the criminal laws;
- B. The value of the person’s testimony or information to the investigation or prosecution;
- C. The likelihood of prompt and full compliance with a compulsion order, and the effectiveness of available sanctions if there is no such compliance;
- D. The person’s relative culpability in connection with the offense or offenses being investigated or prosecuted, and his or her criminal history;
- E. The possibility of successfully prosecuting the person prior to compelling his or her testimony;
- F. The likelihood of adverse collateral consequences to the person if he or she testifies under a compulsion order.

These factors are not intended to be all-inclusive or to require a particular decision in a particular case. They are, however, representative of the kinds of factors that should be considered when deciding whether to seek immunity.

9-23.212. Decision to Request Immunity—Conviction Prior to Compulsion

It is preferable as a matter of policy to punish offenders for their criminal conduct prior to compelling them to testify. While this is not feasible in all cases, a successful prosecution of the witness, or obtaining a plea of guilty to at least some of the charges against the witness, will avoid or mitigate arguments of co-defendants made to the court or jury that the witness “cut a deal” with the government to avoid the witness’s own conviction and punishment.

9-23.400. Authorization to Prosecute after Compulsion

After a person has testified or provided information pursuant to a compulsion order—except in the case of act-of-production immunity—an attorney for the government shall not initiate or recommend prosecution of the person for an offense or offenses first disclosed in, or closely related to, such testimony or information without the express written authorization of the Attorney General. Such requests for authorization should be sent to the Assistant Attorney General for the division that issued the letter of authority for requesting the original compulsion order.

The request to prosecute should indicate the circumstances justifying prosecution and the method by which the government will be able to establish that the evidence it will use against the witness will meet the government’s burden under *Kastigar v. United States*.

C. Immunity and the Constitution

The following foundational case explains why the immunity statutes are consistent with the Fifth Amendment right and do not violate the Constitution. In the course of doing that, the case also makes clear what the effect of statutory immunity is. The key to all of this is to understand three terms: (1) transactional immunity, (2) use immunity, and (3) derivative use immunity. In addition, pay careful attention to the Court’s discussion of its prior decision in *Murphy v. Waterfront Commission*.

KASTIGAR v. UNITED STATES, 406 U.S. 441 (1972)

Mr. Justice POWELL delivered the opinion of the Court.

This case presents the question whether the United States Government may compel testimony from an unwilling witness, who invokes the Fifth Amendment privilege against compulsory self-incrimination, by conferring on the witness immunity from use of the compelled testimony in subsequent criminal proceedings, as well as immunity from use of evidence derived from the testimony.

Petitioners were subpoenaed to appear before a United States grand jury in the Central District of California on February 4, 1971. The Government believed that petitioners were likely to assert their Fifth Amendment privilege. Prior to the scheduled appearances, the Government applied to the District Court for an order directing petitioners to answer questions and produce evidence before the grand jury under a grant of immunity conferred pursuant to 18 U.S.C. §§ 6002, 6003. Petitioners opposed issuance of the order, contending primarily that the scope of the immunity provided by the statute was not coextensive with the scope of the privilege against self-incrimination, and therefore was not sufficient to supplant the privilege and compel their testimony. The District Court rejected this contention, and ordered petitioners to appear before the grand jury and answer its questions under the grant of immunity.

Petitioners appeared but refused to answer questions, asserting their privilege against compulsory self-incrimination. They were brought before the District Court, and each persisted in his refusal to answer the grand jury's questions, notwithstanding the grant of immunity. The court found both in contempt, and committed them to the custody of the Attorney General until either they answered the grand jury's questions or the term of the grand jury expired. The Court of Appeals for the Ninth Circuit affirmed. This Court granted certiorari to resolve the important question whether testimony may be compelled by granting immunity from the use of compelled testimony and evidence derived therefrom ('use and derivative use' immunity), or whether it is necessary to grant immunity from prosecution for offenses to which compelled testimony relates ('transactional' immunity).

The power of government to compel persons to testify in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence. . . . But the power to compel testimony is not absolute. There are a number of exemptions from the testimonial duty, the most important of which is the Fifth Amendment privilege against compulsory self-incrimination. The privilege reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty. It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. This Court has been zealous to safeguard the values which underlie the privilege.

Immunity statutes, which have historical roots deep in Anglo-American jurisprudence, are not incompatible with these values. Rather, they seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify. The existence of these statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime. . . . In addition, every State in the Union, as well as the District of Columbia and Puerto Rico, has one or more such statutes. . . .

Petitioners contend, first, that the Fifth Amendment's privilege against compulsory self-incrimination, which is that '(n)o person . . . shall be compelled in any criminal case to be a witness against himself,' deprives Congress of power to enact laws that compel self-incrimination, even if complete immunity from prosecution is granted prior to the compulsion of the incriminatory testimony. In other words, petitioners assert that no immunity statute, however drawn, can afford a lawful basis for compelling incriminatory testimony. They ask us to reconsider and overrule *Brown v. Walker* and *Ullmann v. United States*, decisions that uphold the constitutionality of immunity statutes.

We find no merit to this contention. . . .

Petitioners' second contention is that the scope of immunity provided by the federal witness immunity statute, 18 U.S.C. § 6002, is not coextensive with the scope of the Fifth Amendment privilege against compulsory self-incrimination, and therefore is not sufficient to supplant the privilege and compel testimony over a claim of the privilege. The statute provides that when a witness is compelled by district court order to testify over a claim of the privilege:

'the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.' 18 U.S.C. § 6002.

The constitutional inquiry, rooted in logic and history, as well as in the decisions of this Court, is whether the immunity granted under this statute is coextensive with the scope of the privilege. If so, petitioners' refusals to answer based on the privilege were unjustified, and the judgments of contempt were proper, for the grant of immunity has removed the dangers against which the privilege protects. If, on the other hand, the immunity granted is not as comprehensive as the protection afforded by the privilege, petitioners were justified in refusing to answer, and the judgments of contempt must be vacated.

Petitioners draw a distinction between statutes that provide transactional immunity and those that provide, as does the statute before us, immunity from use and derivative use. They contend that a statute must at a minimum grant full transactional immunity in order to be coextensive with the scope of the privilege. In support of this contention, they rely on *Counselman v. Hitchcock*, the first case in which this Court considered a constitutional challenge to an immunity statute. The statute, a reenactment of the Immunity Act of 1868, provided that no 'evidence obtained from a party or witness by means of a judicial proceeding . . . shall be given in evidence, or in any manner used against him . . . in any court of the United States . . .'

Notwithstanding a grant of immunity and order to testify under the revised 1868 Act, the witness, asserting his privilege against compulsory self-incrimination, refused to testify before a federal grand jury. He was consequently adjudged in contempt of court. On appeal, this Court construed the statute as affording a witness protection only against the use of the specific testimony compelled from him under the grant of immunity. This construction meant that the statute ‘could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him.’ Since the revised 1868 Act, as construed by the Court, would permit the use against the immunized witness of evidence derived from his compelled testimony, it did not protect the witness to the same extent that a claim of the privilege would protect him. Accordingly, under the principle that a grant of immunity cannot supplant the privilege, and is not sufficient to compel testimony over a claim of the privilege, unless the scope of the grant of immunity is coextensive with the scope of the privilege, the witness’ refusal to testify was held proper. In the course of its opinion, the Court made the following statement, on which petitioners heavily rely:

‘We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. (The immunity statute under consideration) does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates.’

Sixteen days after the *Counselman* decision, a new immunity bill was introduced by Senator Cullom. . . . The bill, which became the Compulsory Testimony Act of 1893, . . . removed the privilege against self-incrimination in hearings before the Interstate Commerce Commission and provided that:

‘no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise . . .’ Act of Feb. 11, 1893.

This transactional immunity statute became the basic form for the numerous federal immunity statutes until 1970, when, after re-examining applicable constitutional principles and the adequacy of existing law, Congress enacted the statute here under consideration. The new statute, which does not ‘afford (the) absolute immunity against future prosecution’ referred to in *Counselman*, was drafted to meet what Congress judged to be the conceptual basis of *Counselman*, as elaborated in subsequent decisions of the Court, namely, that immunity from the use of compelled testimony and evidence derived therefrom is coextensive with the scope of the privilege.

The statute's explicit proscription of the use in any criminal case of 'testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)' is consonant with Fifth Amendment standards. We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being 'forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts. "Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.

Our holding is consistent with the conceptual basis of *Counselman*. . . .

The basis of the Court's decision was recognized in *Ullmann v. United States*, in which the Court reiterated that the *Counselman* statute was insufficient:

'because the immunity granted was incomplete, in that it merely forbade the use of the testimony given and failed to protect a witness from future prosecution based on knowledge and sources of information obtained from the compelled testimony.'

. . . In *Murphy v. Waterfront Comm'n*, the Court carefully considered immunity from use of compelled testimony and evidence derived therefrom. The *Murphy* petitioners were subpoenaed to testify at a hearing conducted by the Waterfront Commission of New York Harbor. After refusing to answer certain questions on the ground that the answers might tend to incriminate them, petitioners were granted immunity from prosecution under the laws of New Jersey and New York. They continued to refuse to testify, however, on the ground that their answers might tend to incriminate them under federal law, to which the immunity did not purport to extend. . . .

The issue before the Court in *Murphy* was whether New Jersey and New York could compel the witnesses, whom these States had immunized from prosecution under their laws, to give testimony that might then be used to convict them of a federal crime. Since New Jersey and New York had not purported to confer immunity from federal prosecution, the Court was faced with the question what limitations the Fifth Amendment privilege imposed on the prosecutorial powers of the Federal Government, a nonimmunizing sovereign. After undertaking an examination of the policies and purposes of the privilege, the Court overturned the rule that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict

him of a crime in another jurisdiction. The Court held that the privilege protects state witnesses against incrimination under federal as well as state law, and federal witnesses against incrimination under state as well as federal law. Applying this principle to the state immunity legislation before it, the Court held the constitutional rule to be that:

‘(A) state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Government in investigating and prosecuting crime, the Federal Governments must be prohibited from making any such use of compelled testimony and its fruits.’

. . . [B]oth the reasoning of the Court in *Murphy* and the result reached compel the conclusion that use and derivative-use immunity is constitutionally sufficient to compel testimony over a claim of the privilege. . . . As the *Murphy* Court noted, immunity from use and derivative use ‘leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege’ in the absence of a grant of immunity. . . . This protection coextensive with the privilege is the degree of protection that the Constitution requires, and is all that the Constitution requires even against the jurisdiction compelling testimony by granting immunity.

Although an analysis of prior decisions and the purpose of the Fifth Amendment privilege indicates that use and derivative-use immunity is coextensive with the privilege, we must consider additional arguments advanced by petitioners against the sufficiency of such immunity. We start from the premise, repeatedly affirmed by this Court, that an appropriately broad immunity grant is compatible with the Constitution.

Petitioners argue that use and derivative-use immunity will not adequately protect a witness from various possible incriminating uses of the compelled testimony: for example, the prosecutor or other law enforcement officials may obtain leads, names of witnesses, or other information not otherwise available that might result in a prosecution. It will be difficult and perhaps impossible, the argument goes, to identify, by testimony or cross-examination, the subtle ways in which the compelled testimony may disadvantage a witness, especially in the jurisdiction granting the immunity.

This argument presupposes that the statute’s prohibition will prove impossible to enforce. The statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom. . . .

This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an ‘investigatory lead,’ and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.

A person accorded this immunity under 18 U.S.C. § 6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities. As stated in *Murphy*:

‘Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.’

This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

This is very substantial protection, commensurate with that resulting from invoking the privilege itself. The privilege assures that a citizen is not compelled to incriminate himself by his own testimony. It usually operates to allow a citizen to remain silent when asked a question requiring an incriminatory answer. This statute, which operates after a witness has given incriminatory testimony, affords the same protection by assuring that the compelled testimony can in no way lead to the infliction of criminal penalties. The statute, like the Fifth Amendment, grants neither pardon nor amnesty. Both the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources. . . .

We conclude that the immunity provided by 18 U.S.C. § 6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it. . . .

The “*Kastigar* burden”—what the government must prove to maintain a prosecution in the face of a motion to dismiss on the basis that the government has relied directly or indirectly on immunized testimony—is often described as “heavy.” Indeed, the burden is so heavy that prosecutors are loath to take it on and often treat derivative use immunity as functionally equivalent to transactional immunity. The next case demonstrates how heavy that burden is, and how prosecutions across international boundaries can further complicate the problem. The nature of the facts and charges will be familiar from Chapter 3.

UNITED STATES v. ALLEN, 864 F.3d 63 (2d Cir. 2017)

JOSÉ A. CABRANES, Circuit Judge:

This case—the first criminal appeal related to the London Interbank Offered Rate (“LIBOR”) to reach this (or any) Court of Appeals—presents the question, among others, whether testimony given by an individual involuntarily under the legal

compulsion of a foreign power may be used against that individual in a criminal case in an American court. As employees in the London office of Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. (“Rabobank”) in the 2000s, defendants-appellants Anthony Allen and Anthony Conti (“Defendants”) played roles in that bank’s LIBOR submission process during the now-well-documented heyday of the rate’s manipulation. Allen and Conti were, for unrelated reasons, no longer employed at Rabobank by 2008 and 2009, respectively. By 2013, they were among the persons being investigated by enforcement agencies in the United Kingdom (“U.K.”) and the United States for their roles in setting LIBOR.

The U.K. enforcement agency, the Financial Conduct Authority (“FCA”), interviewed Allen and Conti (each a U.K. citizen and resident) that year, along with several of their coworkers. At these interviews, Allen and Conti were compelled to testify and given “direct use”—but not “derivative use”—immunity. In accordance with U.K. law, refusal to testify could result in imprisonment. The FCA subsequently decided to initiate an enforcement action against one of Defendants’ coworkers, Paul Robson, and, following its normal procedures, the FCA disclosed to Robson the relevant evidence against him, including the compelled testimony of Allen and Conti. Robson closely reviewed that testimony, annotating it and taking several pages of handwritten notes.

For reasons not apparent in the record, the FCA shortly thereafter dropped its case against Robson, and the Fraud Section of the United States Department of Justice (the “DOJ”) promptly took it up. Robson soon pleaded guilty and became an important cooperator, substantially assisting the DOJ with developing its case. Ultimately, Robson was the sole source of certain material information supplied to the grand jury that indicted Allen and Conti and, after being called as a trial witness by the Government, Robson provided significant testimony to the petit jury that convicted Defendants.

In October 2014, a grand jury returned an indictment charging Defendants with one count of conspiracy to commit wire fraud and bank fraud, in violation of 18 U.S.C. § 1349, as well as several counts of wire fraud, in violation 18 U.S.C. § 1343. Following a trial held in October 2015 in the United States District Court for the Southern District of New York (Jed S. Rakoff, Judge), a jury convicted on all counts. The District Court sentenced Allen principally to two years’ imprisonment and Conti to a year-and-a-day’s imprisonment. Agreeing that Defendants had raised a “substantial issue” for appeal, the District Court granted bail pending appeal. . . .

As relevant here, Rabobank was a contributor panel bank for USD LIBOR and JPY LIBOR. Allen joined Rabobank in 1998 as a cash trader and was the bank’s USD LIBOR submitter until 2005, when he became Rabobank’s Global Head of Liquidity and Finance. In that new role, which he held until being laid off when Rabobank closed its London branch in late 2008, he was responsible for supervising other cash traders. One of those cash traders was Conti, who assumed primary responsibility for USD LIBOR submissions starting in 2005 and continuing through 2009, when he quit shortly after his job was moved to Utrecht. Another cash trader, Paul Robson (whose testimony is central

to the issue before us), was primarily responsible for Rabobank's JPY LIBOR submissions during the relevant time period. Others, including Allen himself, would sometimes submit USD LIBOR rates or JPY LIBOR rates when Conti or Robson were unavailable. According to the "Final Notice" issued to Rabobank by the FCA for its LIBOR-related misconduct, "Rabobank did not explicitly have a policy in place to address LIBOR submissions procedures until 30 March 2011, and certain LIBOR-related compliance risks were not addressed until August 2012."

In addition to LIBOR submitters, Rabobank also employed derivatives traders who would regularly enter into interest rate swap agreements. It was a routine practice of these derivatives traders to submit requests to Conti and Robson (or, at times, their stand-ins) for higher or lower LIBOR submissions. The Government's theory of the case was that these trader requests were dictated by the traders' (and thus Rabobank's) interest in having LIBOR be higher or lower on particular dates based on the transactions that the trader had entered or positions they held. Allen and Conti, the Government alleged, honored those requests in lieu of making good-faith estimates of Rabobank's projected borrowing rates.

One USD derivatives trader, Lee Stewart (nicknamed the "Ambassador"), sat in the same line of desks at Rabobank's London office as did Allen and the cash traders—including Conti, the principal USD LIBOR submitter. Stewart testified at trial that he offered LIBOR requests "out loud," "in front of everyone," and never used "code" or "tr[ie]d" to hide what [he] was talking about." Robson testified that every morning before 11 a.m., Conti led, and Allen participated in, a "gather[ing]" and "discuss[ion]" of the best way to influence LIBOR, prefaced by the shout, "right, LIBOR times[!]"

By contrast, those derivatives traders located in other offices, like USD derivatives trader Christian Schluep (located in New York) or JPY derivatives trader Takayuki Yagami (located in Tokyo), would more often submit their LIBOR requests in writing. Thus there are numerous arguably incriminating written exchanges between the latter traders and the LIBOR submitters. Schluep and Conti had several exchanges regarding the setting of USD LIBOR—for example:

- On July 17, 2006, Schluep asked Conti, "IF ANY CHANCE, A HIGH 3MTH TODAY PL!" Conti replied, "[o]k matey . . . high one today."
- On October 31, 2006, Schluep sent Conti a message discussing market activity and then stated, "SMALL FAVOUR AS USUAL, LOW 2S HIGH 3S IF POSSIBLE MATEY," meaning he wanted a low two-month LIBOR and a high three-month LIBOR. Conti responded to the earlier parts of Schluep's message and added, "[w]ill do matey on the libors."
- On August 13, 2007, Schluep sent a message to Conti, requesting "HIGH 3S AND 6S PLS TODAY MATE (ESP 6MNTHS!!) IF U WOULD BE SO KIND .. [sic] GOTTA MAKE MONEY

SOMEHOW!” Conti responded simply, “cool,” to which Schluep replied, “CHEERS TC.. [sic] EVERY LITTLE HELPS!”

Schluep also had exchanges with Allen—for example:

- On October 6, 2006, Schluep sent a message to Allen stating, “HELLO SKIPPER, CAN U PUT 3S AT 37 FOR ME TOMORROW PLS. . . . MANY THANKS.” Allen replied, “NEVER IN DOUBT!”
- On November 29, 2006, Schluep sent a message to Allen asking for a “LOW 1S HIGH 3S LIBOR PLS!!!” Allen replied “OK MATE, WILL DO MY BEST SPEAK LATER.” Schluep later thanked Allen, because the submissions were “BANG ON THE MONEY!” Allen replied, “NO WORRIES” and joked that he “HAD TO WORK MY WAY OUT OF AN AMBASS HEADLOCK TO GET THOSE IN!”
- On December 1, 2006, Schluep sent a message to Allen stating, “APPRECIATE 3S GO DOWN, BUT A HIGH 3S TODAY WOULD BE NICE.” Allen responded, “I AM FAST TURNING INTO YOUR LIBOR BITCH!!!!” Schluep replied, “JUST FRIENDLY ENCOURAGEMENT THAT’S ALL, APPRECIATE THE HELP.” Allen replied, “NO WORRIES MATE, GLAD TO HELP[.]”

There were similar, if perhaps more explicit and thus arguably more incriminating, exchanges between Yagami and Robson regarding the setting of JPY LIBOR—for example:

- On September 21, 2007, Robson told Yagami that market information supported a submission of 0.85 for the one-month JPY LIBOR. Yagami asked for a higher rate, specifically 0.90. Robson agreed, even though he would “probably get a few phone calls,” telling Yagami that there were “bigger crooks in the market than us guys!”
- On March 19, 2008, Yagami told Robson “[w]e have loads of 6mth fixings today” and—conveying a request from another trader—asked Robson to submit 1.10 for the six-month yen LIBOR. Robson responded that market information supported a 1.03 submission for the six-month LIBOR but that he would submit 1.10 as asked, even though it would likely prompt “a phone call.” Robson added that it “will be quite funny to see the reaction” to his submission at Yagami’s requested rate.

Whether Allen and Conti did, in fact, accommodate trader requests by adjusting their LIBOR submissions was an issue that Defendants contested at trial. Although Allen and Conti claim they ignored the trader requests, the Government presented evidence at trial purporting to show that these trader requests were accommodated. For instance, on August 13, 2007, Schluep e-mailed Conti and said: GONNA NEED A FRICKIN HIGH

6 MTH FIX TOMORROW IF OK WITH U 5.42?” The next day, Schluep sent a reminder and Allen informed another trader that the six-month LIBOR submission would be 5.42 because “i think thats [sic] what [C]hristian [Schluep] needs.” The Rabobank submission for six-month USD LIBOR that day was 5.42. . . .

Where Defendants and the Government parted ways on the facts was whether the traders’ requests were honored. While Conti did not take the stand at trial, Allen testified that he never actually accommodated such requests. On direct examination by the Government, by contrast, Robson—Rabobank’s JPY LIBOR submitter—explained that LIBOR’s lack of precision allowed him to accommodate trader requests without raising eyebrows. . . .

Moreover, Robson proffered to the Government that Conti likewise accommodated trading positions when making LIBOR submissions. And Robson was the sole source of trial and grand jury testimony that Allen specifically directed and instructed others in this scheme. . . .

The FCA’s interviews were compulsory; they were conducted under a grant of direct (but not derivative) use immunity, and a witness’s failure to testify under such terms could result in imprisonment. In order to avoid potential problems under *Kastigar*, the DOJ took care to conduct their interviews wholly independently of the FCA’s interviews and their fruits. Specifically, the FCA agreed to procedures to maintain a “wall” between its investigation and the DOJ’s investigation, including a “day one/day two” interview procedure in which the DOJ interviewed witnesses prior to the FCA. In accordance with that protocol, the FCA interviewed Robson (on January 17, 2013), Conti (on January 25, 2013), and Allen (on June 20 and 21, 2013), among others. Robson, in his compelled testimony to the FCA, denied any improper conduct at Rabobank.

In November 2013, the FCA initiated an enforcement action against Robson and, following its normal procedure, disclosed to Robson the relevant evidence against him, including the compelled testimony of Allen and Conti. Robson’s attorney instructed him to review the materials sent by the FCA in preparation for a meeting between Robson and his attorney. Robson “reviewed the materials over the course of two to three successive or nearly successive days sometime in or about November and/or December of 2013.” During this review, Robson underlined, annotated, and circled certain passages of both Allen’s and Conti’s compelled testimony. Robson also took roughly five pages of handwritten notes. Before Robson had the chance to discuss this material with his attorney, however, the FCA stayed its regulatory proceeding in favor of a criminal prosecution of Robson by the DOJ. On instruction from his lawyer, Robson placed the FCA materials in a box, put them in his attic, and did not review them further. . . .

In mid-July 2014, the DOJ first interviewed Robson at a so-called proffer session. On August 5, 2014, Robson signed a cooperation agreement and shortly thereafter pleaded guilty. At Robson’s plea hearing, the prosecutor informed the District Court that “there is . . . a chance that we would seek a superseding indictment in light of information that

has come to light from our two cooperators” and that there was “a distinct possibility” the new indictment would “involve[] other individuals.”

So it did. On October 16, 2014, the grand jury returned a superseding indictment charging two new individuals—Allen and Conti—with one count of conspiracy to commit wire fraud and bank fraud as well as several counts of wire fraud. It is not disputed that the Government’s presentation of evidence to the grand jury that indicted Defendants relied on evidence that Robson had provided. While Robson did not himself testify, the new information he gave was relayed to the grand jury through FBI Special Agent Jeffrey Weeks, who did testify. And Weeks’s testimony to the grand jury on certain matters derived exclusively from Robson. In particular, Robson was the only source for Weeks’s testimony that Allen “instructed, specifically instructed, LIBOR submitters in London to consider the positions and the requests of Rabobank traders and adjust their submissions for LIBOR and various currencies based on the means of those traders,” and that “Mr. Robson said that sitting near Mr. Conti he was aware that Mr. Conti set U.S. dollar LIBOR rates in which he considered his own positions as appropriate reason or justification for setting the rates.” . . .

At trial, the Government’s case-in-chief consisted of documentary evidence (e.g., e-mails, “instant chats,” and phone calls involving Allen, Conti, or their alleged co-conspirators) and testimony from eight witnesses, including three cooperators: Stewart, Yagami, and Robson. In addition to cross-examination of the Government’s witnesses, Allen and Conti each offered an expert witness, and Allen testified in his own defense. On November 5, 2015, the jury returned a verdict of guilty on all counts (nineteen counts, in total, for Allen and nine for Conti). . . .

In arguing that Fifth Amendment protections apply in this case, Defendants rely on our cases pertaining to foreign and cross-border law enforcement, which have consistently held that “in order to be admitted in our courts, inculpatory statements obtained overseas by foreign officials must have been made voluntarily.” In so holding, we joined our sister circuits that have considered the issue. Defendants contend that these cases are sufficient to resolve the present dispute regarding whether compulsion by a foreign power implicates the Fifth Amendment. We agree. . . .

The Supreme Court has taken care . . . to distinguish extraterritorial applications of the Fourth Amendment from those of the Self-Incrimination Clause of the Fifth Amendment. The Fourth Amendment “prohibits unreasonable searches and seizures whether or not the evidence is sought to be used in a criminal trial,” such that “a violation of the Amendment is fully accomplished at the time of an unreasonable governmental intrusion.” By contrast, in the case of the Fifth Amendment’s Self-Incrimination Clause, “a constitutional violation occurs only at trial,” even if “conduct by law enforcement officials prior to trial may ultimately impair that right.” In light of that distinction, “it naturally follows that, regardless of the origin—i.e., domestic or foreign—of a statement, it cannot be admitted at trial in the United States if the statement was ‘compelled.’”

Thus, the Self-Incrimination Clause's prohibition of the use of compelled testimony arises from the text of the Constitution itself, and directly addresses what happens in American courtrooms, in contrast to the exclusionary rules that are crafted as remedies to deter unconstitutional actions by officers in the field. Its protections therefore apply in American courtrooms even when the defendant's testimony was compelled by foreign officials.

Moreover, for much the same reasons, the Clause applies in American courtrooms even where, as here, the defendant's testimony was compelled by foreign officials lawfully—that is, pursuant to foreign legal process—in a manner that does not shock the conscience or violate fundamental fairness. The Clause flatly prohibits the use of compelled testimony and is not based on any matter of misconduct or illegality on the part of the agency applying the compulsion. . . .

However unusual this particular prosecution may prove to be, so-called cross-border prosecutions have become more common. Such prosecutions necessarily entail intimate coordination between the United States and foreign authorities. As then-Assistant Attorney General Caldwell put it . . . , “[c]ollaboration and coordination among multiple regulators in cross-border matters is the future of major white collar criminal enforcement.” Perhaps the most striking development in cooperative conduct is the embedding of U.S. prosecutors in foreign law enforcement. According to Caldwell, the DOJ “recently placed Criminal Division prosecutors with Eurojust in The Hague and INTERPOL in France” and was “exploring the possibility of embedding prosecutors with other foreign law enforcement as well.” In a more recent address, Acting Principal Deputy Assistant Attorney General Trevor N. McFadden announced that DOJ will be detailing one of its anti-corruption prosecutors to work at the U.K. FCA—“the first time the Criminal Division . . . will detail a prosecutor to work in a foreign regulatory agency on white collar crime issues.”

One area in particular where intimate cooperation and coordination will be needed between U.S. prosecutors and foreign authorities (or, perhaps, between U.S. prosecutors and U.S. prosecutors on detail to foreign authorities) is the securing of witness testimony. As the Government explained in a letter to the District Court in this case, “large scale economic crime conspiracies that harm U.S. markets, such as LIBOR rigging and the manipulation of the foreign exchange spot, often occur, in large part, overseas and successful prosecutions of these matters frequently rely on evidence provided by witnesses who live in foreign countries.” And as this case illustrates, foreign authorities may conduct compulsory witness interviews, including interviews of those who end up being—or are already—the targets of U.S. prosecution.

We do not presume to know exactly what this brave new world of international criminal enforcement will entail. Yet we are certain that these developments abroad need not affect the fairness of our trials at home. If as a consequence of joint investigations with foreign nations we are to hale foreign men and women into the courts of the United

States to fend for their liberty we should not do so while denying them the full protection of a “trial right” we regard as “fundamental” and “absolute.”

Accordingly, we adhere to our precedent in assessing the voluntariness of inculpatory testimony compelled abroad by foreign governments. In the instant appeal, there is no question that the Defendants’ testimony was compelled and, thus, involuntary. We therefore conclude in this case that the Fifth Amendment prohibited the Government from using Defendants’ compelled testimony against them.

Kastigar . . . established a doctrine to enforce this protection. When a witness has been compelled to testify relating to matters for which he is later prosecuted, the government bears “the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.” This burden is “not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.” . . .

With the foregoing principles in mind, we consider whether any evidence from Robson used in Defendants’ prosecution was tainted. To be clear, there is no dispute that the Government “used” evidence from Robson: he was a key cooperator and a prominent trial witness. The less straightforward question is whether any evidence supplied by Robson (to the government, to the grand jury, or at trial) was tainted by his earlier review of the testimony of Defendants compelled in the United Kingdom under U.K. law.

Our Court apparently has never encountered the circumstance in which a government trial witness had, prior to testifying, reviewed a defendant’s compelled testimony. The D.C. Circuit, however, has addressed the applicable legal standards in a pair of high-profile cases arising out of the Iran-Contra affair. In those cases, that Court held that “the use of immunized testimony by witnesses to refresh their memories, or otherwise to focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements, constitutes” an impermissible use of the defendants’ compelled testimony. . . .

In apparent agreement with both parties on appeal, we conclude that the legal standards set forth by the D.C. Circuit . . . are helpful here. We need not, in this case, decide whether the Government is required to demonstrate that Robson’s review of Defendants’ compelled testimony did not in any manner subtly “refresh his memory, focus or organize his thoughts,” or in some other traceless way influence his state of mind. At a minimum, however, we agree with the D.C. Circuit that the Government is required to prove that his exposure to the compelled testimony did not shape, alter, or affect the information that he provided and that the Government used.

The most effective way to demonstrate that a witness’s testimony was untainted by exposure to a defendant’s immunized testimony is by demonstrating that his or her testimony was unchanged from comparable testimony given before the exposure. Thus,

typically, the prosecution can meet its burden by memorializing (or “canning”) the witness’s testimony prior to his or her exposure.

In the present case, Robson did testify to the FCA regarding Rabobank’s submission and alleged manipulation of LIBOR rates, as well as the roles of Allen and Conti, prior to Robson’s exposure to Defendants’ compelled testimony. But what Robson’s “canned” testimony preserved is toxic to the Government’s case; it omits or contradicts in material parts the testimony Robson later provided indirectly to the grand jury and directly to the petit jury. At the *Kastigar* hearing held by the District Court, Robson agreed that “the testimony that [he] gave to the [FCA] and the testimony that [he] gave before the jury in this trial were very different.” For instance, Robson testified to the jury about an altercation between Stewart and Damon Robbins, an alternate submitter for USD LIBOR, on Rabobank’s London desk. But Robson did not testify about this to the FCA, and the *Kastigar* hearing raised questions about whether he had even seen the incident at all or merely read about it in the compelled testimony. Far from rebutting the presumption that Robson’s trial testimony was tainted, his pre-exposure testimony actually evidences such taint through its material differences with Robson’s post-exposure trial testimony.

As Robson’s FCA testimony hurts rather than helps its cause, the Government appears to contend on appeal that it satisfied its burden solely through Robson’s “persuasive[]” testimony at the *Kastigar* hearing. We conclude, however, that Robson’s testimony at the hearing falls far short of satisfying the demands of *Kastigar*. As explained below, the Government adduced, at bottom, nothing more than bare, self-serving denials from Robson to meet its heavy burden. We hold that such conclusory denials are insufficient as a matter of law to sustain the prosecution’s burden of proof under *Kastigar* in the face of materially inconsistent pre-exposure testimony. . . .

Accordingly, we hold that a bare, generalized denial of taint from a witness who has materially altered his testimony after being substantially exposed to a defendant’s compelled testimony is insufficient as a matter of law to sustain the prosecution’s burden of proof under *Kastigar* that that witness’s testimony was derived from a wholly independent source. . . .

In sum, the Government did not, and cannot, meet its burden under *Kastigar*. We therefore conclude that the Government’s use of evidence provided by Robson violated the Defendants’ Fifth Amendment rights. . . .

Upon review of the trial record, we have no trouble concluding that this error was not harmless beyond a reasonable doubt. While two other cooperating witnesses testified, Robson was the unique source of particularly significant and incriminating evidence. Robson was the only LIBOR submitter to testify on behalf of the government, and he testified—contrary to the Defendants’ central argument for acquittal—that, pursuant to a scheme at Rabobank, he in fact took trading positions into account when making submissions. And Robson was also the only witness the Government ever interviewed who said that Allen “directed” Rabobank’s submitters to account for trading positions

when setting LIBOR. Indeed, absent Robson's testimony that Allen issued "instructions" to him, Allen likely would not have been charged, much less convicted, of the nine counts relating to specific JPY LIBOR submissions, because Allen never submitted LIBOR estimates for that currency. Well aware of the substantial litigation risk under *Kastigar* of using a witness who not only had been exposed to Defendants' compelled testimony but who dramatically changed his own story after such exposure, the Government nevertheless chose to call Robson to the witness stand, underscoring the significance of his testimony to the Government's case. . . .

Accordingly, we conclude that the admission of Robson's trial testimony was not harmless. This error requires that Defendants' convictions be vacated and that they be awarded a new trial wherein any tainted statements are suppressed. Defendants also argue, however, that the use of Robson's tainted evidence, conveyed to the grand jury through Agent Weeks's testimony, requires dismissal of the indictment. We thus turn to that argument.

Our precedents establish that an indictment is subject to dismissal if it was procured on the basis of tainted evidence. . . .

Upon review of the evidence and testimony presented to the grand jury in this case, we cannot conclude beyond a reasonable doubt that the grand jury would have indicted Allen and Conti without the evidence supplied by Robson. As the District Court itself acknowledged, "material parts of [Agent Weeks's] grand jury testimony derived exclusively from Mr. Robson." Specifically, when Agent Weeks testified that Allen was the scheme's leader who had "instructed, specifically instructed, LIBOR submitters in London to consider the positions and the requests of Rabobank traders and adjust their submissions for LIBOR," his testimony derived exclusively from Robson's proffer. And when Agent Weeks testified that Mr. Conti "adjusted his U.S. dollar LIBOR rates . . . for his own benefit and the benefit of the other traders," he based his testimony exclusively upon Mr. Robson's proffer, telling the grand jury that "Mr. Robson said that sitting near Mr. Conti he was aware that Mr. Conti set U.S. dollar LIBOR rates in which he considered his own positions as appropriate reason or justification for setting the rates." . . .

Neither did the District Court suggest that the evidence conveyed from Robson, through Agent Weeks, to the grand jury, was harmless; instead, the District Court concluded that the Government had met its burden to prove Robson's evidence was untainted. As explained above, that conclusion was in error. Because we cannot conclude that the *Kastigar* errors before the grand jury were harmless, the indictment must be dismissed.

D. Internal Investigations and State Action Doctrine

Is it a violation of someone's Fifth Amendment right for a corporation to threaten to fire her if she doesn't answer questions? The answer turns in large part on the issue of what constitutes state action in this context for the purpose of constitutional law generally.

A foundational Supreme Court case on employment and the Fifth Amendment, which is not on all fours with the corporate investigation scenario in the private sector, is *Garrity v. New Jersey*, 385 U.S. 493 (1967). In *Garrity*, the Court held that incriminating statements by police officers, extracted by state investigators under threat of termination from the officers' local police departments if they refused to answer, and without any immunity protection, were compelled in violation of the Fifth Amendment.

Three cases follow on this subject: first, a civil lawsuit in which fired employees tried and failed to get mileage out of the Fifth Amendment. Second and third, district court opinions in which employees being prosecuted criminally did make some headway with Fifth Amendment arguments, but perhaps in a manner limited to the facts of the cases.

GILMAN v. MARSH & McLENNAN COS., INC., 826 F.3d 69 (2d Cir. 2016)

DENNIS JACOBS, Circuit Judge:

Faced with the prospect of criminal indictment premised on the actions of two employees, a company demanded that those employees explain themselves under the threat of termination. They refused, were fired, and in this suit seek to recover employment benefits they lost by termination. . . .

In April 2004, the New York Attorney General (the “AG”) began investigating “contingent commission” arrangements by which insurance brokers were thought to be steering clients to particular insurance carriers. Marsh, as one of the brokers under investigation, retained outside counsel, Davis Polk & Wardwell LLP, to conduct an internal investigation of the AG’s allegations. The internal investigation included interviews with Gilman and McNenney in the spring and summer of 2004.

The focus of the AG investigation shifted, in September 2004, to an alleged bid-rigging scheme involving Marsh and several insurance carriers. On October 13, 2004, two individuals at American International Group, Inc. (“AIG”) pleaded guilty to felony complaints charging them with participation in a bid-rigging scheme with Marsh. In the allocation of one of the AIG employees, Gilman and McNenney were identified as co-conspirators. The next day, the AG filed a civil complaint against Marsh for alleged fraudulent business practices and antitrust violations.

The fallout from the civil complaint was swift and severe. Marsh’s stock price plunged, a raft of private civil suits were filed, and Marsh’s directors, clients, and shareholders demanded answers to the bid-rigging allegations. Marsh responded by expanding the ongoing internal investigation; on October 19, 2004, Marsh suspended Gilman and McNenney (with pay). More or less at the same time, Marsh’s counsel asked Gilman and McNenney to sit for interviews and warned that failure to comply would result in termination. Gilman was asked to interview with a lawyer from Davis Polk as soon as possible. McNenney alleges that he was asked to submit to an interview with a lawyer from the AG and that he was told to do so without presence of counsel. (Marsh

vigorously denies that McNenney was asked to interview with the AG, let alone to do so without counsel.)

On October 25, 2004, the CEO of Marsh's parent company resigned and was replaced by Michael Cherkasky. The same day, Cherkasky met with Eliot Spitzer, then-Attorney General of New York, to discuss the investigation. Gilman and McNenney contend that the upshot of the meeting was that the AG would forgo criminal prosecution of Marsh itself in exchange for its cooperation with the AG's investigation, including waivers of attorney-client privilege and work-product immunity for information developed in the (expanding) internal investigation. That day, an AG press release announced that a civil proceeding would suffice to punish and reform Marsh, and that criminal prosecutions arising out of the alleged bid-rigging scheme would be limited to individuals. This press release was widely understood to mean the AG would indict Gilman and McNenney—as it eventually did.

By the time of the October 25 meeting and agreement between Cherkasky and Spitzer, neither Gilman nor McNenney had complied with Marsh's counsel's requests that they sit for interviews. On October 27, 2004, McNenney's attorney conveyed McNenney's refusal to Davis Polk; Marsh fired him the next day. On October 28, 2004, Gilman's attorney scheduled an interview for his client on November 2. But on November 1, 2004, Gilman submitted paperwork purporting to effectuate an early retirement; later that day, his attorney conveyed Gilman's refusal to be interviewed. Marsh fired Gilman the next day, and did not accept Gilman's purported retirement.

As Marsh employees, Gilman and McNenney were eligible for some valuable employment benefits. Under Marsh's Stock Award Plans, they received grants of stock options, stock bonus units, and/or deferred stock units, some of which they could have been entitled to upon termination if (for example) they had retired or were fired without cause. If, however, they were terminated "for cause," any unvested stock benefits were forfeited. Under Marsh's ERISA-governed Severance Pay Plan, Gilman and McNenney were entitled to severance if, *inter alia*, they remained in good standing with Marsh on their last day of work and if their employment terminated (i) because they lacked job skills, or (ii) in connection with a restructuring, or (iii) because Marsh had eliminated their position. An otherwise-eligible employee whose employment was terminated "for cause" was not entitled to severance. Marsh took the position that it fired Gilman and McNenney "for cause," and denied them unvested, deferred compensation as well as severance.

As relevant here, Gilman and McNenney sued Marsh to obtain the lost employment benefits, alleging violations of ERISA, breach of contract, and breach of the implied covenant of good faith and fair dealing. The district court granted summary judgment in favor of Marsh, concluding that the interview requests were reasonable, that Gilman's and McNenney's refusal to sit for interviews gave Marsh cause for termination, that Marsh did in fact fire them for cause (and did not breach the implied covenant), and that Gilman's purported retirement was ineffective. Gilman and McNenney appeal. . . .

The first question is whether the demand that Gilman and McNenney submit to interviews was reasonable as a matter of law. If so, Marsh had cause to fire them and deny them employment benefits. If not, Gilman's and McNenney's claims against Marsh for benefits should have withstood summary judgment. We conclude that the interview demands were reasonable as a matter of law because at the time they were made, Gilman and McNenney were Marsh employees who had been implicated in an alleged criminal conspiracy for acts that were within the scope of employment and that imperiled the company. The second question is whether there is a triable issue of fact as to whether Marsh fired them for cause. We conclude that there is not and reject the argument that Gilman and McNenney were let go routinely as part of a reduction in force and the argument that Gilman could not be fired because he had preemptively resigned. Finally, we reject Gilman's and McNenney's contention that, in light of Marsh's cooperation with the AG, Marsh's requirement that they answer potentially incriminating questions amounted to state action, and was thus unreasonable. Accordingly, Marsh had cause to fire them, as it did, and Gilman and McNenney are entitled to none of the employment benefits they seek.

Under Delaware law, which governs Marsh's employment contracts with Gilman and McNenney, "cause" for termination includes the refusal to "obey a direct, unequivocal, reasonable order of the employer." *Unemployment Ins. Appeal Bd. v. Martin*. Gilman and McNenney do not dispute that Marsh's orders that they sit for interviews were direct and unequivocal. So the decisive issue is whether the orders were reasonable.

When Gilman and McNenney were named as co-conspirators in a criminal bid-rigging scheme for their conduct *as Marsh employees*, it was obvious (as Gilman and McNenney themselves affirmatively argue) that the AG intended to prosecute them criminally. At that time, Marsh had sufficient basis to act on the allegations, made under oath in open court, and would have had cause to terminate Gilman and McNenney, regardless of the ultimate resolution of the allegations. . . . If Marsh had indeed fired them then, it would have been for cause, and Gilman and McNenney would for that reason have been ineligible for the employment benefits they currently seek. It is difficult to see how their claims for benefits improved because Marsh instead gave them the chance to explain themselves, and they refused to comply.

Marsh was presumptively entitled to seek information from its own employees about suspicions of on-the-job criminal conduct. Marsh could take measures to protect its standing with investors, clients, employees, and regulators. Marsh also had a duty to its shareholders to investigate any potentially criminal conduct by its employees that could harm the company. And as corporate officers, Gilman and McNenney had a duty to Marsh to disclose information they had about the AG's allegations.

Marsh's demands placed Gilman and McNenney in the tough position of choosing between employment and incrimination (assuming of course the truth of the allegations). But though Gilman and McNenney "may have possessed the personal rights to [not sit for interviews], that does not immunize [them] from all collateral consequences that

come from [those] act[s],” including leaving Marsh “with no practical option other than to remove [them].” *Hollinger Int’l, Inc. v. Black*. “[T]here would be a complete breakdown in the regulation of many areas of business if employers did not carry most of the load of keeping their employees in line and have the sanction of discharge for refusal to answer what is essential to that end.” *United States v. Solomon*. Marsh had to use the “sanction of discharge for refusal to answer,” because in the absence of an exculpatory explanation, Marsh needed to assume the worst: that the bid-rigging allegations were true and that Marsh was vicariously liable for their criminal conduct. . . .

Given the circumstances, Marsh’s demand that Gilman and McNenney explain themselves in an interview under the penalty of termination was unassailable, even routine. It did what any other company would do, and (arguably) what any company should do. Marsh’s interview demands were reasonable and it had cause to fire Gilman and McNenney for refusing to comply. . . .

Gilman and McNenney argue that Marsh’s interview demands constitute state action that infringed their right against self-incrimination. This is “the legal equivalent of the ‘Hail Mary pass’ in football.” *In re Lionel Corp*. They advance the following argument: if Marsh’s request that Gilman and McNenney sit for interviews under the penalty of termination is deemed state action (because of Marsh’s cooperation with the AG), and if that demand and threat violated their Fifth Amendment right, then Marsh’s request was unreasonable as a matter of law, and their refusal to comply with the interview demands cannot support their loss of benefits. . . .

Marsh had good institutional reasons for requiring Gilman and McNenney to sit for interviews or else lose their jobs: the company’s stock price was sinking and its clients, directors, investors, and regulators were demanding answers about the allegations. There is no evidence that the AG “forced” Marsh to demand interviews, “intervened” in Marsh’s decisionmaking, “steered” Marsh to request interviews, or “supervised” the interview requests. Nor is there evidence that the nature and scope of the pending interviews were framed by the government, or changed after Cherkasky’s October 25 meeting with Spitzer. The expansion of Marsh’s internal investigation was precipitated by allegations advanced by the government, but it is not a measure it would have forgone “but for” the AG’s influence.

Even if, as McNenney contends, Davis Polk sought to interview him without counsel and with the AG present, that request occurred well before October 25, and McNenney adduced no evidence that Marsh’s request for an interview arose out of pressure or coercion from the AG. And Marsh, which already had cause to fire McNenney, could presumably put additional conditions on its interview request anyway, as it still gave McNenney fundamentally the same choice to explain himself or be fired.

Gilman and McNenney invite us to consider that the occasion for the corporate investigation was a criminal initiative by government, and that a likely use of the internal investigation was that Marsh would offer up its findings (together with the employees’

testimony) in the nature of a sacrifice to an angry prosecutor. No doubt, Marsh was compelled by circumstances to conduct an investigation (with expectation that any privileges attached to it would be waived) and that one mighty circumstance was a possible prosecution of the firm. But in the ordinary course, allegations of serious wrongdoing would provoke such an investigation, whether or not the allegations were made by prosecutors and whether or not the company itself was at risk of prosecution. The interests of prudent directors alone would justify or compel such a measure. . . .

Gilman and McNenney urge that we adopt, in effect, this categorical rule: acts that are taken by a private company in response to government action, and that have as one goal obtaining better treatment from the government, amount to state action. But a company is not prohibited from cooperating, and typically has supremely reasonable, independent interests for conducting an internal investigation and for cooperating with a governmental investigation, even when employees suspected of crime end up jettisoned. A rule that deems all such companies to be government actors would be incompatible with corporate governance and modern regulation.

UNITED STATES v. STEIN, 435 F. Supp. 2d 330 (S.D.N.Y. 2006)

KAPLAN, District Judge:

KPMG, the accounting giant, and many of its personnel found themselves under criminal investigation for their role in allegedly abusive tax shelters. An indictment, regardless of whether KPMG was guilty of anything, almost certainly would have meant the demise of the firm—the fate met by its competitor, Arthur Andersen & Co., when it was indicted in the Enron scandal.

Although KPMG long had paid legal fees for any of its employees who were sued or charged with crimes as a result of doing their jobs, the government threatened to consider such payments as a factor weighing in favor of indicting the firm. It threatened also to consider any failure by KPMG to cause its employees to make full disclosure to the government as favoring indictment. So KPMG changed its practice regarding legal fees. It informed employees that it would pay fees, up to \$400,000, but only on the condition that they cooperate with the prosecutors. In other words, KPMG told its personnel that it would cut off payment of legal expenses of any employee who refused to talk to the government or who invoked the Fifth Amendment. And it made crystal clear that it would cut off any payments of legal fees to anyone who was indicted.

The government took full advantage. It sought interviews with many KPMG employees and encouraged KPMG to press the employees to cooperate. Indeed, it urged KPMG to tell employees to disclose any personal criminal wrongdoing. When individuals balked, the prosecutors told KPMG. In each case, KPMG reiterated its threat to cut off payment of legal fees unless the government were satisfied with the individual's cooperation. In some cases, it told the employees to cooperate with prosecutors or be fired.

The government obtained statements, commonly known as proffers, from nine KPMG employees who now are defendants here (the “Moving Defendants”). The Moving Defendants contend that their statements were coerced in violation of their Fifth Amendment privilege against self-incrimination. They move to preclude the government from using the statements or any evidence derived therefrom.

Having considered the evidence, the Court is persuaded that the government is responsible for the pressure that KPMG put on its employees. It threatened KPMG with the corporate equivalent of capital punishment. KPMG took the only course open to it. . .

In this case, not all of the statements made by the Moving Defendants to the government were coerced. Those that were, however, must be suppressed. . . .

One of the guiding principles set forth in the [DOJ] Thompson Memorandum is that “[i]n gauging the extent of the corporation’s cooperation [for purposes of determining whether it should be indicted], the prosecutor may consider the corporation’s willingness to identify the culprits within the corporation, including senior executives, *to make witnesses available*, to disclose the complete results of its internal investigation, and to waive attorney-client and work-product privileges.” The commentary goes on to elaborate on the meaning of cooperation in relevant part by stating: “One factor the prosecutor may weigh in assessing the adequacy of a corporation’s cooperation is the *completeness of its disclosure* including, if necessary, a waiver of the attorney-client and work product protections . . .” Thus, the Thompson Memorandum makes clear that the failure of a business organization facing possible indictment to induce its personnel to submit to interviews by the government and to disclose whatever they know may be a factor weighing in favor of indictment of the entity. . . .

The KPMG lawyers made clear to prosecutors that KPMG believed that an indictment would be fatal to the organization. They said that KPMG intended to cooperate in order to save the firm and that it would not protect individual employees. Later in the meeting, Robert Bennett and Kenneth Bialkin of Skadden, Arps, Slate, Meagher & Flom, the senior lawyers representing KPMG, told the USAO that KPMG’s “common practice” had been to pay legal fees for employees in connection with legal matters arising out of their doing their jobs. Although KPMG still was checking on its legal obligations, they said, it would not pay legal fees for employees who declined to cooperate with the government, or who took the Fifth Amendment, as long as it had discretion to take that position. Mr. Bennett made clear also that KPMG would recommend to individual employees “lawyers who understand cooperation is the best way to go in this type of case.” He expressed also the view that “it [wa]s in the best interests of KPMG for its people to get attorneys that will cooperate with” the government. . . .

As noted, each of the Moving Defendants received the form letter that stated that KPMG would pay an individual’s legal fees and expenses, up to a maximum of \$400,000, on the condition that the individual “cooperate with the government and . . . be prompt, complete, and truthful.” Each subsequently made proffers to the government pursuant to

the USAO's standard proffer agreement after receiving the letter or, in one case, after having been told its substance but before receiving it. Six of the nine left KPMG before they made their statements and do not claim that they made their statements under a threat of loss of their employment. There is no evidence that Mr. Gremminger, one of the three who made a proffer while still employed by KPMG, ever was threatened with firing if he did not make a statement. The situations of the other two, Mr. Smith and Ms. Warley, were different.

Mr. Smith initially refused to make a proffer. Ms. Warley, on the other hand, made a proffer on April 21, 2004. This led to a dispute between her Texas counsel and the USAO in which the attorney demanded agreement by the government with a number of conditions as a prerequisite to a further session.

On May 18, 2004, AUSA Weddle informed Skadden that (1) Mr. Smith had refused to meet with the government and (2) although Ms. Warley had met with prosecutors once, she had refused to meet again except on conditions unacceptable to the USAO. Within days, Eugene O'Kelly, then chairman of KPMG, told Mr. Smith that he understood that "there were concerns about whether [Mr. Smith] was cooperating with the investigation" and told Mr. Smith that "he did not want [him] to put [Mr. O'Kelly] in a position where he was forced to take action against" him. Mr. Smith quite reasonably interpreted this comment as meaning that KPMG would fire him if he did not proffer to the government.

On May 28, 2004, promptly after the O'Kelly-Smith conversation, Skadden forwarded copies of Mr. Weddle's letter to counsel for Smith and Warley. The cover letters stated in relevant part:

"Absent an indication within the next ten business days from the government that your client no longer refuses to meet with the government pursuant to its standard proffer agreement, KPMG will cease payment of [the client's legal] fees.

"Finally, please note that KPMG will view continued non-cooperation as a basis for disciplinary action, including expulsion from the Firm."

Shortly after this threat, Mr. Smith—acting against the advice of his attorney and in order to keep his job—changed his position. He entered into the USAO's standard proffer agreement on June 16, 2004 and met with prosecutors on that date, June 17, and November 23, 2004.

The record does not fully disclose what transpired next between Ms. Warley and the USAO. In any event, she returned for a second proffer session on October 19, 2004 that lasted less than twenty minutes. Ms. Warley's counsel advised the government that Ms. Warley believed that certain Texas statutes precluded her from voluntarily revealing client information without the clients' permission and asked for a grand jury subpoena, compliance with which would be mandatory. The government obliged, but the USAO

then terminated the proffer session despite Ms. Warley's request to continue. A few days later, Ms. Warley appeared before the grand jury but invoked the Fifth Amendment.

On November 10, 2004, Mr. Weddle again wrote to Skadden, informing it that "notwithstanding [Ms. Warley's] counsel's representations that she would cooperate with the investigation, [she] continues to refuse to cooperate." On November 15, 2004, Skadden forwarded the government's letter to Ms. Warley's counsel and advised him that KPMG had ceased payment of her legal fees, effective November 10, 2004. It added:

"In addition, absent an indication from the government within the next ten business days that your client no longer refuses to cooperate with the investigation, KPMG will consider additional actions, including Ms. Warley's separation from the Firm."

In the end, Ms. Warley's counsel disputed the claim that she had not cooperated, but she nevertheless was terminated by KPMG. Subsequent negotiations between Ms. Warley's counsel and the government concerning a further proffer were not successful.

In sum, then, all of the proffers followed KPMG's conditioning of the payment of attorneys' fees on employees' cooperation with the government. In addition, Mr. Smith's proffer and that of Ms. Warley on October 19, 2004 both followed explicit threats of employment termination.

KPMG repeatedly claimed that there was a direct causal connection between its actions and the proffers by some of its employees.

In a November 2, 2004 letter to the USAO, which obviously was intended to demonstrate that KPMG should not be indicted because, among other things, it had cooperated with the government, Skadden wrote:

"KPMG has repeatedly directed all current and former personnel to cooperate with the investigation and has conditioned payment of attorney's fees upon prompt, complete, and truthful cooperation with the government's inquiry. Whenever your Office has notified us that individuals have not rendered prompt, complete, and truthful cooperation, KPMG has promptly and without question encouraged them to cooperate and threatened to cease payment of their attorney fees and (if applicable) to take personnel action, including termination. *In certain instances, KPMG's action has led previously non-cooperating individuals to meet with your Office.* In other instances, KPMG has ceased payment of fees and expenses."

At later meetings, and in a so-called "White Paper" that argued against indictment of the firm, Mr. Bennett "noted that KPMG had 'hinged attorneys fees on whether people would talk to [the government]'" and "that KPMG had cut off fees for several individuals for non-cooperation and had terminated two partners for non-cooperation," including for "asserting . . . [the] 5th Amendment right not to testify." A memorandum of a June 13,

2005 meeting with the DOJ discloses that Mr. Bennett argued that “We [KPMG] said we’d pressure—although we didn’t use that word—our employees to cooperate” and when employees did not cooperate, “Justin [AUSA Weddle] or Stan [AUSA Okula] would tell us,” and the firm then cut off fee payments and/or fired the individual. Indeed, KPMG’s final submission to the DOJ argued that it had fully cooperated by, among other things, “pressuring current and former personnel to cooperate fully with the investigation.” . . .

The Fifth Amendment provides in relevant part that “No person . . . shall be compelled in any criminal case to be a witness against himself.” An individual claiming a violation of the privilege against self-incrimination must prove that the statement sought to be suppressed was a product of compulsion by or attributable to the government. . . .

It no longer may be doubted that economic coercion to secure a waiver of the privilege against self-incrimination, where it is attributable to the government, violates the Fifth Amendment if the pressure is sufficient to “deprive[] [the accused] of his ‘free choice to admit, to deny, or to refuse to answer.’” The point is well illustrated by *Garrity v. New Jersey*, where the Supreme Court held that statements obtained from police officers in circumstances in which a state statute would have required the termination of their employment had they declined to answer were involuntary and therefore inadmissible against them in a criminal trial. So one may not exclude the possibility that KPMG’s conditioning of the payment of legal fees upon cooperating with the prosecutors, assuming it was attributable to the government, left these defendants with no choice but to talk. Yet that is only the beginning of the discussion. . . .

Prospective criminal defendants often make so-called queen for a day proffers to prosecutors, and they do so for several reasons. As the Moving Defendants concede, some do so in the hope of obtaining a cooperation agreement. Some do so in efforts to negotiate pleas. And some do so in the hope of persuading the government not to indict at all. Thus, the fact that most of these defendants made proffers after KPMG conditioned the continued payment of their legal fees on their cooperating with the government in and of itself sheds little light on whether their statements were coerced. In other words, the fact that these defendants proffered *after* KPMG conditioned payment of their legal fees on cooperation does not mean that they proffered, even in part, *because* KPMG so conditioned payment. To illustrate the point, Mr. Watson acknowledges that he proffered on the first of several occasions voluntarily because he hoped to persuade the USAO that he should not have been prosecuted.

In consequence, *Garrity* does not require the result the Moving Defendants advocate. While it stands for the proposition that the coerced nature of a statement sometimes may be apparent on undisputed facts, it does not support the Moving Defendants’ argument that the existence of an objectively coercive influence alone is sufficient to warrant suppression, even where other evidence or common sense suggests that the statement at issue in fact was voluntary. . . .

The situations of Mr. Smith and, with respect to all but the first of their proffers, Mr. Watson and Ms. Warley are quite different. Mr. Watson submitted a declaration asserting that he decided to proffer on the second and third occasions only because of the pressure placed upon him by KPMG. Although Mr. Smith and Ms. Warley did not submit affidavits addressing the issue of voluntariness, there was more than sufficient evidence to raise an issue of fact on that point. In consequence, the Court held an evidentiary hearing on the issue of coercion of these statements.

The evidence that Mr. Smith's proffers all were coerced is compelling. After he received the March 11, 2004 letter, the government requested that he proffer. Despite KPMG's insistence on cooperation and its having conditioned the payment of legal fees upon compliance with that request, he refused. In May, however, the government reported his refusal to KPMG. Mr. O'Kelly implicitly but unmistakably threatened to fire him if he did not fall into line. The threat was made explicit by Skadden on May 28, 2004. Mr. Smith, whose family was entirely dependent upon him for support, rejected his attorney's advice and agreed to proffer in order to save his job.

The government argues that Mr. Smith's decision was not a product of the government's pressure on KPMG, arguing that he previously had made statements to government bodies or otherwise represented the firm vis-a-vis government agencies and concerned clients because he, as a very senior company official, and KPMG had a "unity of interest." But this contention is not persuasive.

To be sure, Mr. Smith, as vice chair of the firm, took a prominent position in attempting to deal with a host of matters related to the tax shelters at issue in this case. He was involved, to varying degrees, with the IRS promoter audit, the SEC independence investigation, the DOJ summons enforcement proceeding, and other matters and testified before the Senate. The government may well be correct that his position would have been in jeopardy if he had refused to engage in these activities. But that does not get the government where it wants to go.

To begin with, the question here is whether the statements Mr. Smith made to the USAO after KPMG conditioned payment of his legal fees on his cooperation and explicitly threatened to fire him if he did not waive his constitutional rights and proffer were coerced. That other statements also might have been coerced by fear of loss of his job is beside the point.

Second, there is a world of difference between the prior statements and activities and those in question here. The former occurred in circumstances in which only KPMG's interests were immediately at stake, not Mr. Smith's personal liberty. Once the criminal referral was made and the USAO sent Mr. Smith a subject letter, the personal stakes for him changed dramatically. In consequence, even assuming *arguendo* that Mr. Smith voluntarily took some risks for the firm before he became the subject of a criminal investigation, the suggestion that he voluntarily ran the risk to his own freedom that was entailed in submitting to questions from prosecutors would lack force.

Finally, the question ultimately is one of credibility. The Court credits Mr. Smith's testimony and finds that he made the statements at the proffer sessions because KPMG threatened to fire him and cut off payment of his legal fees if he did not. The statements were coerced. . . .

The Court recognizes that the criminal process often requires defendants and prospective defendants to make hard choices among unpalatable alternatives and that there often is nothing wrong with this. What distinguishes this case is that the government here coerced KPMG to apply pressure to Mr. Watson and other individual defendants in order to secure waivers of constitutional rights that the government itself could not obtain. That goes beyond the bounds of appropriate government action. . . .

This is not the end of the analysis. The Fifth Amendment "restricts only governmental conduct, and will constrain a private entity only insofar as its actions are found to be 'fairly attributable' to the government." . . .

As the Supreme Court has explained, action by a private entity is "fairly attributable" to the government where "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." Such a nexus exists either "(1) where the state 'has exercised coercive power [over a private decision] or has provided such significant encouragement, either overt or covert, that the choice [by the private actor] must in law be deemed to be that of the State;' or (2) where 'the private entity has exercised powers that are traditionally the exclusive prerogative of the State.'" In other words, state action will be found where the government commands or significantly encourages a private entity to take the specific action alleged to violate the Fifth Amendment, as well as where the government is "entwined" in the management or control of specific conduct at issue. . . .

Here, the government quite deliberately precipitated KPMG's use of economic threats to coerce the proffer statements in question. "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." The Thompson Memorandum, moreover, made it clear that a company's failure to ensure that its employees disclose whatever they knew, regardless of their individual rights and concerns, might weigh in favor of indicting the company. The USAO knew that KPMG would apply additional pressure, beyond the threatened cut-off of legal fees, to "uncooperative" employees. Indeed, it reported them to KPMG in circumstances in which there was no conceivable reason for doing so except to facilitate the firing threats that ensued. . . .

The ultimate question here is whether "the state 'has exercised coercive power [over a private decision] or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.'" This Court finds that the government, both through the Thompson Memorandum and the actions of the USAO,

quite deliberately coerced, and in any case significantly encouraged, KPMG to pressure its employees to surrender their Fifth Amendment rights. There is a clear nexus between the government “and the *specific* conduct of which” the Moving Defendants complain. KPMG’s actions in this regard are “fairly attributable” to the United States. . . .

In this case, the pressure that was exerted on the Moving Defendants was a product of intentional government action. The government brandished a big stick—it threatened to indict KPMG. And it held out a very large carrot. It offered KPMG the hope of avoiding the fate of Arthur Andersen if KPMG could deliver to the USAO employees who would talk, notwithstanding their constitutional right to remain silent, and strip those employees of economic means of defending themselves. In two instances, that pressure resulted in statements that otherwise would not have been made. In seven, the evidence does not warrant that conclusion. The coerced statements and their fruits must be suppressed.

UNITED STATES v. CONNOLLY, 2019 WL 2120523 (S.D.N.Y. May 2, 2019)

COLLEEN McMAHON, Chief Judge:

[Gavin] Black moves for relief under *United States v. Kastigar*, on the basis that statements obtained by his employer, Deutsche Bank AG (“Deutsche Bank”), in the course of what purported to be an internal investigation into the possible manipulation of the London Inter-Bank Offered Rate (“LIBOR”), are fairly attributable to the Government within the meaning of *Garrity v. New Jersey*

Black has made a rather convincing showing that Deutsche Bank and its outside counsel, Paul Weiss, Rifkind, Wharton & Garrison LLP (“Paul Weiss”), were *de facto* the Government for *Garrity* purposes; more important, the Government has made an utterly unpersuasive case in rebuttal. There remain holes in the record, however, and a full-bore *Garrity* hearing would be a fascinating exercise—especially because there are profound implications if the Government, as has been suggested elsewhere, is routinely outsourcing its investigations into complex financial matters to the targets of those investigations, who are in a uniquely coercive position *vis-à-vis* potential targets of criminal activity. The Court is deeply troubled by this issue.

But the Court is not eager to put the parties through a purely academic exercise. And in this case, holding a *Garrity* hearing would be a purely academic exercise because, even if Deutsche bank and Paul Weiss were agents of the Government, Black’s *Kastigar* rights were not violated. The motion is, therefore, denied. . . .

In or about October 2008, the United States Commodity Futures Trading Commission (“CFTC”) opened an investigation into LIBOR manipulation by two financial services firms—Barclays PLC (“Barclays”) and UBS Group AG (“UBS”)—both of which were LIBOR panel submitting banks.

In 2010, the Government started looking at another LIBOR panel member, Deutsche Bank. The United States Securities and Exchange Commission (“SEC”) was the first

federal agency to open an investigation into Deutsche Bank's role in LIBOR manipulation. The Bank retained Paul Weiss sometime in "early 2010" to respond to the SEC's inquiry.

On April 19, 2010, the CFTC sent a letter to Deutsche Bank's General Counsel for the Americas, Joseph Polizzotto, stating that it, too, intended to look into whether Deutsche Bank had submitted false or misleading LIBOR reports. The CFTC advised Deutsche Bank that it "expect[ed]" the Bank to "cooperate fully" with its investigation. It then went on to explain exactly what cooperation would look like:

Accordingly, the Division requests that Deutsche Bank Securities Inc. (and its parent, subsidiaries, affiliates and divisions, collectively referred to as "Deutsche Bank") voluntarily conduct by external counsel a full review of Deutsche Bank's U.S. Dollar LIBOR reporting for the relevant time period, and report on an on-going basis the results of that review to the Division, with the review to be completed by no later than September 1, 2010. Further, the Division requests that Deutsche Bank certify that it was in compliance with the Act and Regulations with respect to its reporting of LIBOR and related trading.

Appended to the CFTC's letter was a CFTC Enforcement Advisory Memorandum titled "Cooperation Factors in Enforcement Division Sanction Recommendations." This memorandum stated that a corporate cooperator might receive cooperation credit if, among other things, it "utilize[s] all available means to [] make employee testimony or other relevant corporate documents available in a timely manner." It also noted that the quality of a corporation's cooperation might depend upon whether the company "avoid[ed] entering into joint defense agreements with counsel for employees[.]"

Deutsche Bank expanded Paul Weiss's representation to include conducting the so-called "voluntary" investigation that was demanded (not requested) by the CFTC. According to Walter Ricciardi, the Paul Weiss partner who headed the Bank's internal investigation into LIBOR from its inception until January 2013, there was nothing "voluntary" about the investigation that followed the CFTC letter; given the draconian consequences that would likely ensue if it did not accept the agency's invitation, Deutsche Bank's only choice was about its "level of cooperation" with the Government, not about whether to cooperate. Accordingly, Deutsche Bank immediately decided that it would go all-in with cooperation.

On the record presently before the Court, it is clear enough that, for five years, Deutsche Bank and its outside counsel coordinated extensively with the three Government agencies—the SEC, the CFTC, and eventually the United States Department of Justice ("DOJ")—that were looking into possible LIBOR manipulation. Indeed, it is apparent that the Government was kept abreast of developments on a regular basis, and that the federal agencies gave considerable direction to the investigating Paul Weiss attorneys, both about what to do and about how to do it. The issue raised by Black's motion is just

exactly how much the investigation conducted by Paul Weiss was a substitute for investigative efforts by Government attorneys.

In the early days of the CFTC's investigation, counsel for Deutsche Bank and the CFTC held a series of telephone meetings during which they laid out the framework for the Bank's initial investigatory steps. The CFTC proposed, and Deutsche Bank expressly agreed, to take certain immediate actions, including specifically, "Interview[ing] [] all relevant Bank staff, including those who had knowledge/approval/over sight of, input on or discussions regarding the setting and submission of the Bank's LIBOR[.]"

In a letter "set[ting] forth" the actions Deutsche Bank had "agreed" to undertake, the CFTC also conveyed the Government's expectation that counsel would regularly provide updates on its internal investigation:

[A]s we discussed, the CFTC and the SEC further envision regular updates, initially occurring weekly, from Counsel concerning the status and progress of the internal investigation, These updates will include simultaneous productions of responsive documents and information uncovered in the internal investigation.

The Court will assume that the CFTC and SEC received the weekly reports demanded in the July 14, 2010 letter, especially since Ricciardi testified that, while he did not recall the CFTC's specific request for ongoing updates, he "probably didn't pay much attention to it because that's just the standard way it's always done."

At the same time that the CFTC opened its investigation, the DOJ submitted an "Access Request Letter" to the CFTC, asking it to provide DOJ with all documents it obtained as part of its investigation into LIBOR manipulation generally. As a result of this access request letter, DOJ ultimately "received [from CFTC] hundreds of thousands of documents throughout the course of its investigation of Deutsche Bank[.]"

On November 4, 2010, Paul Weiss lawyers and representatives of Deutsche Bank's legal department met in person with CFTC representatives in order to provide a summary of the Bank's investigation to date. Prior to that meeting, Paul Weiss lawyers had conducted telephone interviews with several people at Deutsche Bank who ended up being part of this case, including James King and Michael Curtler (both of whom eventually testified at Black's trial). They had also interviewed David Nicholls, an individual who oversaw Deutsche Bank's global finance and currency forward-trading desks horn London.

At the November 4 meeting, the CFTC "asked" (*i.e.*, instructed) Paul Weiss to "interview King, Curtler, and Nicholls again, this time in person, before Thanksgiving, and that at the same time, to the extent [Paul Weiss] learn[s] that King or Curtler regularly interact with or obtain information from others, on the same desk or other desks, [Paul Weiss] interview those individuals as well[.]" Deutsche Bank identified Gavin Black as an individual who fell within the parameters of the Government's

interview request. The Government concedes “for the purposes of this motion” that the “certain employees” it expected Paul Weiss to interview included Gavin Black.

Paul Weiss lawyers, acting on behalf of Deutsche Bank, interviewed Black on November 22, 2010. Black did not have discretion to refuse to talk to the investigative team. Deutsche Bank’s employee policy, titled “Global Compliance Core Principles,” provides that an employee “*must* fully cooperate with Compliance and other appropriate Deutsche Bank departments (*e.g.*, Legal, Group Audit, etc.) handling internal and external examinations, investigations and other reviews involving Deutsche Bank, its customers and other related company activities.” Although the policy did not explicitly provide for termination if employees did not comply—it only states, “Employees who violate Deutsche Bank’s policies *may* be subject to disciplinary action up to and including termination of employment[.]”—Ricciardi testified, credibly, that any employee who did not cooperate with the investigation would have lost his job. Moreover, Black himself has submitted a declaration in which he avers that “[he] did not believe that [he] had any choice but to agree to meet with Paul Weiss lawyers and answer their questions [.]” and that, “had [he] refused to do so, it would have resulted in [his] termination from Deutsche Bank.” In light of Ricciardi’s testimony, Black’s subjective understanding is what any reasonable employee of Deutsche Bank would have understood.

As the Paul Weiss investigation continued, Deutsche Bank representatives and counsel continued to update the Government about their findings and coordinate next steps, as to Black and others. The Government gave Deutsche Bank/Paul Weiss marching orders during these meetings. For example, on December 4, 2014, a Government official directed Roberto Finzi, a Paul Weiss partner, to “approach [an employee] interview as if he were a prosecutor”—a request with which Finzi complied by giving his “word.” It is not clear whether the Government followed a similar protocol with respect to some or all of Paul Weiss’s earlier interviews of Deutsche Bank employees. Other evidence indicates that the UK FCA—which was conducting a LIBOR investigation of its own—required Paul Weiss to provide it with an “interview plan and a list of documents” before it was permitted to interview another Deutsche Bank employee.

Nonetheless, the Court has only a limited picture of Black’s interactions with Paul Weiss and Deutsche Bank. It knows even less about the Government’s role in those interactions.

Paul Weiss lawyers interviewed Black a second time on August 25, 2011 and a third time on June 19, 2012. Black was not represented by counsel at either of these interviews—just as he had not been represented at the November 22, 2010 interview. Nor does it appear that he was provided with any advance information about what to prepare (or be prepared for) at these interviews. He was given standard *Upjohn* warnings at all interviews.⁵

⁵ An “*Upjohn* warning” is the notice an attorney (in-house or outside counsel) provides a company

... After the Bank interviewed Black for the third time in 2012, its lawyers met with the Government in person to provide a “download,” meaning an exhaustive summary, of Black’s statements to Paul Weiss attorneys. Government notes from the “download” meeting corroborate the version of events that Ricciardi subsequently provided to the Government, *viz*, that Black’s interviews with Paul Weiss largely consisted of his denying any wrongdoing. They also reflect some willingness by Paul Weiss to help the Government investigate Black, should it ever come to that point:

Gavin, if you choose to interview him, may recall only one or two e-mails presented before him; beyond that he does not recall any email exchanges. He will be exceptionally clear and straightforward with his answers. That said, he does not recall communication entirely. At best 3–4 occasions, which the emails may cover, are recalled. [O]ne communication where a setter asks: “Any Requests” Black would not interpret this to be soliciting a LIBOR request at that time, nor would he see anything wrong with that statement today. There is no nefarious meaning behind it, he would say.

According to Black’s counsel, the Government ultimately used the information it learned from this “download” meeting to question Black during his proffer session, which took place in London on October 1, 2013—long after Deutsche Bank, through Paul Weiss, had interviewed Black and then relayed his statements to the Government.

On September 9, 2014, as the Bank’s internal investigation was drawing to a close, Deutsche Bank’s counsel sought the Government’s “permission” to interview Gavin Black, who still worked at the Bank, for a fourth time—which is to say, Deutsche Bank *asked the Government for “permission” to interview its own employee*. The Government asserts in its brief that Paul Weiss interviewed Gavin Black on December 4, 2014, at which interview Black was represented by counsel. While the Government does not provide a citation to the record to support this assertion, and the Court has not located other evidence to corroborate this assertion, it will accept the Government’s representation.

employee to inform her that the attorney represents only the company and not the employee individually. An attorney cautions a company employee with an *Upjohn* warning when the company is involved in litigation or conducting an internal investigation. Providing an employee with an *Upjohn* warning should make it clear that:

- The attorney-client privilege over communications between the attorney and the employee belongs solely to, and is controlled by, the company.
- The company may choose to waive the privilege and disclose what the employee tells the attorney to a government agency or any other third party.

The term originated with *Upjohn Co. v. United States*, 449 U.S. 383 (1981), in which the Supreme Court held that the attorney-client privilege is preserved between the company and its attorney when its attorney communicates with the company’s employees, despite the rule that communications with third parties constitute a waiver of the attorney-client privilege.

On January 21, 2015, Paul Weiss submitted a report, known colloquially as the Paul Weiss “White Paper,” summarizing the findings of its LIBOR investigation and laying out a roadmap of the case against Deutsche Bank and various individuals who worked for the Bank.

Among other things, the White Paper provides an exhaustive overview of the Bank’s substantial cooperation with the Government during its LIBOR investigation. During the course of Deutsche Bank’s nearly five-year internal investigation, Paul Weiss lawyers conducted nearly 200 interviews of more than fifty Bank employees—including, of course, of Black—and shared the results of these interviews with the Government. In addition to conducting interviews, Paul Weiss extracted and reviewed 158 million electronic documents, as well as listened to 850,000 audio files, or over hundreds of thousands of hours of audio tapes. . . .

When all was said and done, the LIBOR investigation was the largest and most expensive internal investigation in the respective histories of both Deutsche Bank and Paul Weiss.

But the investigation was a conspicuous success for Deutsche Bank. On April 23, 2015, Deutsche Bank entered into a deferred prosecution agreement (“DPA”) with DOJ, under which Deutsche Bank agreed to (i) pay \$ 775 million in criminal penalties; (ii) continue cooperating with the Government in its ongoing investigation; and (iii) retain a corporate monitor for the three-year term of the agreement. In addition, one of Deutsche Bank’s subsidiaries, Deutsche Bank Group Services (UK) Limited, agreed to plead guilty to one count of wire fraud and pay its own fine. . . .

One critically important issue is just what the Government was doing during the five years between the sending of the CFTC’s April 2010 letter and Deutsche Bank’s eventual entry into a DPA with DOJ on April 23, 2015. Did the Government conduct a substantive parallel investigation to the “internal” investigation at Deutsche Bank, or did it simply give direction to Deutsche Bank/Paul Weiss, take the results of their labor (which appears to have been fully disclosed to Government lawyers), and save itself the trouble of doing its own work?

On the record presently before it, the Court would have to conclude the latter. The Government—which has never treated this matter with the seriousness it deserves—did not provide the Court with much information about any independent investigative activities it may have undertaken during those years. Indeed, it has declared that it has no need to do so.

The Government—first the SEC on April 4, 2010, then the DOJ on June 27, 2011—subpoenaed Deutsche Bank for documents. However, the Government does not appear to have interviewed any witnesses from Deutsche Bank—at least, not until after Paul Weiss interviewed those witnesses and passed information gleaned from those interviews on to the Government—or taken any investigative depositions, or reviewed

anything that had not first passed through the maw of Paul Weiss's five-year, \$10 million investigative machine and been fully digested for the Government by the target of the investigation. . . . It is hard not to conclude that the Government did not conduct a single interview of its own without first using a road map that Paul Weiss provided—illuminating just how the Government should “investigate” the case against certain Deutsche Bank employees, including Black. . . .

The Fifth Amendment provides in relevant part, “No person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. An individual claiming a violation of the privilege against self-incrimination must prove that the statements at issue were both the product of coercion and attributable to the government. . . .

As the Second Circuit [has] . . . , a close nexus of state action exists between a private entity and the state when a governmental actor (i) exercises coercive power; (ii) is entwined in the management or control of the private actor; (iii) provides the private action with significant encouragement, either over or covert; (iv) engages in a joint activity in which the private actor is a willful participant; (v) delegates a public function to the private actor; or (vi) entwines the private actor in governmental policies.

It is not enough, however, that there be a close nexus between the state and the actions undertaken by a private entity; the Government must influence the specific conduct of which the party complains. The “controlling factor” is not whether the state directed the constitutionally prohibited conduct, but whether the state “involved itself in the use of a substantial economic threat to coerce a person into furnishing an incriminating statement.” *United States ex rel. Sanney v. Montanye*. The defendant bears the initial burden of showing that his interview statements are subject to *Garrity* protection. . . .

The record, which is limited (the responsibility for which falls squarely on the Government), contains compelling evidence that Deutsche Bank's investigation is fairly attributable to the Government. Among other things, it suggests that the Government directed Deutsche Bank to investigate Gavin Black on its behalf. The Bank's first interview of Black was conducted at the behest of the Government. Although there is no evidence either way about whether the fruits of that interview were shared with the Government agencies investigating Deutsche Bank, it is plausible—if not likely—that they did, since the record reflects that Paul Weiss was eager to share information about Black's subsequent two interviews. Record evidence also establishes that, as Deutsche Bank's investigation progressed, the Government continued to discuss Black by name in meetings with Bank investigators. All of this occurred well before any representative of the Government made any effort to speak with Black; that did not occur until the fall of 2013, three and a half years after Deutsche Bank's “internal” investigation began.

Of course, it is not enough under *Garrity* that Deutsche Bank's investigation was *generally* fairly attributable to the Government. The Bank's interviews of Black must have been Government-engineered interviews. The evidence certainly points in that

direction. There is no evidence suggesting that Black's interviews were conducted on some different footing than were the interviews of other Deutsche Bank employees. During the period when Paul Weiss conducted the first three (of four) interviews of Black, the Government told Deutsche Bank whom to interview and when. It told Deutsche Bank to interview Gavin Black. Moreover, even as late as 2014—when the investigation was in its fourth year—the Government was still directing Paul Weiss's activities. When Paul Weiss wanted to interview Gavin Black on September 9, 2014, it sought the Government's permission to do so. And the Government did not simply give permission; it directed an experienced Paul Weiss partner and former Assistant U.S. Attorney for the Southern District of New York on the precise manner in which he should ask his questions. For its part, rather than simply producing documents and providing interview summaries, Paul Weiss, in full (and understandable) aid of its client's (*i.e.*, Deutsche Bank's) interests, digested the vast information it collected, highlighted the most important nuggets, and shared a blueprint for what prosecutors should expect should they finally interview Black on their own. Not surprisingly, when it came time to resolve its case against Deutsche Bank, the Government credited Paul Weiss for its extensive support of its own investigative efforts.

The only conclusion one can draw from this evidence is that, rather than conduct its own investigation, the Government outsourced the important developmental stage of its investigation to Deutsche Bank—the original target of that investigation—and then built its own “investigation” into specific employees, such as Gavin Black, on a very firm foundation constructed for it by the Bank and its lawyers. This was no ordinary “outside” investigation. Deutsche Bank did not respond to the Government's subpoenas by turning over documents without comment, and its employees were not subjected to government or regulatory depositions on notice, at which they were defended by company counsel. Indeed, Deutsche Bank did the opposite—it effectively deposed their employees by company counsel and then turned over the resulting questions and answers to the investigating agencies. . . .

Having declined to offer much by way of evidence, the Government falls back on strained legal and policy arguments that are not just unconvincing, but unworthy.

The Government (repeatedly) argues, for example, that Deutsche Bank could not have shared a close enough nexus with the Government, because its fiduciary duty diverged from the Government's, in that Deutsche Bank—as a public company—owed its duty to shareholders, and Paul Weiss—as counsel to Deutsche Bank—owed a duty of loyalty to its client. It is hard to take this argument seriously.

The Second Circuit [has] noted . . . that, “The threat of [ruinous indictment] brings significant pressure to bear on corporations, and that threat ‘provides a sufficient nexus’ between a private entity's employment decision at the government's behest and the government itself.” According to Ricciardi, Deutsche Bank was facing the threat of ruin, such that the only “choice” facing Deutsche Bank when it received the CFTC's letter was the “level of cooperation” it would provide to the Government—because not

cooperating was not an option. Viewed in that light, the CFTC's request that Deutsche Bank conduct a "voluntary" investigation was a classic "Godfather offer"—one that could not be refused. And Deutsche Bank's interest in cooperating was perfectly aligned with the Government's interest in outsourcing its investigative functions (if that is indeed what occurred in this case). This massive amount of pressure is highly relevant to any assessment of the sufficiency of the nexus between the Government and Deutsche Bank's "internal" investigation. . . .

Finally, the Government urges that the Court must not conclude that there was a sufficiently close nexus between it and Deutsche Bank, because doing so will hamper law enforcement by curtailing the Government's ability to encourage cooperation, which will prove a bad idea as a matter of policy.

The Court does not doubt that it saves the Government considerable time and precious resources to permit counsel for the target of an investigation to do the heavy lifting of ferreting out the truth—especially in a case like this one, which is so large, technical, and complicated. But this is a court of law, not a court of policy. The Court is not concerned with whether the outsourcing of investigations to private parties makes life easier for the Government or for the taxpayers; it is concerned with the protection of the defendant's constitutional right against self-incrimination, and so with the constitutional implications, if any, of such outsourcing. That concern trumps the Government's interest in convenience.

In conclusion, given the Government's deliberate choice not to create a record that would allow for a contrary finding, the record presently before the Court establishes that the Government violated *Garrity*, because Deutsche Bank's interviews of Gavin Black, for which he was compelled to sit under threat of termination, are fairly attributable to the Government. . . .

As stated earlier, the Fifth Amendment prevents the Government from making any use, direct or indirect, of a defendant's compelled statements. The Government must affirmatively prove by a preponderance of the evidence that the evidence it "used" was derived from a source that was "wholly independent" of Black's compelled testimony. Prohibited "uses" of compelled testimony include "obtaining [an] indictment" based on tainted evidence, *Hubbell*; "preparing [the Government's case for trial];" and presenting tainted evidence to the grand jury. *Poindexter*. *Kastigar* does not, however, encompass "merely tangential" non-evidentiary uses of compelled testimony, *Rivieccio*, such as evidence that does not "influence[] the [G]overnment's decision to pursue its line of investigation." *Nanni*.

None of Black's interview statements was introduced into evidence at his trial. In fact, the Government, in view of the looming *Garrity/Kastigar* issue, declined to call Ricciardi as a prosecution witness at the last possible moment—which it initially planned to do for the sole and exclusive purpose of getting Black's false denials before

the jury, so the Government could argue that they were completely at odds with the literal text of his emails and chats.

Nor did the Government make indirect use of Black's false exculpatory statements at trial. There is not a single item of trial evidence that would not have come in but for Black's interview statements to Paul Weiss. Black does not identify, and the Court cannot find, a single question that was asked that otherwise would not have been asked. . . .

The Government thus did not violate *Kastigar* at Black's trial.

The Government also did not make direct or indirect use of any of Black's interview statements before the grand jury. . . . [T]he Government identifies an independent source other than Black's interviews (whether with the UK FCA or with Paul Weiss) for everything that FBI Special Agent Jeffrey Weeks (the only grand jury witness) presented to the grand jury—either in the form of documents, cooperators, or information received from Deutsche Bank. Indeed, in connection with the Court's prior *Kastigar* opinion, the Court reviewed the Government's alternative source material for *every line* of grand jury testimony; all were accounted for, and none derived, directly or indirectly, from Black. . . .

Even assuming that the Government violated *Kastigar*, any such *Kastigar* violation would constitute harmless error. . . .

The Government has persuaded the Court that any improper use of Black's compelled statements was harmless. As should be readily clear to the parties by now, the Court having sat through a lengthy trial and reviewed the evidence on numerous occasions—does not doubt that Black would have been indicted and convicted even if Paul Weiss lawyers had never spoken to him. The evidence that the Government obtained against Black from its many independent sources was overwhelming.

Problem 12-1
Both <i>Stein</i> and <i>Connolly</i> found state action, but the cases ultimately had very different outcomes. What are the key factual differences that resulted in the coerced statements in <i>Stein</i> being granted use immunity (perhaps even derivative use immunity?) yet the statements in <i>Connolly</i> were still admissible?

Individual corporate employees prosecuted following corporate efforts to cooperate with the DOJ continue to press Fifth Amendment arguments to attempt to suppress evidence in their own cases in the form of statements made during internal investigations. In *United States v. Coburn*, Civ. No. 2:19-cr-00120 (KM) (D.N.J. July 20, 2023), two former employees of Cognizant Corporation facing prosecution moved to suppress statements taken from them in the course of Cognizant's internal investigation into

FCPA violations. It was known at Cognizant that employees who refused to cooperate with the company's investigations would be subject to termination.

The court in *Coburn* denied the defendants' motions on the basis that Cognizant had conducted some of the interviews even before it self-disclosed the FCPA matter to DOJ, and that one interview conducted after Cognizant began to cooperate with DOJ was not managed or directed in any way by DOJ. The mere existence of DOJ's incentives to Cognizant to investigate and share the results to obtain reduced penalties, the court said, was not enough to establish that Cognizant's questioning of the defendant employees was state action. In addition, the court said, Cognizant had reasons to conduct a thorough investigation apart from its desire to secure leniency from the DOJ. It seems likely that, more than *Stein* and *Connolly*, the *Coburn* decision (and its facts) will be pointed to by prosecutors as guidance for how to avoid later Fifth Amendment issues while negotiating for the fruits of corporate internal investigations. (The second Trump Administration's DOJ directed the prosecutors to dismiss the indictment against the Cognizant executives one week before it was scheduled to go to trial.)

Problem 12-2

Recall Shirley, the hedge fund trader from the problems in Chapter 11, who walked into your office with the grand jury subpoena. Return to that initial office meeting with her. Provide the (more robust) advice and explanation to Shirley that you would now give at that first meeting in light of what you have learned from the materials in this chapter.

Problem 12-3

You represent a corporation under investigation for securities fraud. In an effort to obtain a non-prosecution agreement, you advise the corporation to cooperate with the DOJ and conduct a thorough internal investigation. Some of the corporation's employees may be individually implicated in the fraud and are hesitant to speak with investigators. How would you advise the corporation to proceed with its investigation, balancing your obligation to your client (the corporation) and the Fifth Amendment rights of the employees?

13. FOURTH AND FIFTH AMENDMENTS AND DOCUMENTS

This chapter covers one of the subtlest and hardest topics in constitutional criminal procedure, so ambitions should be kept reasonable here. Look to come away with an awareness of what the issue(s) are, a sense of why they are hard, and an idea of how to think harder and read more about them if you encounter them in practice. The good news, at least for the student, is that the law turns out to provide only very limited means to resist production of documents to government authorities and thus the issues here can be summarily dispensed with in the vast majority of situations.

Firms have no Fifth Amendment right to not talk. Companies cannot speak, of course, and their employees have only their own individual Fifth Amendment rights, not any right on behalf of their employers. The remaining issue, then, is what to do about documents, which is what firms would really like to protect (and is kind of how they “speak”). Are documents protected by the Fifth Amendment in any way? By the Fourth Amendment? By some combination of the two?

As you work through the sequence of cases in this chapter, you will see that firms have no constitutional right to resist production of evidence. But individuals have, as part of their own Fifth Amendment right, the right to not have “the act of production” used against them—in *some* circumstances (sigh). You have to carefully track the Supreme Court’s reasoning on this, and it is one of those areas where seeing how the doctrine developed over time makes it easier to understand the most recent decisions. Before proceeding into the case law, refresh your memory of the text of the Fourth and Fifth Amendments below.

U.S. Constitution Amendment IV

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

U.S. Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be **compelled in any criminal case to be a witness against himself**, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

A. *Boyd: The Road Not Taken*

The first case in our sequence seems to say that the Fourth and Fifth Amendments give a person the right to resist obeying what is, in essence, a regular subpoena for documents. As you will see, *Boyd* did not last, but it is an enlightening thought experiment to consider what corporate enforcement would look like now had *Boyd* remained law.

BOYD v. UNITED STATES, 116 U.S. 616 (1886)

BRADLEY, J.

This was an information filed by the district attorney of the United States in the district court for the Southern district of New York, in July, 1884, in a cause of seizure and forfeiture of property, against 35 cases of plate glass, seized by the collector as forfeited to the United States, under the twelfth section of the ‘Act to amend the customs revenue laws,’ etc., passed June 22, 1874, (18 St. 186.) It is declared by that section that any owner, importer, consignee, etc., who shall, with intent to defraud the revenue, make, or attempt to make, any entry of imported merchandise, by means of any fraudulent or false invoice, affidavit, letter, or paper, or by means of any false statement, written or verbal, or who shall be guilty of any willful act or omission, by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, shall for each offense be fined in any sum not exceeding \$5,000 nor less than \$50, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited.

The charge was that the goods in question were imported into the United States to the port of New York, subject to the payment of duties; and that the owners or agents of said merchandise, or other person unknown, committed the alleged fraud, which was described in the words of the statute. The plaintiffs in error entered a claim for the goods, and pleaded that they did not become forfeited in manner and form as alleged. On the trial of the cause it became important to show the quantity and value of the glass contained in 29 cases previously imported. To do this the district attorney offered in evidence an order made by the district judge under the fifth section of the same act of June 22, 1874, directing notice under seal of the court to be given to the claimants, requiring them to produce the invoice of the 29 cases. The claimants, in obedience to the notice, but objecting to its validity and to the constitutionality of the law, produced the invoice; and when it was offered in evidence by the district attorney they objected to its reception on the ground that, in a suit for forfeiture, no evidence can be compelled from the claimants themselves, and also that the statute, so far as it compels production of evidence to be used against the claimants, is unconstitutional and void. The evidence being received, and the trial closed, the jury found a verdict for the United States, condemning the 35 cases of glass which were seized, and judgment of forfeiture was given. This judgment was affirmed by the circuit court, and the decision of that court is now here for review. . . .

The principal question, however, remains to be considered. Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws-is such a proceeding for such a purpose an '*unreasonable* search and seizure' within the meaning of the fourth amendment of the constitution? or is it a legitimate proceeding? It is contended by the counsel for the government, that it is a legitimate proceeding, sanctioned by long usage, and the authority of judicial decision. No doubt long usage, acquiesced in by the courts, goes a long way to prove that there is some plausible ground or reason for it in the law, or in the historical facts which have imposed a particular construction of the law favorable to such usage. It is a maxim that, *consuetudo est optimus interpret legum*; and another maxim that, *contemporanea expositio est optima et fortissima in lege*. But we do not find any long usage or any contemporary construction of the constitution, which would justify any of the acts of congress now under consideration. As before stated, the act of 1863 was the first act in this country, and we might say, either in this country or in England, so far as we have been able to ascertain, which authorized the search and seizure of a man's private papers, or the compulsory production of them, for the purpose of using them in evidence against him in a criminal case, or in a proceeding to enforce the forfeiture of his property. Even the act under which the obnoxious writs of assistance were issued did not go as far as this, but only authorized the examination of ships and vessels, and persons found therein, for the purpose of finding goods prohibited to be imported or exported, or on which the duties were not paid, and to enter into and search any suspected vaults, cellars, or warehouses for such goods. The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government.

The first statute passed by congress to regulate the collection of duties, the act of July 31, 1789, (1 St. 43,) contains provisions to this effect. As this act was passed by the same congress which proposed for adoption the original amendments to the constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment. So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets,

implements of gambling, etc., are not within this category. *Com. v. Dana*. Many other things of this character might be enumerated. The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the fourth or fifth amendment, or any other clause of the constitution; nor is the examination of a defendant under oath after an ineffectual execution, for the purpose of discovering secreted property or credits, to be applied to the payment of a judgment against him, obnoxious to those amendments. But, when examined with care, it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods, the owner from whom they were stolen is entitled to their possession, and in the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment; and in the case of goods seized on attachment or execution, the creditor is entitled to their seizure in satisfaction of his debt; and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civil to effect the ends of justice, and is no more than what the court of chancery would direct on a bill for discovery. Whereas, by the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property.

In order to ascertain the nature of the proceedings intended by the fourth amendment to the constitution under the terms ‘unreasonable searches and seizures,’ it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced ‘the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;’ since they placed ‘the liberty of every man in the hands of every petty officer.’ This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.

‘Then and there,’ said John Adams, ‘then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.’ These things, and the events which took place in England immediately following the argument about writs of assistance in Boston, were fresh in the memories of those who achieved our independence and established our form of government. In the period from 1762, when the *North Briton* was started by John Wilkes, to April, 1766, when the house of commons passed resolutions condemnatory of general warrants, whether for the seizure of persons or papers, occurred the bitter controversy between the English government and Wilkes, in which the latter appeared as the champion of popular rights, and was, indeed, the pioneer in the contest which resulted in the abolition of some grievous abuses which had gradually crept into the

administration of public affairs. Prominent and principal among these was the practice of issuing general warrants by the secretary of state, for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel. Certain numbers of the *North Briton*, particularly No. 45, had been very bold in denunciation of the government, and were esteemed heinously libelous. By authority of the secretary's warrant Wilkes' house was searched, and his papers were indiscriminately seized. For this outrage he sued the perpetrators and obtained a verdict of £1,000 against Wood, one of the party who made the search, and £4,000 against Lord Halifax, the secretary of state, who issued the warrant. The case, however, which will always be celebrated as being the occasion of Lord CAMDEN'S memorable discussion of the subject, was that of *Entick v. Carrington and Three Other King's Messengers*, reported at length in 19 How. St. Tr 1029. The action was trespass for entering the plaintiff's dwelling-house in November, 1762, and breaking open his desks, boxes, etc., and searching and examining his papers. The jury rendered a special verdict, and the case was twice solemnly argued at the bar. Lord CAMDEN pronounced the judgment of the court in Michaelmas term, 1765, and the law, as expounded by him, has been regarded as settled from that time to this, and his great judgment on that occasion is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British constitution, and is quoted as such by the English authorities on that subject down to the present time.

As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the fourth amendment to the constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures. . . .

It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense[. I]t is the invasion of this sacred right which underlies and constitutes the essence of Lord CAMDEN's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other. . . .

We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is

condemned in the fifth amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the fourth amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms. We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. In this very case the ground of forfeiture, as declared in the twelfth section of the act of 1874, on which the information is based, consists of certain acts of fraud committed against the public revenue in relation to imported merchandise, which are made criminal by the statute; and it is declared, that the offender shall be fined not exceeding \$5,000, nor less than \$50, or be imprisoned not exceeding two years, or both; and in addition to such fine such merchandise shall be forfeited. These are the penalties affixed to the criminal acts, the forfeiture sought by this suit being one of them. If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants—that is, civil in form—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one. . . .

We think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection by the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings. We are of opinion, therefore, that the judgment of the circuit court should be reversed, and the cause remanded, with directions to award a new trial; and it is so ordered. . . .

The next case begins to chip away at *Boyd* and clarifies a great deal the question of what Fifth and Fourth Amendment rights corporations possess, if any. Notice the gap between *Boyd* (1886) and *Hale* (1906) and think about general developments in U.S. history during that time that may explain the shift in jurisprudence.

HALE v. HENKEL, 201 U.S. 43 (1906)

Mr. Justice Brown delivered the opinion of the court.

[The basic facts of this case are as follows: A corporation was served a subpoena for records to prove a Sherman Act violation. Hale, an employee of the corporation and the Appellant in this action, refused to produce the documents and was held in contempt.]

. . . Appellant also invokes the protection of the 5th Amendment to the Constitution, which declares that no person ‘shall be compelled in any criminal case to be a witness against himself,’ and in reply to various questions put to him he declined to answer, on the ground that he would thereby incriminate himself. . . .

But it is further insisted that, while the immunity statute may protect individual witnesses, it would not protect the corporation of which appellant was the agent and representative. This is true, but the answer is that it was not designed to do so. The right of a person under the 5th Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person. A privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or a corporation. The question whether a corporation is a ‘person’ within the meaning of this amendment really does not arise, except, perhaps, where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employees. The amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself*; and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation. As the combination or conspiracies provided against by the Sherman antitrust act can ordinarily be proved only by the testimony of parties thereto, in the person of their agents or employees, the privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the legislature to declare these combinations unlawful if the judicial power may close the door of access to every available source of information upon the subject? Indeed, so strict is the rule that the privilege is a personal one that it has been held in some cases that counsel will not be allowed to make the objection. We hold that the questions should have been answered.

The second branch of the case relates to the nonproduction by the witness of the books and papers called for by the *subpoena duces tecum*. The witness put his refusal on the ground, first, that it was impossible for him to collect them within the time allowed; second, because he was advised by counsel that, under the circumstances, he was under no obligation to produce them; and finally, because they might tend to incriminate him.

Had the witness relied solely upon the first ground, doubtless the court would have given him the necessary time. The last ground we have already held untenable. While the second ground does not set forth with technical accuracy the real reason for declining to produce them, the witness could not be expected to speak with legal exactness, and we think is entitled to assert that the subpoena was an infringement upon the 4th Amendment to the Constitution, which declares that ‘the right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.’ . . .

Having already held that, by reason of the immunity act of 1903, the witness could not avail himself of the 5th Amendment it follows that he cannot set up that amendment as against the production of the books and papers, since, in respect to these, he would also be protected by the immunity act. We think it quite clear that the search and seizure clause of the 4th Amendment was not intended to interfere with the power of courts to compel, through a *subpoena duces tecum*, the production, upon a trial in court, of documentary evidence. As remarked in *Summers v. Moseley*, it would be 'utterly impossible to carry on the administration of justice' without this writ. . . .

If, whenever an officer or employee of a corporation were summoned before a grand jury as a witness he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers. Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the state. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the state or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the state, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the state, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights.

Upon the other hand, the corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with

special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

It is true that the corporation in this case was chartered under the laws of New Jersey, and that it receives its franchise from the legislature of that state; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the general government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty, the general government possesses the same right to see that its own laws are respected as the state would have with respect to the special franchises vested in it by the laws of the state. The powers of the general government in this particular in the vindication of its own laws are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over the state corporations.

Although, for the reasons above stated, we are of the opinion that an officer of a corporation which is charged with a violation of a statute of the state of its creation, or of an act of Congress passed in the exercise of its constitutional powers, cannot refuse to produce the books and papers of such corporation, we do not wish to be understood as holding that a corporation is not entitled to immunity, under the 4th Amendment, against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the 14th Amendment, against unlawful discrimination. Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises.

We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the 4th Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd Case*, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpoena duces tecum*, against which the person, be he individual or corporation, is entitled to protection.

B. The Modern Fifth Amendment and the “Testimonial Act of Production”

The next case, *Fisher*, is a bit more complicated because the attorney-client privilege is also involved, but here the modern Supreme Court works out what the Fifth Amendment privilege really is as it concerns pre-existing documents: It is individual and it involves the act of production. While the case is a short run defeat for those resisting subpoenas, it ultimately leaves them with some potential basis to object to production.

FISHER v. UNITED STATES, 425 U.S. 391 (1976)

MR. JUSTICE WHITE delivered the opinion of the Court.

In these two cases we are called upon to decide whether a summons directing an attorney to produce documents delivered to him by his client in connection with the attorney-client relationship is enforceable over claims that the documents were constitutionally immune from summons in the hands of the client and retained that immunity in the hands of the attorney.

In each case, an Internal Revenue agent visited the taxpayer or taxpayers and interviewed them in connection with an investigation of possible civil or criminal liability under the federal income tax laws. Shortly after the interviews—one day later in No. 74-611 and a week or two later in No. 74-18—the taxpayers obtained from their respective accountants certain documents relating to the preparation by the accountants of their tax returns. Shortly after obtaining the documents—later the same day in No. 74-611 and a few weeks later in No. 74-18—the taxpayers transferred the documents to their lawyers—respondent Kasmir and petitioner Fisher, respectively—each of whom was retained to assist the taxpayer in connection with the investigation. Upon learning of the whereabouts of the documents, the Internal Revenue Service served summonses on the attorneys directing them to produce documents listed therein. . . .

All of the parties in these cases and the Court of Appeals for the Fifth Circuit have concurred in the proposition that if the Fifth Amendment would have excused a taxpayer from turning over the accountant's papers had he possessed them, the attorney to whom they are delivered for the purpose of obtaining legal advice should also be immune from subpoena. Although we agree with this proposition for the reasons set forth in Part III, *infra*, we are convinced that, under our decision in *Couch v. United States*, it is not the taxpayer's Fifth Amendment privilege that would excuse the attorney from production. The relevant part of that Amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself."

The taxpayer's privilege under this Amendment is not violated by enforcement of the summonses involved in these cases because enforcement against a taxpayer's lawyer would not "compel" the taxpayer to do anything—and certainly would not compel him to be a "witness" against himself. The Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of "physical or moral compulsion" exerted on the person asserting the privilege. In *Couch v. United States*, we recently ruled that the Fifth Amendment rights of a taxpayer were not violated by the enforcement of a documentary summons directed to her accountant and requiring production of the taxpayer's own records in the possession of the accountant. We did so on the ground that in such a case "the ingredient of personal compulsion against an accused is lacking."

Here, the taxpayers are compelled to do no more than was the taxpayer in *Couch*. The taxpayers' Fifth Amendment privilege is therefore not violated by enforcement of the summonses directed toward their attorneys. This is true whether or not the Amendment

would have barred a subpoena directing the taxpayer to produce the documents while they were in his hands. . . .

Respondents in No. 74-611 and petitioners in No. 74-18 argue, and the Court of Appeals for the Fifth Circuit apparently agreed, that if the summons was enforced, the taxpayer's Fifth Amendment privilege would be, but should not be, lost solely because they gave their documents to their lawyers in order to obtain legal advice. But this misconceives the nature of the constitutional privilege. The Amendment protects a person from being compelled to be a witness against himself. Here, the taxpayers retained any privilege they ever had not to be compelled to testify against themselves and not to be compelled themselves to produce private papers in their possession. This personal privilege was in no way decreased by the transfer. It is simply that by reason of the transfer of the documents to the attorneys, those papers may be subpoenaed without compulsion on the taxpayer. The protection of the Fifth Amendment is therefore not available. "A party is privileged from producing evidence but not from its production." *Johnson v. United States*. The Court of Appeals for the Fifth Circuit suggested that because legally and ethically the attorney was required to respect the confidences of his client, the latter had a reasonable expectation of privacy for the records in the hands of the attorney and therefore did not forfeit his Fifth Amendment privilege with respect to the records by transferring them in order to obtain legal advice. It is true that the Court has often stated that one of the several purposes served by the constitutional privilege against compelled testimonial self-incrimination is that of protecting personal privacy. But the Court has never suggested that every invasion of privacy violates the privilege. Within the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests; but the Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort.

The proposition that the Fifth Amendment protects private information obtained without compelling self-incriminating testimony is contrary to the clear statements of this Court that under appropriate safeguards private incriminating statements of an accused may be overheard and used in evidence, if they are not compelled at the time they were uttered, and that disclosure of private information may be compelled if immunity removes the risk of incrimination. If the Fifth Amendment protected generally against the obtaining of private information from a man's mouth or pen or house, its protections would presumably not be lifted by probable cause and a warrant or by immunity. The privacy invasion is not mitigated by immunity; and the Fifth Amendment's strictures, unlike the Fourth's, are not removed by showing reasonableness. The Framers addressed the subject of personal privacy directly in the Fourth Amendment. They struck a balance so that when the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and a warrant to search and seize will issue. They did not seek in still another Amendment—the Fifth—to achieve a general protection of privacy but to deal with the more specific issue of compelled self-incrimination. We cannot cut the Fifth Amendment completely loose from the moorings

of its language, and make it serve as a general protector of privacy—a word not mentioned in its text and a concept directly addressed in the Fourth Amendment. We adhere to the view that the Fifth Amendment protects against “compelled self-incrimination, not [the disclosure of] private information.” *United States v. Nobles*. Insofar as private information not obtained through compelled self-incriminating testimony is legally protected, its protection stems from other sources—the Fourth Amendment’s protection against seizures without warrant or probable cause and against subpoenas which suffer from “too much indefiniteness or breadth in the things required to be ‘particularly described,’” *Oklahoma Press Pub. Co. v. Walling*, the First Amendment, or evidentiary privileges such as the attorney-client privilege.

Our above holding is that compelled production of documents from an attorney does not implicate whatever Fifth Amendment privilege the taxpayer might have enjoyed from being compelled to produce them himself. The taxpayers in these cases, however, have from the outset consistently urged that they should not be forced to expose otherwise protected documents to summons simply because they have sought legal advice and turned the papers over to their attorneys. The Government appears to agree unqualifiedly. The difficulty is that the taxpayers have erroneously relied on the Fifth Amendment without urging the attorney-client privilege in so many words. They have nevertheless invoked the relevant body of law and policies that govern the attorney-client privilege. In this posture of the case, we feel obliged to inquire whether the attorney-client privilege applies to documents in the hands of an attorney which would have been privileged in the hands of the client by reason of the Fifth Amendment.

Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged. The purpose of the privilege is to encourage clients to make full disclosure to their attorneys. As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice. However, since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege. This Court and the lower courts have thus uniformly held that pre-existing documents which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by client in order to obtain more informed legal advice. The purpose of the privilege requires no broader rule. Pre-existing documents obtainable from the client are not appreciably easier to obtain from the attorney after transfer to him. Thus, even absent the attorney-client privilege, clients will not be discouraged from disclosing the documents to the attorney, and their ability to obtain informed legal advice will remain unfettered. It is otherwise if the documents are not obtainable by subpoena duces tecum or summons while in the exclusive possession of the client, for the client will then be reluctant to transfer possession to the lawyer unless the documents are also privileged in the latter’s hands. Where the transfer is made for the purpose of obtaining legal advice,

the purposes of the attorney-client privilege would be defeated unless the privilege is applicable. “It follows, then, that when the client himself would be privileged from production of the document, either as a party at common law . . . or as exempt from self-incrimination, the attorney having possession of the document is not bound to produce.” 8 Wigmore § 2307. Lower courts have so held. This proposition was accepted by the Court of Appeals for the Fifth Circuit below, is asserted by petitioners in No. 74-18 and respondents in No. 74-611, and was conceded by the Government in its brief and at oral argument. Where the transfer to the attorney is for the purpose of obtaining legal advice, we agree with it.

Since each taxpayer transferred possession of the documents in question from himself to his attorney, in order to obtain legal assistance in the tax investigations in question, the papers, if unobtainable by summons from the client, are unobtainable by summons directed to the attorney by reason of the attorney-client privilege. We accordingly proceed to the question whether the documents could have been obtained by summons addressed to the taxpayer while the documents were in his possession. The only bar to enforcement of such summons asserted by the parties or the courts below is the Fifth Amendment’s privilege against self-incrimination.

The proposition that the Fifth Amendment prevents compelled production of documents over objection that such production might incriminate stems from *Boyd v. United States*.

. . .

Among its several pronouncements, *Boyd* was understood to declare that the seizure, under warrant or otherwise, of any purely evidentiary materials violated the Fourth Amendment and that the Fifth Amendment rendered these seized materials inadmissible. That rule applied to documents as well as to other evidentiary items—“[t]here is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized. . . .” *Gouled v. United States*. Private papers taken from the taxpayer, like other “mere evidence,” could not be used against the accused over his Fourth and Fifth Amendment objections. Several of *Boyd*’s express or implicit declarations have not stood the test of time. The application of the Fourth Amendment to subpoenas was limited by *Hale v. Henkel*, and more recent cases. Purely evidentiary (but “nontestimonial”) materials, as well as contraband and fruits and instrumentalities of crime, may now be searched for and seized under proper circumstances. Also, any notion that “testimonial” evidence may never be seized and used in evidence is inconsistent with *Katz v. United States*, approving the seizure under appropriate circumstances of conversations of a person suspected of crime.

It is also clear that the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a testimonial communication that is incriminating. We have, accordingly, declined to extend the protection of the privilege to the giving of blood samples, *Schmerber v. California*; to the giving of handwriting exemplars, *Gilbert v.*

California; voice exemplars, *United States v. Wade*; or the donning of a blouse worn by the perpetrator, *Holt v. United States*. Furthermore, despite *Boyd*, neither a partnership nor the individual partners are shielded from compelled production of partnership records on self-incrimination grounds. *Bellis v. United States*. It would appear that under that case the precise claim sustained in *Boyd* would now be rejected for reasons not there considered.

The pronouncement in *Boyd* that a person may not be forced to produce his private papers has nonetheless often appeared as dictum in later opinions of this Court. To the extent, however, that the rule against compelling production of private papers rested on the proposition that seizures of or subpoenas for “mere evidence,” including documents, violated the Fourth Amendment and therefore also transgressed the Fifth, the foundations for the rule have been washed away. In consequence, the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give “testimony” that incriminates him. Accordingly, we turn to the question of what, if any, incriminating testimony within the Fifth Amendment’s protection, is compelled by a documentary summons. A subpoena served on a taxpayer requiring him to produce an accountant’s workpapers in his possession without doubt involves substantial compulsion. But it does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications. The accountant’s workpapers are not the taxpayer’s. They were not prepared by the taxpayer, and they contain no testimonial declarations by him. Furthermore, as far as this record demonstrates, the preparation of all of the papers sought in these cases was wholly voluntary, and they cannot be said to contain compelled testimonial evidence, either of the taxpayers or of anyone else. The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else.

The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer’s belief that the papers are those described in the subpoena. The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments of the taxpayer are both “testimonial” and “incriminating” for purposes of applying the Fifth Amendment. These questions perhaps do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof. In light of the records now before us, we are confident that however incriminating the contents of the accountant’s workpapers might be, the act of producing them—the only thing which the taxpayer is compelled to do—would not itself involve testimonial self-incrimination.

It is doubtful that implicitly admitting the existence and possession of the papers rises to the level of testimony within the protection of the Fifth Amendment. The papers belong to the accountant, were prepared by him, and are the kind usually prepared by an accountant working on the tax returns of his client. Surely the Government is in no way relying on the “truth-telling” of the taxpayer to prove the existence of or his access to the documents. The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government’s information by conceding that he in fact has the papers. Under these circumstances by enforcement of the summons “no constitutional rights are touched. The question is not of testimony but of surrender.” *In re Harris*. When an accused is required to submit a handwriting exemplar he admits his ability to write and impliedly asserts that the exemplar is his writing. But in common experience, the first would be a near truism and the latter self-evident. In any event, although the exemplar may be incriminating to the accused and although he is compelled to furnish it, his Fifth Amendment privilege is not violated because nothing he has said or done is deemed to be sufficiently testimonial for purposes of the privilege. This Court has also time and again allowed subpoenas against the custodian of corporate documents or those belonging to other collective entities such as unions and partnerships and those of bankrupt businesses over claims that the documents will incriminate the custodian despite the fact that producing the documents tacitly admits their existence and their location in the hands of their possessor. The existence and possession or control of the subpoenaed documents being no more in issue here than in the above cases, the summons is equally enforceable.

Moreover, assuming that these aspects of producing the accountant’s papers have some minimal testimonial significance, surely it is not illegal to seek accounting help in connection with one’s tax returns or for the accountant to prepare workpapers and deliver them to the taxpayer. At this juncture, we are quite unprepared to hold that either the fact of existence of the papers or of their possession by the taxpayer poses any realistic threat of incrimination to the taxpayer.

As for the possibility that responding to the subpoena would authenticate the workpapers, production would express nothing more than the taxpayer’s belief that the papers are those described in the subpoena. The taxpayer would be no more competent to authenticate the accountant’s workpapers or reports by producing them than he would be to authenticate them if testifying orally. The taxpayer did not prepare the papers and could not vouch for their accuracy. The documents would not be admissible in evidence against the taxpayer without authenticating testimony. Without more, responding to the subpoena in the circumstances before us would not appear to represent a substantial threat of self-incrimination. Moreover, in *Wilson v. United States*, the custodian of corporate, union or partnership books or those of a bankrupt business was ordered to respond to a subpoena for the business’ books even though doing so involved a “representation that the documents produced are those demanded by the subpoena,” *Curcio v. United States*. Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his “private papers,” see *Boyd v. United States*. We do

hold that compliance with a summons directing the taxpayer to produce the accountant's documents involved in these cases would involve no incriminating testimony within the protection of the Fifth Amendment. . . .

Because *Fisher* is unusually tricky, let us recap:

- (1) The client gives his accounting and tax records to his lawyer;
- (2) The government subpoenas the documents from the lawyer;
- (3) The lawyer raises the attorney-client privilege as a shield to production of the records;
- (4) Under the instrumental policy rationale supporting the attorney-client privilege, the privilege applies to the documents only if *not* shielding such documents with the privilege would cause a client to hesitate to share such records with his lawyer;
- (5) The client would not hesitate to share such documents with his lawyer if, in any event, the client could not protect them by keeping them in his own possession;
- (6) Therefore, to decide whether the privilege applies to the documents, it is necessary to decide whether the client could resist production of the documents if instead he retained possession of them;
- (7) The client could not object to production of the documents on the grounds that their contents are protected by the Fifth Amendment because there is no Fifth Amendment right with respect to the contents of documents the government does not compel one to create;
- (8) However, the client does have a Fifth Amendment right with respect to the act of producing the documents, if that act itself could incriminate the client by authenticating the documents or conceding their existence for government investigators;
- (9) The existence of these tax records was sufficiently known to the government, and the accountant could have been used to authenticate them, so nothing about the client's act of production would have incriminated the client;
- (10) Because the client could not have resisted production of the documents had he retained them, the attorney-client privilege need not apply to the documents when possessed by the lawyer: the availability of the privilege would not influence, one way or the other, a client's decision whether to retain such documents or share them with a lawyer.

To summarize the key takeaways from *Fisher*: An individual cannot raise a Fifth Amendment objection to someone else's testimony or production. Furthermore, the Fifth Amendment does not protect against the compelled production of incriminating evidence, only against incriminating testimonial communication. Whether the "act of production" itself constitutes a testimonial communication depends on the facts and circumstances. If the government is relying on the "truth-telling" of the individual to

prove the existence of or access to documents, then the act of production may be testimonial.

The following case further clarifies the meaning of *Fisher*.

UNITED STATES v. DOE, 465 U.S. 605 (1984)

Justice POWELL delivered the opinion of the Court.

This case presents the issue whether, and to what extent, the Fifth Amendment privilege against compelled self-incrimination applies to the business records of a sole proprietorship.

Respondent is the owner of several sole proprietorships. In late 1980, a grand jury, during the course of an investigation of corruption in the awarding of county and municipal contracts, served five subpoenas on respondent. The first two demanded the production of the telephone records of several of respondent's companies and all records pertaining to four bank accounts of respondent and his companies. The subpoenas were limited to the period between January 1, 1977 and the dates of the subpoenas. The third subpoena demanded the production of a list of virtually all the business records of one of respondent's companies for the period between January 1, 1976, and the date of the subpoena. The fourth subpoena sought production of a similar list of business records belonging to another company. The final subpoena demanded production of all bank statements and cancelled checks of two of respondent's companies that had accounts at a bank in the Grand Cayman Islands.

Respondent filed a motion in federal district court seeking to quash the subpoenas. The District Court for the District of New Jersey granted his motion except with respect to those documents and records required by law to be kept or disclosed to a public agency. In reaching its decision, the District Court noted that the Government had conceded that the materials sought in the subpoena were or might be incriminating. The court stated that, therefore, "the relevant inquiry is . . . whether the act of producing the documents has communicative aspects which warrant Fifth Amendment protection." The court found that the act of production would compel respondent to "admit that the records exist, that they are in his possession, and that they are authentic." While not ruling out the possibility that the Government could devise a way to ensure that the act of turning over the documents would not incriminate respondent, the court held that the Government had not made such a showing. . . .

The Court in *Fisher* expressly declined to reach the question whether the Fifth Amendment privilege protects the contents of an individual's tax records in his possession. The rationale underlying our holding in that case is, however, persuasive here. As we noted in *Fisher*, the Fifth Amendment protects the person asserting the privilege only from compelled self-incrimination. Where the preparation of business records is voluntary, no compulsion is present. A subpoena that demands production of

documents “does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought.” . . .

[*Fisher*’s] reasoning applies with equal force here. Respondent does not contend that he prepared the documents involuntarily or that the subpoena would force him to restate, repeat, or affirm the truth of their contents. The fact that the records are in respondent’s possession is irrelevant to the determination of whether the creation of the records was compelled. We therefore hold that the contents of those records are not privileged.

Although the contents of a document may not be privileged, the act of producing the document may be. A government subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect. . . .

In *Fisher*, the Court explored the effect that the act of production would have on the taxpayer and determined that the act of production would have only minimal testimonial value and would not operate to incriminate the taxpayer. Unlike the Court in *Fisher*, we have the explicit finding of the District Court that the act of producing the documents would involve testimonial self-incrimination. The Court of Appeals agreed. The District Court’s finding essentially rests on its determination of factual issues. Therefore, we will not overturn that finding unless it has no support in the record. Traditionally, we also have been reluctant to disturb findings of fact in which two courts below have concurred. We therefore decline to overturn the finding of the District Court in this regard, where, as here, it has been affirmed by the Court of Appeals. . . .

We conclude that the Court of Appeals erred in holding that the contents of the subpoenaed documents were privileged under the Fifth Amendment. The act of producing the documents at issue in this case is privileged and cannot be compelled without a statutory grant of use immunity pursuant to 18 U.S.C. §§ 6002 and 6003. The judgment of the Court of Appeals is, therefore, affirmed in part, reversed in part, and the case is remanded to the District Court for further proceedings in accordance with this decision.

Justice O’CONNOR, concurring.

I concur in both the result and reasoning of Justice Powell’s opinion for the Court. I write separately, however, just to make explicit what is implicit in the analysis of that opinion: that the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind. The notion that the Fifth Amendment protects the privacy of papers originated in *Boyd v. United States*, but our decision in *Fisher v. United States*, sounded the death-knell for *Boyd*. “Several of *Boyd*’s express or implicit declarations [had] not stood the test of time[,]” and its privacy of papers concept “had long been a rule searching for a rationale. . . .” Today’s decision puts a long-overdue end to that fruitless search. . . .

Note that a few years later, in *Braswell v. United States*, 487 U.S. 99 (1988), the Supreme Court held that although individuals have the rights described in *Fisher* and *Doe*, they can still be made to produce and authenticate documents in their capacity as *records custodians* for firms. However, what they do in that custodial capacity cannot be used against them in any individual prosecution.

The following case is the most recent Supreme Court word on all of this. It is not an easy case, but it is the clearest statement we have on when the use of a person's "act of production" against them violates the person's Fifth Amendment rights.

Immunity and *Kastigar* were covered in the last chapter, so it should make sense to you now how the Fifth Amendment analysis works structurally, even if this case leaves open some issues about exactly when the "act of production" privilege will apply. As you read, carefully follow the procedural steps taken with regards to this man, Hubbell.

UNITED STATES v. HUBBELL, 530 U.S. 27 (2000)

JUSTICE STEVENS delivered the opinion of the Court.

The two questions presented concern the scope of a witness' protection against compelled self-incrimination: (1) whether the Fifth Amendment privilege protects a witness from being compelled to disclose the existence of incriminating documents that the Government is unable to describe with reasonable particularity; and (2) if the witness produces such documents pursuant to a grant of immunity, whether 18 U.S.C. § 6002 prevents the Government from using them to prepare criminal charges against him.

This proceeding arises out of the second prosecution of respondent, Webster Hubbell, commenced by the Independent Counsel appointed in August 1994 to investigate possible violations of federal law relating to the Whitewater Development Corporation. The first prosecution was terminated pursuant to a plea bargain. In December 1994, respondent pleaded guilty to charges of mail fraud and tax evasion arising out of his billing practices as a member of an Arkansas law firm from 1989 to 1992, and was sentenced to 21 months in prison. In the plea agreement, respondent promised to provide the Independent Counsel with "full, complete, accurate, and truthful information" about matters relating to the Whitewater investigation.

The second prosecution resulted from the Independent Counsel's attempt to determine whether respondent had violated that promise. In October 1996, while respondent was incarcerated, the Independent Counsel served him with a subpoena *duces tecum* calling for the production of 11 categories of documents before a grand jury sitting in Little Rock, Arkansas. On November 19, he appeared before the grand jury and invoked his Fifth Amendment privilege against self-incrimination. In response to questioning by the prosecutor, respondent initially refused "to state whether there are documents within my possession, custody, or control responsive to the Subpoena." Thereafter, the prosecutor produced an order, which had previously been obtained from the District Court pursuant

to 18 U.S.C. § 6003(a), directing him to respond to the subpoena and granting him immunity “to the extent allowed by law.” Respondent then produced 13,120 pages of documents and records and responded to a series of questions that established that those were all of the documents in his custody or control that were responsive to the commands in the subpoena, with the exception of a few documents he claimed were shielded by the attorney-client and attorney work-product privileges.

The contents of the documents produced by respondent provided the Independent Counsel with the information that led to this second prosecution. On April 30, 1998, a grand jury in the District of Columbia returned a 10-count indictment charging respondent with various tax-related crimes and mail and wire fraud. The District Court dismissed the indictment relying, in part, on the ground that the Independent Counsel’s use of the subpoenaed documents violated § 6002 because all of the evidence he would offer against respondent at trial derived either directly or indirectly from the testimonial aspects of respondent’s immunized act of producing those documents. Noting that the Independent Counsel had admitted that he was not investigating tax-related issues when he issued the subpoena, and that he had “learned about the unreported income and other crimes from studying the records’ contents,” the District Court characterized the subpoena as “the quintessential fishing expedition.”

The Court of Appeals vacated the judgment and remanded for further proceedings. The majority concluded that the District Court had incorrectly relied on the fact that the Independent Counsel did not have prior knowledge of the contents of the subpoenaed documents. The question the District Court should have addressed was the extent of the Government’s independent knowledge of the documents’ existence and authenticity, and of respondent’s possession or control of them. . . .

In the opinion of the dissenting judge, the majority failed to give full effect to the distinction between the contents of the documents and the limited testimonial significance of the act of producing them. In his view, as long as the prosecutor could make use of information contained in the documents or derived therefrom without any reference to the fact that respondent had produced them in response to a subpoena, there would be no improper use of the testimonial aspect of the immunized act of production. In other words, the constitutional privilege and the statute conferring use immunity would only shield the witness from the use of any information resulting from his subpoena response “beyond what the prosecutor would receive if the documents appeared in the grand jury room or in his office unsolicited and unmarked, like manna from heaven.”

On remand, the Independent Counsel acknowledged that he could not satisfy the “reasonable particularity” standard prescribed by the Court of Appeals and entered into a conditional plea agreement with respondent. In essence, the agreement provides for the dismissal of the charges unless this Court’s disposition of the case makes it reasonably likely that respondent’s “act of production immunity” would not pose a significant bar to his prosecution. The case is not moot, however, because the agreement

also provides for the entry of a guilty plea and a sentence that will not include incarceration if we should reverse and issue an opinion that is sufficiently favorable to the Government to satisfy that condition. Despite that agreement, we granted the Independent Counsel's petition for a writ of certiorari in order to determine the precise scope of a grant of immunity with respect to the production of documents in response to a subpoena. We now affirm.

It is useful to preface our analysis of the constitutional issue with a restatement of certain propositions that are not in dispute. The term "privilege against self-incrimination" is not an entirely accurate description of a person's constitutional protection against being "compelled in any criminal case to be a witness against himself."

The word "witness" in the constitutional text limits the relevant category of compelled incriminating communications to those that are "testimonial" in character. As Justice Holmes observed, there is a significant difference between the use of compulsion to extort communications from a defendant and compelling a person to engage in conduct that may be incriminating. Thus, even though the act may provide incriminating evidence, a criminal suspect may be compelled to put on a shirt, to provide a blood sample or handwriting exemplar, or to make a recording of his voice. The act of exhibiting such physical characteristics is not the same as a sworn communication by a witness that relates either express or implied assertions of fact or belief. Similarly, the fact that incriminating evidence may be the byproduct of obedience to a regulatory requirement, such as filing an income tax return, maintaining required records, or reporting an accident, does not clothe such required conduct with the testimonial privilege.

More relevant to this case is the settled proposition that a person may be required to produce specific documents even though they contain incriminating assertions of fact or belief because the creation of those documents was not "compelled" within the meaning of the privilege. . . .

On the other hand, we have also made it clear that the act of producing documents in response to a subpoena may have a compelled testimonial aspect. We have held that "the act of production" itself may implicitly communicate "statements of fact." By "producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic." Moreover, as was true in this case, when the custodian of documents responds to a subpoena, he may be compelled to take the witness stand and answer questions designed to determine whether he has produced everything demanded by the subpoena. The answers to those questions, as well as the act of production itself, may certainly communicate information about the existence, custody, and authenticity of the documents. Whether the constitutional privilege protects the answers to such questions, or protects the act of production itself, is a question that is distinct from the question whether the unprotected contents of the documents themselves are incriminating.

Finally, the phrase “in any criminal case” in the text of the Fifth Amendment might have been read to limit its coverage to compelled testimony that is used against the defendant in the trial itself. It has, however, long been settled that its protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence. Thus, a half-century ago we held that a trial judge had erroneously rejected a defendant’s claim of privilege on the ground that his answer to the pending question would not itself constitute evidence of the charged offense. As we explained: “The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.” *Hoffman v. United States*. Compelled testimony that communicates information that may “lead to incriminating evidence” is privileged even if the information itself is not inculpatory. It is the Fifth Amendment’s protection against the prosecutor’s use of incriminating information derived directly or indirectly from the compelled testimony of the respondent that is of primary relevance in this case. . . .

The Government correctly emphasizes that the testimonial aspect of a response to a subpoena *duces tecum* does nothing more than establish the existence, authenticity, and custody of items that are produced. We assume that the Government is also entirely correct in its submission that it would not have to advert to respondent’s act of production in order to prove the existence, authenticity, or custody of any documents that it might offer in evidence at a criminal trial; indeed, the Government disclaims any need to introduce any of the documents produced by respondent into evidence in order to prove the charges against him. It follows, according to the Government, that it has no intention of making improper “use” of respondent’s compelled testimony.

The question, however, is not whether the response to the subpoena may be introduced into evidence at his criminal trial. That would surely be a prohibited “use” of the immunized act of production. But the fact that the Government intends no such use of the act of production leaves open the separate question whether it has already made “derivative use” of the testimonial aspect of that act in obtaining the indictment against respondent and in preparing its case for trial. It clearly has.

It is apparent from the text of the subpoena itself that the prosecutor needed respondent’s assistance both to identify potential sources of information and to produce those sources. Given the breadth of the description of the 11 categories of documents called for by the subpoena, the collection and production of the materials demanded was tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of particular documents fitting certain broad descriptions. The assembly of literally hundreds of pages of material in response to a request for “any and all documents reflecting, referring, or relating to any direct or indirect sources of money or other things of value received by or provided to” an individual or members of his family during a 3-year period is the functional equivalent of the preparation of an answer to either a detailed written interrogatory or a series of oral questions at a discovery

deposition. Entirely apart from the contents of the 13,120 pages of materials that respondent produced in this case, it is undeniable that providing a catalog of existing documents fitting within any of the 11 broadly worded subpoena categories could provide a prosecutor with a “lead to incriminating evidence,” or “a link in the chain of evidence needed to prosecute.”

Indeed, the record makes it clear that that is what happened in this case. The documents were produced before a grand jury sitting in the Eastern District of Arkansas in aid of the Independent Counsel’s attempt to determine whether respondent had violated a commitment in his first plea agreement. The use of those sources of information eventually led to the return of an indictment by a grand jury sitting in the District of Columbia for offenses that apparently are unrelated to that plea agreement. What the District Court characterized as a “fishing expedition” did produce a fish, but not the one that the Independent Counsel expected to hook. It is abundantly clear that the testimonial aspect of respondent’s act of producing subpoenaed documents was the first step in a chain of evidence that led to this prosecution. The documents did not magically appear in the prosecutor’s office like “manna from heaven.” They arrived there only after respondent asserted his constitutional privilege, received a grant of immunity, and—under the compulsion of the District Court’s order—took the mental and physical steps necessary to provide the prosecutor with an accurate inventory of the many sources of potentially incriminating evidence sought by the subpoena. It was only through respondent’s truthful reply to the subpoena that the Government received the incriminating documents of which it made “substantial use . . . in the investigation that led to the indictment.” *Brief for United States*.

For these reasons, we cannot accept the Government’s submission that respondent’s immunity did not preclude its derivative use of the produced documents because its “possession of the documents [was] the fruit *only* of a simple physical act—the act of producing the documents.” It was unquestionably necessary for respondent to make extensive use of “the contents of his own mind” in identifying the hundreds of documents responsive to the requests in the subpoena. The assembly of those documents was like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox. The Government’s anemic view of respondent’s act of production as a mere physical act that is principally non-testimonial in character and can be entirely divorced from its “implicit” testimonial aspect so as to constitute a “legitimate, wholly independent source” (as required by *Kastigar*) for the documents produced simply fails to account for these realities.

In sum, we have no doubt that the constitutional privilege against self-incrimination protects the target of a grand jury investigation from being compelled to answer questions designed to elicit information about the existence of sources of potentially incriminating evidence. That constitutional privilege has the same application to the testimonial aspect of a response to a subpoena seeking discovery of those sources. Before the District Court, the Government arguably conceded that respondent’s act of production in this case had a testimonial aspect that entitled him to respond to the

subpoena by asserting his privilege against self-incrimination. On appeal and again before this Court, however, the Government has argued that the communicative aspect of respondent's act of producing ordinary business records is insufficiently "testimonial" to support a claim of privilege because the existence and possession of such records by any businessman is a "foregone conclusion" under our decision in *Fisher v. United States*. This argument both misreads *Fisher* and ignores our subsequent decision in *United States v. Doe*. . . .

Whatever the scope of this "foregone conclusion" rationale, the facts of this case plainly fall outside of it. While in *Fisher* the Government already knew that the documents were in the attorneys' possession and could independently confirm their existence and authenticity through the accountants who created them, here the Government has not shown that it had any prior knowledge of either the existence or the whereabouts of the 13,120 pages of documents ultimately produced by respondent. The Government cannot cure this deficiency through the overbroad argument that a businessman such as respondent will always possess general business and tax records that fall within the broad categories described in this subpoena. The *Doe* subpoenas also sought several broad categories of general business records, yet we upheld the District Court's finding that the act of producing those records would involve testimonial self-incrimination.

Given our conclusion that respondent's act of production had a testimonial aspect, at least with respect to the existence and location of the documents sought by the Government's subpoena, respondent could not be compelled to produce those documents without first receiving a grant of immunity under § 6003. As we construed § 6002 in *Kastigar*, such immunity is co-extensive with the constitutional privilege. *Kastigar* requires that respondent's motion to dismiss the indictment on immunity grounds be granted unless the Government proves that the evidence it used in obtaining the indictment and proposed to use at trial was derived from legitimate sources "wholly independent" of the testimonial aspect of respondent's immunized conduct in assembling and producing the documents described in the subpoena. The Government, however, does not claim that it could make such a showing. Rather, it contends that its prosecution of respondent must be considered proper unless someone—presumably respondent—shows that "there is some substantial relation between the compelled testimonial communications implicit in the act of production (as opposed to the act of production standing alone) and some aspect of the information used in the investigation or the evidence presented at trial." We could not accept this submission without repudiating the basis for our conclusion in *Kastigar* that the statutory guarantee of use and derivative-use immunity is as broad as the constitutional privilege itself. This we are not prepared to do.

The Eleventh Circuit has analyzed how *Fisher* and *Hubbell* apply to a government effort to obtain a computer hard drive and its decryption from an individual by court order. *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335 (11th Cir. 2012). The court, referring to the individual as "Doe," found the Fifth Amendment to apply under the following analysis:

We hold that the act of Doe's decryption and production of the contents of the hard drives would sufficiently implicate the Fifth Amendment privilege. We reach this holding by concluding that (1) Doe's decryption and production of the contents of the drives would be testimonial, not merely a physical act; and (2) the explicit and implicit factual communications associated with the decryption and production are not foregone conclusions.

First, the decryption and production of the hard drives would require the use of the contents of Doe's mind and could not be fairly characterized as a physical act that would be nontestimonial in nature. We conclude that the decryption and production would be tantamount to testimony by Doe of his knowledge of the existence and location of potentially incriminating files; of his possession, control, and access to the encrypted portions of the drives; and of his capability to decrypt the files.

We are unpersuaded by the Government's derivation of the key/combination analogy in arguing that Doe's production of the unencrypted files would be nothing more than a physical nontestimonial transfer. The Government attempts to avoid the analogy by arguing that it does not seek the combination or the key, but rather the contents. This argument badly misses the mark. In *Fisher*, where the analogy was born, and again in *Hubbell*, the Government never sought the "key" or the "combination" to the safe for its own sake; rather, the Government sought the files being withheld, just as the Government does here. Requiring Doe to use a decryption password is most certainly more akin to requiring the production of a combination because both demand the use of the contents of the mind, and the production is accompanied by the implied factual statements noted above that could prove to be incriminatory. Hence, we conclude that what the Government seeks to compel in this case, the decryption and production of the contents of the hard drives, is testimonial in character.

Moving to the second point, the question becomes whether the purported testimony is a "foregone conclusion." We think not. Nothing in the record before us reveals that the Government knows whether any files exist and are located on the hard drives; what's more, nothing in the record illustrates that the Government knows with reasonable particularity that Doe is even capable of accessing the encrypted portions of the drives.

Finally, on the following pages, Professor Beale gives us some help in stepping back and putting this complicated story together.

THE FIFTH AMENDMENT AND THE GRAND JURY

Sara Sun Beale & James E. Felman, 22 CRIM. JUSTICE 4 (2007)

One of the most complex and difficult areas of current grand jury law is the intersection of the grand jury's subpoena power and the Fifth Amendment rights of those subpoenaed. Grand juries issue subpoenas for only one reason—to obtain evidence of a crime. It follows that those subpoenaed will be called upon at times to produce documents or give testimony that might tend to incriminate them. Because this tension is inherent in the nature of the grand jury process, one might assume that the applicable law would be fairly well settled. As we explain below, however, in a number of important areas there is considerable uncertainty and ongoing evolution. Although we refer below principally to federal cases, the constitutional principles we discuss are equally applicable to state grand jury proceedings.

Our discussion is divided into two parts—(1) subpoenas issued to individuals for their own personal documents or testimony, and (2) subpoenas issued to individuals as custodians of the records of entities. Within each part we have further subdivided our discussion between subpoenas seeking documents and subpoenas seeking testimony.

Subpoenas to individuals. Subpoenas to individuals may seek documents, testimony, or both. We begin with a discussion of testimonial subpoenas, and then turn to the additional and more difficult issues presented by document subpoenas. . . .

Individual subpoenas for documents. The Fifth Amendment was originally interpreted to protect all private papers from compelled production, *Boyd v. United States*, but the Supreme Court has abandoned that interpretation. Under the current understanding of the Fifth Amendment, the courts draw a distinction between the content of subpoenaed documents and the actions required to produce such documents, giving greater protection to the act of production and raising many thorny issues.

It is now settled that an individual may not withhold documents from production pursuant to a grand jury subpoena on the ground that the content of the documents may tend to incriminate the individual. *Fisher v. United States*. There is, however, an exception to this rule when an individual was compelled by the government to incriminate himself or herself by creating the documents in the first place. *Shapiro v. United States*.

Although an individual has no Fifth Amendment right to resist the production of documents because their *content* might be incriminating, the Court has recognized that the mere *act of producing* subpoenaed documents may carry separate incriminating implications. As the Court explained:

The act of producing evidence in response to a subpoena has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the

[individual producing the records]. It would also indicate the [individual]’s belief that the papers are those described in the subpoena.

Fisher.

Fisher held that the Fifth Amendment protects an individual against any compulsion to incriminate himself or herself by such an act of production, because the conduct of producing the documents is essentially testimonial in nature.

The scope of the Fifth Amendment privilege extends only to instances where the compelled act of production would, in fact, carry incriminating implications. Under some circumstances, the individual’s production of the subpoenaed documents will not be deemed to be incriminating because it conveys nothing the government does not already know. In *Fisher*, where the government subpoenaed documents that it was already aware of, the Court observed that “[t]he existence and location of the [subpoenaed] papers are a foregone conclusion and the [witness] adds little or nothing to the sum total of the Government’s information by conceding that he in fact has the papers.” Under these circumstances the Court held there was no Fifth Amendment right to withhold the documents because compliance was more like “surrender” of them than “testimony” about them. *See also United States v. Norwood* (no Fifth Amendment protection where existence and location of documents a “foregone conclusion”).

A much different factual setting was presented more recently, however, in *United States v. Hubbell*. There, the government sought categories of documents the existence and location of which it had no prior knowledge. The Court held that “the collection and production of the materials demanded was tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of particular documents fitting certain broad descriptions,” in which it was “unquestionably necessary for [the witness] to make extensive use of ‘the contents of his own mind’ in identifying the hundreds of documents responsive to the requests in the subpoena.” Under these circumstances, the Court held that *Hubbell*’s Fifth Amendment rights encompassed the compelled production of the documents pursuant to subpoena.

There is thus a critical distinction between “foregone conclusion” acts of production—which have no Fifth Amendment protection under *Fisher*—and “fishing expedition” acts of production that are protected under *Hubbell*. Locating the dividing line between them turns on the level of the government’s prior knowledge of the existence, location, and authenticity of the documents to be produced. If the case falls on the right side of the line, a witness faced with a potentially incriminating act of production may lawfully refuse to produce the documents altogether.

Litigation in the lower courts has begun to flesh out both the standard under *Hubbell* and the procedure for determining whether that standard has been met. The District of Columbia and the Ninth Circuit have established a “reasonable particularity” standard to determine “whether an act of production is sufficiently testimonial to implicate the Fifth Amendment.” *United States v. Ponds; In re Grand Jury Subpoena*. Under this

standard, a witness who believes the act of producing documents in response to a grand jury subpoena may add to the government's arsenal of incriminating evidence may move for a protective order prior to producing the documents. The burden then falls on the government to establish its knowledge of the existence, possession, and authenticity of the subpoenaed documents with "reasonable particularity" such that the communication inherent in the act of production can be considered a forgone conclusion. *Ponds*. It may be necessary in this process for the witness to submit the documents in question to the court for in camera review. See, e.g., *United States v. Bell* (utilizing in camera review); *United States v. Cianciulli* (same).

If the government carries its burden, it is entitled to production of the documents. If the government fails to carry its burden, it may obtain the documents only by extending both use and derivative use immunity to the witness. Where the government elects to confer immunity, the scope of the immunity extends not merely to the evidence of the act of producing the documents, but also to the *contents* of the documents themselves. *Ponds*. Moreover, the contents of the documents obtained through the grant of immunity may not be used in *any* way, including merely refreshing the recollection of another witness.

Given the implications of conferring immunity regarding the contents of subpoenaed documents, the government will likely be reluctant to confer such immunity on a target of its investigation. Moreover, the government may not need to use subpoenas in the cases where it could most easily establish the act of production would be a forgone conclusion. When it has information regarding the existence and location of the documents it seeks, this information may rise to the level of probable cause, which would enable the government to obtain a search warrant. But when the government is truly in the dark about what documents may be in the possession of a witness, the Fifth Amendment provides significant protections to a witness who prefers to keep the lights out.

Subpoenas to records custodians. Many federal crimes investigated with the use of a grand jury involve activities by legal entities as well as individuals. Such entities include not only corporations, but also labor unions and most partnerships. Grand juries typically obtain a legal entity's documents by issuing a subpoena to the custodian of the entity's records, and we first discuss the issues directly related to the production of such documents. We then turn to the additional issues raised by subpoenas seeking testimony related to the production of documents (such as authentication testimony) and subpoenas issued to former employees in possession of entity documents.

Records custodian subpoenas for documents. The Fifth Amendment law regarding entities themselves is well established: artificial legal entities have no privilege against self-incrimination under the Fifth Amendment. *United States v. White*. The Supreme Court has offered various justifications for the collective entities doctrine, but the strongest factor was probably necessity; a recognition of the privilege would have made it nearly impossible to enforce the antitrust laws and many other statutes regulating corporate activity. See generally SARA SUN BEALE ET AL., GRAND JURY LAW

AND PRACTICE, § 6:12 (2nd ed. 1997). Accordingly, corporate records must be produced in response to a grand jury subpoena regardless of their tendency to incriminate the entity. *United States v. Doe*. In the ordinary course of events, this makes grand jury subpoenas for corporate records straightforward. Even if the documents tend to incriminate not only the entity but also certain individuals associated with or employed by the entity, the documents must nevertheless be produced because they are the property of the entity and not the individuals. Where given a choice, entities typically designate as their custodians persons with no potential criminal exposure.

The picture becomes more complex, however, where the documents sought may tend to incriminate not only the entity, but also the records custodian personally. Although the entity has no Fifth Amendment privilege, an individual records custodian does have Fifth Amendment rights, but those rights are quite different than they would be if the subpoena sought personal records. The Supreme Court has long held that an individual cannot rely on a personal privilege against self-incrimination to avoid producing the records of an entity held by the individual in a representative capacity—even if the content of those records might be personally incriminating. *Bellis v. United States*. When an individual becomes a representative of an artificial entity, he or she undertakes certain obligations, including the duty to produce documents subpoenaed from the entity by the government. When acting in a representative capacity, the custodian acts for the entity, not the custodian. Because the entity has no privilege against self-incrimination, its agent likewise has no privilege.

Although the custodian must produce the corporate records regardless of the degree to which their *content* might incriminate the custodian, the Supreme Court has been more solicitous of the custodian's right to avoid incrimination as a result of the communicative aspects of *the act of production*. The Court addressed this tension between the custodian's Fifth Amendment rights regarding the act of production and the grand jury's entitlement to the records of the entity lacking any Fifth Amendment rights in *Braswell v. United States*. The Court solved the dilemma with a compromise: the custodian must produce the records even if the act of producing them would incriminate the custodian, but the government is prohibited from making direct use of the act of production in any subsequent prosecution of the custodian. Because the custodian acts as a representative or agent, the custodian's acts are deemed to be the act of the entity and not that of the custodian personally. If the custodian is later tried on criminal charges and the government uses the documents the custodian produced, the government is permitted to inform the jury that the corporation produced the records. The government may not, however, disclose to the jury that the records were produced on behalf of the corporation by the custodian.

Although the *Braswell* Court did not use this term, it effectively created a limited form of immunity, which is automatic and self-executing. There need be no communication from the government nor order of the court conferring this protection on the custodian. It would be prudent, however, for counsel representing custodians to accompany the document production with a letter confirming that the documents are being produced by

the custodian in a representative rather than individual capacity and that the custodian will be entitled to the protections of *Braswell* in connection with the production.

Note, however, that the informal immunity conferred by *Braswell* is limited to the government's direct use of the custodian's act of production. It does not appear to extend to the government's *derivative* use of the custodian's act of production in its investigation and prosecution of the custodian. See *In re Three Grand Jury Subpoenas Duces Tecum*. Thus evidence discovered as a result of knowledge gleaned from corporate documents produced by the custodian may later be introduced to incriminate the custodian. In contrast, Fifth Amendment rights may only be overcome through a grant of both use and derivative use immunity. Under the rationale of *Braswell*, however, the custodian was not compelled to give up his or her Fifth Amendment claims, so the custodian is not entitled to true use and derivative use immunity. Instead, the limitation on the government's use of the evidence gained from the custodian—though it functions as a form of immunity—simply flows from the recognition that these acts are deemed to be the acts of the corporation, not of the custodian as an individual.

Braswell's automatic use immunity for custodians functions best when the entity at issue has many individuals associated with it, so that a jury would have no reason to assume that the documents in question were produced by the custodian on trial. But what about a custodian who is the only individual associated with the entity, such as a corporation with a single shareholder who is also the sole employee? Under this scenario, the protection of *Braswell* will be largely illusory, because the jury will almost certainly infer that if the documents were produced by the entity, the only person who could have done so is the defendant. The *Braswell* Court recognized this difficulty but declined to address it:

We leave open the question whether the agency rationale supports compelling a custodian to produce corporate records when the custodian [can] establish, by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records.

This question remains an open one, though the lower courts addressing the issue after *Braswell* have declined to afford any additional protections for custodians of one-person entities. See, e.g., *United States v. Amato*; *In re Grand Jury Subpoena*; *United States v. Stone*. Nevertheless, while the issue remains unresolved by the Supreme Court, counsel representing custodians of one-person legal entities would be prudent to raise it and, if nothing else, preserve the matter for further review.

On the other hand, a sole proprietorship—meaning a business owned by an individual rather than an entity such as a corporation or partnership—is treated for Fifth Amendment purposes as an individual. A sole proprietorship has no established institutional existence separate from its owner, and is regarded as the owner's alter ego. See *Bellis v. United States*; *Herman v. Galvin*; *In re Tower Metal Alloy Co*. Thus

subpoenas to sole proprietorships should be addressed under the framework we discussed above regarding subpoenas to individuals. . . .

Problem 13-1

- (a) Your client Shirley is in your office again for that initial interview. But this time, about halfway through the meeting, she says this: “Huh. I don’t know if this matters. But I just remembered that I put some comments about one of my meetings with Edgar about stock trades in my diary. I like to write about my day before I go to sleep at night. I usually keep my diary next to my bed but I think it’s in an extra handbag that I left at the office today.” Advise Shirley about the diary (and ask her about any additional facts you might need).
- (b) Same as above, but Shirley tells you that she put the comments about the meeting with Edgar on the Notes app on her iPhone. Advise Shirley.

14. ATTORNEY-CLIENT PRIVILEGE

Lawyers are pervasive in the world of corporate regulation, primarily in two capacities: (1) as advisors who participate contemporaneously in activities that may later be subject to legal scrutiny, criminal or otherwise (*i.e.*, deal lawyers); and (2) as representatives of firms and persons subject to ex post enforcement action (*i.e.*, litigators).

The attorney-client privilege and the related work product doctrine have much to say about the activities of both types of lawyers. These areas of law are almost entirely a matter of federal common law. The case law is voluminous and the issues tend to be fact-intensive. Most questions or problems in this area will require careful research. The materials in this chapter provide a sense of some, but not all, of the legal issues relating to the privilege that commonly arise in the corporate enforcement setting.

A. The Privilege: An Overview

As you may have learned in other contexts, the attorney-client privilege has spawned an enormous amount of case law, and it is a doctrine you are likely to encounter in litigation practice of all types. It is also taught in several other law school courses. Because we are interested in the privilege's relevance to corporate crime, it makes sense to use the following treatise excerpt to see an overview of the elements of the privilege and how the doctrinal issues are organized. The chapter then moves to court decisions specific to the area of corporate crime.

PRINCIPLES OF EVIDENCE

Graham C. Lilly, Daniel J. Capra & Stephen A. Saltzburg (West 5th ed.)

§ 10.3 The Attorney-Client Privilege

The privilege protecting communications between attorney and client is recognized in every American jurisdiction. It is firmly rooted and unqualified—that is, once it attaches, it is not subject to a judicial override. Furthermore, it can be claimed, even after the client's death, by her personal representative. The privilege rests both on privacy concerns and, more importantly, on a utilitarian rationale. The privilege encourages frank and full disclosure by the client, thus improving the quality of legal representation. And because the existence of the privilege is widely known, it may encourage persons in need of legal advice to seek it. That said, it is still not easy to craft the proper bounds of the attorney-client privilege.

Here are some of the difficulties. The client may wish to conceal physical evidence, or hide his identity. Note that the protection of information like this is only tenuously connected to the purpose of the privilege—full and frank communications between client and lawyer. Thus the privilege is generally inapplicable in situations like these. Another difficulty arises because, in the course of legal representation, lawyers and clients necessarily interact with a wide range of third parties, such as investigators, paralegals,

accountants, physicians, and consulting attorneys. Thorny problems emerge in determining whether communications with and among these secondary actors fall within the boundaries of the attorney-client privilege. And numbers alone magnify the difficulty of marking the appropriate bounds of this privilege, especially when the holder is a business enterprise, such as a corporation, partnership, or other business association. Wide disclosure of “privileged” communications may suggest that the communications were not intended to be confidential or that even if the privilege initially attached, it has been waived. Special problems also exist when shareholders in a corporation sue management on behalf of the corporation—an increasingly common practice in American business life. Other problems arise when a lawyer represents several clients on a common matter and they subsequently become adversaries, or when separately represented clients cooperate and pool their resources.

In resolving these and other problems, it is important to keep in mind the core objective of the attorney-client privilege: to promote full and candid confidential communications between client and attorney so as to facilitate the rendition of legal services. While the development of the attorney-client privilege generally proceeds by case law, courts have been guided by proposed Federal Rule 503. Even though neither this rule nor the other proposed privilege rules were adopted when Congress enacted the Federal Rules of Evidence in 1975, Congress made it clear that its decision to allow the law of privilege to evolve by judicial decision was not a disapproval of any of the proposed enumerated privileges. Proposed Rule 503 is a carefully crafted, detailed provision, covering many aspects of the attorney-client privilege. It has been an influential “standard” in both federal and state courts and its influence has prompted greater uniformity across jurisdictional lines. You should be aware, however, that some differences in the scope of the attorney-client privilege do exist among the jurisdictions and this is particularly true among the various states. Thus, the following textual materials should be viewed as representing the position of most courts and, in particular, of most federal courts.

Proposed Rule 503 broadly defines the attorney-client privilege. Subsection (b) states:

General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representatives and his lawyer or his lawyer’s representative, or (2) between his lawyer and the lawyer’s representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

Proposed Rule 503 contemplates the protection of not only the direct communications between attorney and client, but also of communications between and among various representatives of each. Legal services often involve non-lawyer specialists such as

investigators, physicians, economists, investment bankers, accountants, scientists, and mathematicians. It is important to note, however, that for communications to these non-lawyers to be protected by the attorney-client privilege, these representatives must either be communicating to the lawyer (or his representative) or the client (or his representative) for the purpose of assisting the lawyer in delivering legal services. Proposed Rule 503(a)(3) affirms this observation by defining an attorney's "representative" as one who is engaged "to assist the lawyer in the rendition of professional legal services." . . .

The attorney-client privilege is available not only to individual clients, but also to partnerships, various business entities (such as associations and corporations), and to governmental officers and agencies. Proposed Rule 503(a)(1) defines "client" as a person or entity "who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him." The availability of the privilege is not dependent on the payment of legal fees or on a formal contract between client and attorney. The language of Proposed Rule 503(a) ("[consulting] a lawyer with a view to obtaining professional legal services") confirms the well-established principle that the privilege applies to an initial attorney-client consultation even if the client (or the attorney) declines representation. . . .

The privilege requires that the client must be seeking *legal advice* from the lawyer; that requirement emphasizes the obvious fact that not everything said to a lawyer, even in confidence, is privileged. (If that were the case, lawyers would be quite popular at bars and parties). That said, clients often seek lawyers for assistance on complex matters that involve a *mixture* of law, business, policy, and other subjects that are not strictly "legal." But if including any non-legal subject within a broader legal discussion would lose the privilege, then the attorney-client relationship would suffer. Accordingly, the courts have held that if the *dominant intent* of the client is to seek legal advice, the privilege is not lost if advice is also sought on related business, financial, or other not strictly legal matters. . . .

Although the attorney-client privilege was initially formulated to protect only the client's confidential communications, modern courts recognize that the privilege also applies to the attorney's confidential communications to the client. The client's statements and the attorney's statements often interlock. If the privilege did not attach to the attorney's statements, her disclosures could often be used to infer at least the general content of the client's confidential communications to the attorney. This is especially true when the attorney renders legal advice based on what the client has told her. Thus, considerations of both practicality and preserving confidentiality have prompted courts to apply the privilege to the confidential communications of both client and attorney. . . .

[T]he attorney-client privilege *does not apply* to letters, documents . . . or other inscribed items that were not prepared for the purpose of facilitating legal services. If the rule were otherwise, a client could place all "preexisting" documents beyond the reach of discovery by the simple expedient of turning them over to her attorney. The fact that

such documents end up being useful to the lawyer is beside the point—the question is whether the communications were *initially* made to the lawyer for the purpose of securing legal advice. Of course, if the client prepares a confidential letter to the attorney telling him, for example, how to interpret the documents or suggesting trends reflected in the data contained in them, this letter would be protected by the privilege. Furthermore, if an attorney gives confidential legal advice to a client that is based on the attorney's review or analysis of unprotected documents, the *communication from the attorney* to the client is protected by the privilege (while the underlying documents are not). . . .

Students of civil procedure may recall the so-called “work-product” doctrine, traceable to the Supreme Court's decision in *Hickman v. Taylor*. Although that decision concerned the recognition of the doctrine in federal courts, it is generally recognized among the states as well. In recent years, the central features of the doctrine have often been codified in a rule of court or statute. Federal Rule of Civil Procedure 26(b)(3) sets forth the basic rules of work-product; subsection (b)(4) extends the work-product doctrine (or at least its rationale) to experts engaged by a party to assist in trial preparation. Generally speaking, the work-product doctrine extends *conditional immunity* from discovery by an opponent to written materials prepared in “anticipation of litigation.” Typically, the protected materials are prepared by the lawyer, but materials prepared by others—such as an investigator, agent, consultant, or the party himself—are also conditionally immune if prepared for litigation. Familiar examples of a lawyer's work-product would be his notes about a witness's statement or his investigator's recorded measurements of skid marks at the scene of an automobile accident. Like the attorney-client privilege, the work-product doctrine protects the *materials or communications* generated by the lawyer, or by a client who is a party to a suit, or by a representation of either. However, the work-product doctrine *does not protect the client's knowledge*, which includes facts known to his attorney who is his agent. In other words, the client would have to answer an interrogatory: “How far were you from the ‘Hazard’ sign when you first saw it?” Furthermore, the court may order discovery of work-product materials if the party seeking them shows a substantial need or, in the case of a *consulting* expert (who does not testify), exceptional need. The requisite showing of need varies with the particular context and is affected by the discovering party's ability to secure unprotected evidence that is the substantial equivalent of the materials sought. . . .

One qualifies as a lawyer's representative only if engaged “to assist the lawyer in the rendition of professional legal services.” Courts have held that the non-lawyer must be *necessary to the legal representation* for communications to or from the non-lawyer to be privileged. . . . The mere preparation of an income tax return is not legal in nature; indeed most income tax preparers are not attorneys. On the other hand, tax lawyers routinely render legal services, creating many occasions on which communications from their clients (and their communications to their clients) are within the attorney-client privilege. . . .

Incidentally, a question sometimes arises as to whether the name of a client is protected by the attorney-client privilege. For example, a grand jury or the IRS invokes a process such as a summons or subpoena addressed to a lawyer, demanding the identity of the lawyer's client. In most cases, the client has no intention to conceal her identity—disclosure of her identity to the lawyer is preliminary to and independent from any communications made to secure legal advice. Even if a client desired anonymity, sound public policy usually militates against granting it. Occasionally, however, protection of a client's identity is justified, as when a whistleblower seeks legal advice in connection with revealing wrongdoing or when revealing the client's name would disclose the general content of a confidential communication. . . .

Suppose that the client is a corporation (or other business entity) and that the communication in question is made by a corporate agent to the corporation's attorney. Because the corporation can speak only through individuals, the question is whether the corporation—the client and holder of the privilege—is the communicant. Depending on the context and a particular court's view of the proper scope of the attorney-client privilege, the statements of the agent could be either, (1) communications from the corporate client and within the corporation's privilege or, (2) statements of a person who is speaking as an individual witness and whose communications are not within the corporation's privilege.

Note that if the privilege extends far down into the corporate personnel structure—to middle management or even below—the reach of the privilege may unjustifiably hinder the efforts of an opponent to support his claim or defense. It also makes it difficult to discover discrepancies between what a corporate employee says (in a deposition, for example) to the opponent and what he told the corporate attorney.

The application of attorney-client protection in the corporate setting often strains some of the basic doctrines of privilege law, rooted as they are in the context of the individual client. The requirement of confidentiality, for example, meshes poorly with the layered structure of the large corporation, where statements may be passed through many hands before reaching counsel or counsel's advice may be widely shared within the corporation. In addition, the often-indistinct boundary between legal and business advice is likely to be perplexingly blurred in the corporate context, and this is especially true as to communications between a corporate spokesman and in-house counsel. On the other hand, the modern corporation could not realize the full potential of legal advice without some application of the privilege. It, like the individual client, needs to communicate freely and fully with its attorneys, preferably through the corporate agents with the most knowledge. The problem, therefore, is one of drawing a line that sensibly balances the corporation's need for an attorney-client privilege and the opponent's need for fair access to evidence generated within the corporate structure. The extremes are easily recognized and managed. Clearly protected is a confidential communication from the CEO to the attorney, made for the purpose of receiving legal advice for the corporation. Clearly unprotected is a routinely prepared statement by a lower-level employee, made in the normal course of business, but subsequently sent to the corporate attorney. The

difficulties lie in the shadowy area between these polarities. For communications to corporate counsel, two general tests have been devised.

Some states still adhere to the “control-group test” for determining which corporate agents are considered part of the client when communicating to the corporation’s attorney. Under this test, the privilege attaches only if the corporate officer speaking with the attorney is vested with authority both to seek legal advice for the corporation and to participate significantly in the corporation’s response to the attorney’s recommendations. The analogy is to the individual client, who can obtain legal advice and then, if he wishes, tailor his conduct consistently with that advice. The problem with this approach in the corporate context is its heavy reliance on the formal delegation of corporate authority. If the person who speaks with the attorney is an officer within the upper tiers of management, he probably “speaks for the corporation.” Often, however, the high-level corporate spokesperson is not the individual who is fully informed about the matter in question. The attorney will nearly always want to speak with corporate agents who are the most knowledgeable, yet these persons may be outside the circle of upper level personnel empowered to “speak for” the corporation. Although their statements to the attorney may gain qualified protection through the application of the work-product rule (if litigation is anticipated), the unqualified protection of the attorney-client privilege is not available. Thus, from a functional standpoint, the rigidity of the control-group test can have a distorting effect on the choice of corporate spokespersons.

The second approach to the corporate attorney-client privilege is often referred to as the “subject-matter test.” It was adopted for the federal courts in *Upjohn Co. v. United States*, and is the prevailing approach in most states. . . . In brief, the *Upjohn* approach would allow the privilege when the facts showed that: (1) the communication in question was pursuant to a corporate purpose to obtain legal advice, (2) the communication “concerned matters within the scope of the employee’s corporate duties,” (3) the employee knew that he was making a confidential statement and was doing so as part of his employer’s efforts to secure legal advice or services, and (4) the statements were kept confidential or disclosed on a limited basis consistent with maintaining the privilege.

The last requirement—limited disclosure—can apply in two contexts: disclosure *within* or *outside* the corporate firm. Because corporations depend heavily upon information, there is a practical need that corporate records be accessible to those individuals or groups who need access. Yet, there is always a risk that information collected under the umbrella of the attorney-client privilege may be so widely shared that the privilege is lost. Generally, privileged communications should be disclosed only to persons who need access—to those who “need to know” the confidential information in order to do their jobs—and care should be taken to ensure that these persons understand the need to maintain confidentiality. If privileged documents are kept in a general filing system, access should be restricted.

Voluntary disclosures outside the company pose an even greater risk of losing the privilege. Here, it is important to ensure the disclosure is made only to those who are “necessary to the legal representation”—a concept discussed above. Common sense dictates the importance of signaling the confidential nature of the disclosure through the use of labels, cover letters, or other precautionary measures.

Because litigation often deals with events that occurred several or more years before suit was filed, some of the employees or officers who gave privileged communications on the corporation’s behalf may have died or left the company. Their departure from the corporate staff does not affect the availability of the privilege for communications made at the time of their employment. A closer question attends *post-employment* statements by a former employee to corporate counsel. In his concurring opinion in *Upjohn*, Chief Justice Burger suggested that the privilege did embrace these statements because a former employee, like a current employee, may have information that is necessary for the lawyer to give sound legal advice—and lower courts have so held.

Several other issues surrounding the corporate attorney-client privilege warrant brief mention. As we have seen, the holder of the privilege is the corporation. The privilege can be waived only by management; sometimes the board of directors will reserve for itself the right to claim or waive the privilege. The power to waive resides with the current board, regardless of when the privileged communications were made.

Note the anomaly that arises when a corporate agent speaks to the corporate lawyer about a matter that would incriminate him personally. Those communications are privileged, but it is the *corporation* that holds the privilege. If the corporation decides to waive its privilege as to those communications—most commonly to cooperate with the government in order to avoid fines or other penalties—the agent is unprotected, and his own statements can be admitted against him at his trial. This is because there is no personal attorney-client relationship with the corporate lawyer—nor can there be, because a lawyer representing both the corporation and the agent in circumstances of possible corporate/agent wrongdoing would be operating under a conflict of interest, for the very reason that the corporation may find it beneficial to waive its privilege and cooperate with the government, leaving its agent unprotected. . . .

The attorney-client privilege protects *communications*, not factual information that was the subject of a communication between the lawyer and the client—as shown in the following Illustration.

Clyde, whose expensive luxury car is only two years old, has just been told by his mechanic that the car will soon need costly repairs. Doubtful that the mechanic is correct, Clyde (who is mechanically inclined) verifies for himself the imminent repairs. Because the manufacturer’s warranty on the car has expired, Clyde decides to sell it without disclosing its defects.

Subsequently, the buyer sues Clyde and Clyde retains a defense lawyer. He tells his attorney about the mechanic’s report and about his own confirmation of the impending

mechanical failures. During discovery, the plaintiff's lawyer takes Clyde's deposition. He asks Clyde the following series of questions.

Q: "Did you know this car had these [named] serious mechanical defects?"

Q: "Did your mechanic, at Bosch Bros. Luxury Cars, inform you on June 3, 2008, that the car had these [named] defects?"

Q: "Do you have mechanical skills?"

Q: "Isn't it true that on or about June 5, 2008, you personally verified that the car you sold to the plaintiff had precisely the defects and problems identified by the Bosch Bros. mechanic?"

Clyde's attorney objects to these questions on the ground that they call for responses that are protected by the attorney-client privilege. How should the judge rule? None of these questions is improper, and Clyde must provide answers to each. The attorney-client privilege does not apply to facts or events that are the subject of, or described in, a confidential communication. If it did, there would be little or no evidence for the jury to consider. A client could simply relate all the relevant facts to his attorney and thereby insulate the client's knowledge of the underlying events from discovery. Of course, the attorney-client privilege does protect Clyde's *communications* to his lawyer. If it did not, these statements would be admissible as party admissions.

It sometimes happens that several clients with a common problem retain a single lawyer or firm to represent them. For example, one lawyer may represent both *A* and *B* in a matter of joint or common interest, such as their purchase of real estate or their common dispute with an insurance company. The rule in such situations provides that the statements of both clients and those of the lawyer are privileged if made for purposes of seeking legal advice on the common objective. It seems plain enough that, as against outsiders, *each client* is entitled to claim the privilege as to statements *she has made*, as well as to the attorney's responsive statements. But can client *A* invoke the privilege (as against outsiders) so as to prevent disclosure of *B*'s statements to the attorney as well as the attorney's responsive statements to *B*? The issue usually does not arise because *A* and *B* have a common objective and thus each is likely to claim the privilege or agree to waive it. However, should they disagree, most courts hold that all clients remain bound by the common interest arrangement—that is, *A* will not be permitted to disclose any communications made by either party in pursuit of the common interest. (Note that the parties can contract in their common interest arrangement either to bind all parties or to allow parties to waive the protection as to their own communications—but the default rule is that all parties are bound and the privilege is retained.)

In subsequent litigation in which *A* and *B*, having fallen out, become adversaries, the rule is that privilege is lost as to all of their statements. (Here, no "outsider" is involved.) First, when they were joint clients, neither client intended that his communications

would be shielded from the other. Second, even if, say, *A* “secretly” communicated with the attorney, the communication would not be privileged as to *B* because the attorney would have an ethical duty to share it with her other joint client. Proposed Rule 503(d)(5) states that in an action between persons who were formally joint clients, there is no privilege as to communications “made by any [of the joint clients] . . . to a lawyer retained or consulted in common . . .” (Again, though, the parties can contract with each other to protect against disclosure in a subsequent litigation between them).

The rule protecting joint-client discussions has also been extended to protect confidential communications where two or more clients, *each with his own attorney*, agree to pool or share information in order to conserve resources and mount a more effective case—either a defensive or an offensive one. These allied clients have both a mutual and an individual interest: they are sharing information (and perhaps resources) with respect to their common interests, yet each participating client is represented by his own lawyer or firm. These sharing arrangements would seldom materialize if outsiders could successfully argue that confidential disclosures within the group lost the protection of the attorney-client privilege because dissemination went beyond the individual attorney-client units that comprise the pool. Thus, it is not surprising that courts protect the confidential communications of separately represented parties who pursue a common legal objective. Protection under the common-interest doctrine applies, however, only if the parties claiming the attorney-client privilege can show that they have agreed (orally or in writing) to assume an allied position. It is thus advisable for the parties to a pooling arrangement who wish to protect the attorney-client privilege—and most parties do—to enter into a formal, preferably written, agreement. Again, however, if the parties pursuing a common interest later end up suing each other, the communications previously made can be freely used by the parties in that subsequent litigation—this is because there was no expectation of confidentiality vis-a-vis the member of the common interest “unit” at the time the statements were made. (But the parties can, by contract, provide for protection against use of the statements in a subsequent litigation between or among them.) . . .

While a confidential communication between a client and a lawyer on a legal matter is protected by the privilege, that privilege can be waived in a number of circumstances. The basic question of waiver is whether the client has—by some statement or action subsequent to the making of the privileged communication—explicitly or implicitly acted in such a way that justifies a finding that the party no longer wishes to, or should, retain the privilege.

The most obvious form of waiver is a knowing and voluntary disclosure of the privileged information. That waiver-by-disclosure most often occurs when the client determines that the benefits of the disclosure outweigh the risks that the privileged information will be used against the client. A common example is a corporation that is being investigated by a government regulator or prosecutor for possible internal corporate misconduct (e.g., accounting violations). Assume that the corporation had previously hired a law firm to conduct an internal investigation, and the law firm prepared a report. That report is

confidential. But the corporation may decide to voluntarily disclose it to the government investigator. The benefits of disclosure—cooperating with the government and thereby avoiding or ameliorating fines and penalties—often outweigh the risk that the report, now waived, will be used against the corporation in some litigation.

Other situations arise in which waiver is *implied* from the client's conduct. Implied waiver is likely to be found when the client acts in such a way that it would be unfair to the adversary to uphold the privilege. When a client sues her lawyer for malpractice, for example, the lawyer can use relevant confidential statements made during the representation to defend herself—it would be unfair for the client to attack the lawyer's performance and yet leave the lawyer unable to rebut the charges by showing that, for example, he was instructed by the client to do the act for which he is now criticized. Similarly, if a client refuses to pay his attorney, the attorney can support her claim for fees with confidential information. In other words, the privilege is suspended as to any "communication relevant to an issue of breach of duty by the lawyer to . . . [her] client or by the client to his lawyer." This is because it would be unfair for the client to contest the value of the lawyer's services, and yet not allow the lawyer to defend by offering communications by the client that affected those services.

In a related context, a client waives his privilege if he asserts an affirmative defense of "reliance on advice of counsel." It would be unfair for the client to raise the attorney-client discussions as a defense, but then to prevent the adversary from inquiring into just what was said between the client and the attorney on the matter.

Recall that corporations often find it useful to cooperate with government investigations by turning over privileged information. While that is a waiver, should it extend to allowing private parties to use the information? Here is an example: a corporation is being investigated by the SEC for securities fraud. It turns over a confidential report to the SEC. Then private parties sue the corporation, and argue that they are entitled to the report, because the corporation waived the privilege by disclosing it to the SEC. The question in such a case is whether the waiver is *selective* or general. The policy argument for finding the waiver to be selective is that it would encourage corporations to cooperate with the government, because it would limit the costs of that cooperation; and the protection of selective waiver could also limit the costs of government investigations into potential corporate misconduct, because the government would be able to rely on the report instead of having to do its own investigation from square one.

But almost all courts have rejected the notion of selective waiver—meaning that a voluntary disclosure to anyone operates as a waiver to everyone. The courts reason that corporations are *already*—in the absence of selective waiver—cooperating with the government by turning over confidential reports. This is because the benefits of cooperation in avoiding criminal fines and penalties generally outweigh the costs, even including the cost that the privileged material can be used by private parties. Thus, selective waiver is not necessary to encourage cooperation (except, perhaps, for corporations at the margin, but the consequence of establishing selective waiver would

be that *all* corporations would be protected, even those who would cooperate anyway.) Moreover, the courts frown upon strategic activity in the use of the privilege; it seems to be gaming the privilege for a client to say, “I will waive to you, but not to you—it depends on how advantageous the waiver will be to me.”

In litigation, it is often the case that a party will mistakenly disclose privileged information during discovery. This is especially true in electronic discovery cases, where the explosion of information raises substantial challenges for an accurate “privilege review” of documents subject to discovery. In recent years, the costs of electronic discovery have skyrocketed, and most of those costs have been attributed to the resources necessary to make sure that no email, spreadsheet, metadata, etc. contains privileged information. The consequences of mistaken disclosure of privileged information, at least in some common law courts, was to find a waiver no matter how careful the privilege review. And some courts even found a *subject matter* waiver in these circumstances—meaning that all privileged documents related to the subject matter of the mistakenly disclosed documents would also have to be disclosed to the adversary. Federal Rule 502, enacted by Congress in 2008, seeks to reduce the costs of privilege review by providing some measure of protection against a finding of waiver after a mistaken disclosure. Three provisions of the Rule are especially important:

- 1) Rule 502(a) precludes the court from finding a subject matter waiver unless the disclosure of the privileged information was *intentional* and results in unfairness to the adversary. Thus, a mistaken disclosure in discovery will never result in a subject matter waiver.
- 2) Rule 502(b) provides that a mistaken disclosure in a federal proceeding will not be a waiver at all if the party took “reasonable steps” to prevent the disclosure and acted reasonably promptly to retrieve the information once the party learns about the mistaken disclosure. Thus, while a party cannot be careless, it need not undertake herculean efforts to protect against mistaken disclosures in discovery.
- 3) Rule 502(d) provides that if a federal court enters an order that disclosure of privileged information in a proceeding is not a waiver, then that order is binding on all subsequent courts, state and federal. So getting a court order allows parties on each side to limit the costs of preproduction privilege review, because there will not be a waiver if privileged material is disclosed in the litigation.

B. Federal Rules of Evidence

The Federal Rules of Evidence mostly delegate privilege questions to the courts. The relevant Rules are printed below. Note that Rule 502 is a more recent rule on waiver, but it only covers some waiver issues, not nearly all of them. Additionally, Proposed Rule 503 was not enacted, though it is frequently cited as persuasive authority.

Rule 501. Privilege in General

The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency;

Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

- (1) The waiver is intentional;
- (2) The disclosed and undisclosed communications or information concern the same subject matter; and
- (3) They ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

- (1) The disclosure is inadvertent;
- (2) The holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (3) The holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B).

(c) Disclosure Made in a State Proceeding. When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

- (1) would not be a waiver under this rule if it had been made in a federal proceeding;
or
 - (2) is not a waiver under the law of the state where the disclosure occurred.
- (d) **Controlling Effect of a Court Order.** A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding.
- (e) **Controlling Effect of a Party Agreement.** An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.
- (f) **Controlling Effect of this Rule.** Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.
- (g) **Definitions.** In this rule:
- (1) “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and
 - (2) “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial

Proposed Rule 503. Lawyer-Client Privilege [not enacted, in favor of common law; see Rule 501]

- (a) **Definitions.** As used in this rule:
- (1) A “client” is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.
 - (2) A “lawyer” is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.
 - (3) A “representative of the lawyer” is one employed to assist the lawyer in the rendition of professional legal services.
 - (4) A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of

professional legal services to the client or those reasonably necessary for the transmission of the communication.

- (b) **General rule of privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.
- (c) **Who may claim the privilege.** The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.
- (d) **Exceptions.** There is no privilege under this rule:
 - (1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or
 - (2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or
 - (3) Breach of duty by lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer; or
 - (4) Document attested by lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or
 - (5) Joint clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

C. The Corporate Privilege

Upjohn is the case on the attorney-client privilege of corporations and the application of the work product doctrine to companies' lawyers. It is very important and helpful to understand the policy considerations that apply to the attorney-client privilege and work product doctrine. Doctrinal problems will be resolved with reference to what result will

further those policy objectives (or not). That said, it's not obvious how the policy arguments play out when the client is a firm. How might the Court's policy analysis in *Upjohn* be subject to criticism?

UPJOHN CO. v. UNITED STATES, 449 U.S. 383 (1981)

Justice REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to address important questions concerning the scope of the attorney-client privilege in the corporate context and the applicability of the work-product doctrine in proceedings to enforce tax summonses. With respect to the privilege question the parties and various *amici* have described our task as one of choosing between two "tests" which have gained adherents in the courts of appeals. We are acutely aware, however, that we sit to decide concrete cases and not abstract propositions of law. We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so. We can and do, however, conclude that the attorney-client privilege protects the communications involved in this case from compelled disclosure and that the work-product doctrine does apply in tax summons enforcement proceedings.

Petitioner Upjohn Co. manufactures and sells pharmaceuticals here and abroad. In January 1976 independent accountants conducting an audit of one of Upjohn's foreign subsidiaries discovered that the subsidiary made payments to or for the benefit of foreign government officials in order to secure government business. The accountants, so informed petitioner, Mr. Gerard Thomas, Upjohn's Vice President, Secretary, and General Counsel. Thomas is a member of the Michigan and New York Bars, and has been Upjohn's General Counsel for 20 years. He consulted with outside counsel and R. T. Parfet, Jr., Upjohn's Chairman of the Board. It was decided that the company would conduct an internal investigation of what were termed "questionable payments." As part of this investigation the attorneys prepared a letter containing a questionnaire which was sent to "All Foreign General and Area Managers" over the Chairman's signature. The letter began by noting recent disclosures that several American companies made "possibly illegal" payments to foreign government officials and emphasized that the management needed full information concerning any such payments made by Upjohn. The letter indicated that the Chairman had asked Thomas, identified as "the company's General Counsel," "to conduct an investigation for the purpose of determining the nature and magnitude of any payments made by the Upjohn Company or any of its subsidiaries to any employee or official of a foreign government." The questionnaire sought detailed information concerning such payments. Managers were instructed to treat the investigation as "highly confidential" and not to discuss it with anyone other than Upjohn employees who might be helpful in providing the requested information. Responses were to be sent directly to Thomas. Thomas and outside counsel also interviewed the recipients of the questionnaire and some 33 other Upjohn officers or employees as part of the investigation.

On March 26, 1976, the company voluntarily submitted a preliminary report to the Securities and Exchange Commission on Form 8-K disclosing certain questionable payments. A copy of the report was simultaneously submitted to the Internal Revenue Service, which immediately began an investigation to determine the tax consequences of the payments. Special agents conducting the investigation were given lists by Upjohn of all those interviewed and all who had responded to the questionnaire. On November 23, 1976, the Service issued a summons pursuant to 26 U.S.C. § 7602 demanding production of:

“All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds of the Upjohn Company had been improperly accounted for on the corporate books during the same period.”

“The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company’s foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries.”

The company declined to produce the documents specified in the second paragraph on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. On August 31, 1977, the United States filed a petition seeking enforcement of the summons under 26 U.S.C. §§ 7402(b) and 7604(a) in the United States District Court for the Western District of Michigan. That court adopted the recommendation of a Magistrate who concluded that the summons should be enforced. Petitioners appealed to the Court of Appeals for the Sixth Circuit which rejected the Magistrate’s finding of a waiver of the attorney-client privilege, but agreed that the privilege did not apply “[t]o the extent that the communications were made by officers and agents not responsible for directing Upjohn’s actions in response to legal advice . . . for the simple reason that the communications were not the ‘client’s.’” The court reasoned that accepting petitioners’ claim for a broader application of the privilege would encourage upper-echelon management to ignore unpleasant facts and create too broad a “zone of silence.” Noting that Upjohn’s counsel had interviewed officials such as the Chairman and President, the Court of Appeals remanded to the District Court so that a determination of who was within the “control group” could be made. In a concluding footnote the court stated that the work-product doctrine “is not applicable to administrative summonses issued under 26 U.S.C. § 7602.”

Federal Rule of Evidence 501 provides that “the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience.” The attorney-client privilege is

the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in *Trammel v. United States*: "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher v. United States*, we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see *Hunt v. Blackburn* (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"). Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation and the Government does not contest the general proposition.

The Court of Appeals, however, considered the application of the privilege in the corporate context to present a "different problem," since the client was an inanimate entity and "only the senior management, guiding and integrating the several operations, . . . can be said to possess an identity analogous to the corporation as a whole." The first case to articulate the so-called "control group test" adopted by the court below, *Philadelphia v. Westinghouse Electric Corp., sub nom. General Electric Co. v. Kirkpatrick*, reflected a similar conceptual approach:

"Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, . . . then, in effect, *he is (or personifies) the corporation* when he makes his disclosure to the lawyer and the privilege would apply."

Such a view, we think, overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant. See ABA Code of Professional Responsibility, Ethical Consideration 4-1:

“A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.”

In the case of the individual client the provider of information and the person who acts on the lawyer’s advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below—“officers and agents . . . responsible for directing [the company’s] actions in response to legal advice”—who will possess the information needed by the corporation’s lawyers. Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. This fact was noted in *Diversified Industries, Inc. v. Meredith*:

“In a corporation, it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel as well as from top executives. The attorney dealing with a complex legal problem ‘is thus faced with a “Hobson’s choice.” If he interviews employees not having “the very highest authority,” their communications to him will not be privileged. If, on the other hand, he interviews *only* those employees with the “very highest authority,” he may find it extremely difficult, if not impossible, to determine what happened.’” *Id.* (quoting Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. IND. & COM. L. REV. (1971)).

The control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney’s advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation’s policy. *See, e.g., Duplan Corp. v. Deering Milliken, Inc.* (“After the lawyer forms his or her opinion, it is of no immediate benefit to the Chairman of the Board or the President. It must be given to the corporate personnel who will apply it”).

The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced

with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, "constantly go to lawyers to find out how to obey the law," Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 BUS. LAW. (1969), particularly since compliance with the law in this area is hardly an instinctive matter, *see, e.g., United States v. United States Gypsum Co.* ("the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct"). The test adopted by the court below is difficult to apply in practice, though no abstractly formulated and unvarying "test" will necessarily enable courts to decide questions such as this with mathematical precision. But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. The very terms of the test adopted by the court below suggest the unpredictability of its application. The test restricts the availability of the privilege to those officers who play a "substantial role" in deciding and directing a corporation's legal response. Disparate decisions in cases applying this test illustrate its unpredictability. *Compare, e.g., Hogan v. Zletz, sub nom. Natta v. Hogan* (control group includes managers and assistant managers of patent division and research and development department), *with Congoleum Industries, Inc. v. GAF Corp.* (control group includes only division and corporate vice presidents, and not two directors of research and vice president for production and research).

The communications at issue were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. As the Magistrate found, "Mr. Thomas consulted with the Chairman of the Board and outside counsel and thereafter conducted a factual investigation to determine the nature and extent of the questionable payments *and to be in a position to give legal advice to the company with respect to the payments.*" Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. The questionnaire identified Thomas as "the company's General Counsel" and referred in its opening sentence to the possible illegality of payments such as the ones on which information was sought. A statement of policy accompanying the questionnaire clearly indicated the legal implications of the investigation. The policy statement was issued "in order that there be no uncertainty in the future as to the policy with respect to the practices which are the subject of this investigation." It began "Upjohn will comply with all laws and regulations," and stated that commissions or payments "will not be used as a subterfuge for bribes or illegal

payments” and that all payments must be “proper and legal.” Any future agreements with foreign distributors or agents were to be approved “by a company attorney” and any questions concerning the policy were to be referred “to the company’s General Counsel.” This statement was issued to Upjohn employees worldwide, so that even those interviewees not receiving a questionnaire were aware of the legal implications of the interviews. Pursuant to explicit instructions from the Chairman of the Board, the communications were considered “highly confidential” when made, and have been kept confidential by the company. Consistent with the underlying purposes of the attorney-client privilege, these communications must be protected against compelled disclosure.

The Court of Appeals declined to extend the attorney-client privilege beyond the limits of the control group test for fear that doing so would entail severe burdens on discovery and create a broad “zone of silence” over corporate affairs. Application of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney:

“[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, ‘What did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.” *Philadelphia v. Westinghouse Electric Corp.*

See also Diversified Industries; State ex rel. Dudek v. Circuit Court (“the courts have noted that a party cannot conceal a fact merely by revealing it to his lawyer”). Here the Government was free to question the employees who communicated with Thomas and outside counsel. Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them. While it would probably be more convenient for the Government to secure the results of petitioner’s internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner’s attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege. As Justice Jackson noted in his concurring opinion in *Hickman v. Taylor*: “Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary.”

Needless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas. Any such approach would violate the spirit of Federal Rule of Evidence 501. See S. Rep. No. 93-1277 (1974) (“the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis”). While such a “case-by-case” basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client

privilege, it obeys the spirit of the Rules. At the same time we conclude that the narrow “control group test” sanctioned by the Court of Appeals, in this case cannot, consistent with “the principles of the common law as . . . interpreted . . . in the light of reason and experience,” Fed. Rule Evid. 501, govern the development of the law in this area.

Our decision that the communications by Upjohn employees to counsel are covered by the attorney-client privilege disposes of the case so far as the responses to the questionnaires and any notes reflecting responses to interview questions are concerned. The summons reaches further, however, and Thomas has testified that his notes and memoranda of interviews go beyond recording responses to his questions. To the extent that the material subject to the summons is not protected by the attorney-client privilege as disclosing communications between an employee and counsel, we must reach the ruling by the Court of Appeals that the work-product doctrine does not apply to summonses issued under 26 U.S.C. § 7602.

The Government concedes, wisely, that the Court of Appeals erred and that the work-product doctrine does apply to IRS summonses. This doctrine was announced by the Court over 30 years ago in *Hickman v. Taylor*. In that case the Court rejected “an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party’s counsel in the course of his legal duties.” The Court noted that “it is essential that a lawyer work with a certain degree of privacy” and reasoned that if discovery of the material sought were permitted

“much of what is now put down in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.”

The “strong public policy” underlying the work-product doctrine was reaffirmed recently in *United States v. Nobles*, and has been substantially incorporated in Federal Rule of Civil Procedure 26(b)(3).

As we stated last Term, the obligation imposed by a tax summons remains “subject to the traditional privileges and limitations.” *United States v. Euge*. Nothing in the language of the IRS summons provisions or their legislative history suggests an intent on the part of Congress to preclude application of the work-product doctrine. Rule 26(b)(3) codifies the work-product doctrine, and the Federal Rules of Civil Procedure are made applicable to summons enforcement proceedings by Rule 81(a)(3). See *Donaldson v. United States*. While conceding the applicability of the work-product doctrine, the Government asserts that it has made a sufficient showing of necessity to overcome its protections. The Magistrate apparently so found. The Government relies on the following language in *Hickman*:

“We do not mean to say that all written materials obtained or prepared by an adversary’s counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and nonprivileged facts remain hidden in an attorney’s file and where production of those facts is essential to the preparation of one’s case, discovery may properly be had. . . . And production might be justified where the witnesses are no longer available or can be reached only with difficulty.”

The Government stresses that interviewees are scattered across the globe and that Upjohn has forbidden its employees to answer questions it considers irrelevant. The above-quoted language from *Hickman*, however, did not apply to “oral statements made by witnesses . . . whether presently in the form of [the attorney’s] mental impressions or memoranda.” As to such material the Court did “not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. . . . If there should be a rare situation justifying production of these matters petitioner’s case is not of that type.” Forcing an attorney to disclose notes and memoranda of witnesses’ oral statements is particularly disfavored because it tends to reveal the attorney’s mental processes, 329 U.S., at 513 (“what he saw fit to write down regarding witnesses’ remarks”); *id.* at 516–17 (“the statement would be his [the attorney’s] language, permeated with his inferences”).

Rule 26 accords special protection to work product revealing the attorney’s mental processes. The Rule permits disclosure of documents and tangible things constituting attorney work product upon a showing of substantial need and inability to obtain the equivalent without undue hardship. This was the standard applied by the Magistrate. Rule 26 goes on, however, to state that “[i]n ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.” Although this language does not specifically refer to memoranda based on oral statements of witnesses, the *Hickman* court stressed the danger that compelled disclosure of such memoranda would reveal the attorney’s mental processes. It is clear that this is the sort of material the draftsmen of the Rule had in mind as deserving special protection. *See* Notes of Advisory Committee on 1970 Amendment to Rules, 28 U.S.C. App. P. 442 (“The subdivision . . . goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories . . . of an attorney or other representative of a party. The *Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers’ mental impressions and legal theories . . .”).

Based on the foregoing, some courts have concluded that *no* showing of necessity can overcome protection of work product which is based on oral statements from witnesses. . . .

We do not decide the issue at this time. It is clear that the Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work-product doctrine. The Magistrate applied the “substantial need” and “without undue hardship” standard articulated in the first part of Rule 26(b)(3). The notes and memoranda sought by the Government here, however, are work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney-client privilege. To the extent they do not reveal communications, they reveal the attorneys’ mental processes in evaluating the communications. As Rule 26 and *Hickman* make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.

While we are not prepared at this juncture to say that such material is always protected by the work-product rule, we think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure. Since the Court of Appeals thought that the work-product protection was never applicable in an enforcement proceeding such as this, and since the Magistrate whose recommendations the District Court adopted applied too lenient a standard of protection, we think the best procedure with respect to this aspect of the case would be to reverse the judgment of the Court of Appeals for the Sixth Circuit and remand the case to it for such further proceedings in connection with the work-product claim as are consistent with this opinion.

Accordingly, the judgment of the Court of Appeals is reversed, and the case remanded for further proceedings. . . .

Problem 14-1

(a)	What are the major rationales for the attorney-client privilege? Be as specific as possible.
(b)	Contra <i>Upjohn</i> ’s reasoning, critique the application of those rationales to corporations.

The following two decisions, stemming from the same civil litigation, further illustrate *Upjohn*’s application and deal with some issues relating to waiver of the privilege. Notice how the fact pattern here mirrors so many of the corporate cases discussed in previous chapters. And especially pay attention to the dangers of potential privilege waiver highlighted by the second decision.

In re KELLOGG BROWN & ROOT, INC., 756 F.3d 754 (D.C. Cir. 2014) (KBR I)

KAVANAUGH, Circuit Judge:

More than three decades ago, the Supreme Court held that the attorney-client privilege protects confidential employee communications made during a business’s internal investigation led by company lawyers. See *Upjohn Co. v. United States*. In this case, the

District Court denied the protection of the privilege to a company that had conducted just such an internal investigation. The District Court's decision has generated substantial uncertainty about the scope of the attorney-client privilege in the business setting. We conclude that the District Court's decision is irreconcilable with *Upjohn*. We therefore grant KBR's petition for a writ of mandamus and vacate the District Court's March 6 document production order.

Harry Barko worked for KBR, a defense contractor. In 2005, he filed a False Claims Act complaint against KBR and KBR-related corporate entities, whom we will collectively refer to as KBR. In essence, Barko alleged that KBR and certain subcontractors defrauded the U.S. Government by inflating costs and accepting kickbacks while administering military contracts in wartime Iraq. During discovery, Barko sought documents related to KBR's prior internal investigation into the alleged fraud. KBR had conducted that internal investigation pursuant to its Code of Business Conduct, which is overseen by the company's Law Department.

KBR argued that the internal investigation had been conducted for the purpose of obtaining legal advice and that the internal investigation documents therefore were protected by the attorney-client privilege. Barko responded that the internal investigation documents were unprivileged business records that he was entitled to discover. *See generally* Fed. R. Civ. P. 26(b)(1).

After reviewing the disputed documents in camera, the District Court determined that the attorney-client privilege protection did not apply because, among other reasons, KBR had not shown that "the communication would not have been made 'but for' the fact that legal advice was sought." *United States ex rel. Barko v. Halliburton Co.* (quoting *United States v. ISS Marine Services, Inc.*). KBR's internal investigation, the court concluded, was "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." . . .

Federal Rule of Evidence 501 provides that claims of privilege in federal courts are governed by the "common law—as interpreted by United States courts in the light of reason and experience." Fed. R. Evid. 501. The attorney-client privilege is the "oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*. As relevant here, the privilege applies to a confidential communication between attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client. . . .

KBR's assertion of the privilege in this case is materially indistinguishable from *Upjohn*'s assertion of the privilege in that case. As in *Upjohn*, KBR initiated an internal investigation to gather facts and ensure compliance with the law after being informed of potential misconduct. And as in *Upjohn*, KBR's investigation was conducted under the auspices of KBR's in-house legal department, acting in its legal capacity. The same considerations that led the Court in *Upjohn* to uphold the corporation's privilege claims apply here.

The District Court in this case initially distinguished *Upjohn* on a variety of grounds. But none of those purported distinctions takes this case out from under *Upjohn*'s umbrella.

First, the District Court stated that in *Upjohn* the internal investigation began after in-house counsel conferred with outside counsel, whereas here the investigation was conducted in-house without consultation with outside lawyers. But *Upjohn* does not hold or imply that the involvement of outside counsel is a necessary predicate for the privilege to apply. On the contrary, the general rule, which this Court has adopted, is that a lawyer's status as in-house counsel "does not dilute the privilege." *In re Sealed Case*. As the Restatement's commentary points out, "Inside legal counsel to a corporation or similar organization . . . is fully empowered to engage in privileged communications." 1 RESTATEMENT § 72, cmt. C.

Second, the District Court noted that in *Upjohn* the interviews were conducted by attorneys, whereas here many of the interviews in KBR's investigation were conducted by non-attorneys. But the investigation here was conducted at the direction of the attorneys in KBR's Law Department. And communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege. *See FTC v. TRW, Inc.*; *see also* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 7:18, (2013) ("If internal investigations are conducted by agents of the client at the behest of the attorney, they are protected by the attorney-client privilege to the same extent as they would be had they been conducted by the attorney who was consulted."). So that fact, too, is not a basis on which to distinguish *Upjohn*.

Third, the District Court pointed out that in *Upjohn* the interviewed employees were expressly informed that the purpose of the interview was to assist the company in obtaining legal advice, whereas here they were not. The District Court further stated that the confidentiality agreements signed by KBR employees did not mention that the purpose of KBR's investigation was to obtain legal advice. Yet nothing in *Upjohn* requires a company to use magic words to its employees in order to gain the benefit of the privilege for an internal investigation. And in any event, here as in *Upjohn* employees knew that the company's legal department was conducting an investigation of a sensitive nature and that the information they disclosed would be protected. *Cf. Upjohn* (*Upjohn*'s managers were "instructed to treat the investigation as 'highly confidential'"). KBR employees were also told not to discuss their interviews "without the specific advance authorization of KBR General Counsel." *United States ex rel. Barko v. Halliburton Co.*

In short, none of those three distinctions of *Upjohn* holds water as a basis for denying KBR's privilege claim.

More broadly and more importantly, the District Court also distinguished *Upjohn* on the ground that KBR's internal investigation was undertaken to comply with Department of Defense regulations that require defense contractors such as KBR to maintain compliance programs and conduct internal investigations into allegations of potential

wrongdoing. The District Court therefore concluded that the purpose of KBR's internal investigation was to comply with those regulatory requirements rather than to obtain or provide legal advice. In our view, the District Court's analysis rested on a false dichotomy. So long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion.

The District Court began its analysis by reciting the "primary purpose" test, which many courts (including this one) have used to resolve privilege disputes when attorney-client communications may have had both legal and business purposes. *See also In re Sealed Case*. But in a key move, the District Court then said that the primary purpose of a communication is to obtain or provide legal advice only if the communication would not have been made "but for" the fact that legal advice was sought. In other words, if there was any other purpose behind the communication, the attorney-client privilege apparently does not apply. The District Court went on to conclude that KBR's internal investigation was "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." *Id.* (citing federal contracting regulations). Therefore, in the District Court's view, "the primary purpose of" the internal investigation "was to comply with federal defense contractor regulations, not to secure legal advice." *United States ex rel. Barko v. Halliburton Co.*; *see id.* ("Nothing suggests the reports were prepared to obtain legal advice. Instead, the reports were prepared to try to comply with KBR's obligation to report improper conduct to the Department of Defense.").

The District Court erred because it employed the wrong legal test. The but-for test articulated by the District Court is not appropriate for attorney-client privilege analysis. Under the District Court's approach, the attorney-client privilege apparently would not apply unless the sole purpose of the communication was to obtain or provide legal advice. That is not the law. We are aware of no Supreme Court or court of appeals decision that has adopted a test of this kind in this context. The District Court's novel approach to the attorney-client privilege would eliminate the attorney-client privilege for numerous communications that are made for both legal and business purposes and that heretofore have been covered by the attorney-client privilege. And the District Court's novel approach would eradicate the attorney-client privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs, which is now the case in a significant swath of American industry. In turn, businesses would be less likely to disclose facts to their attorneys and to seek legal advice, which would "limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Upjohn*. We reject the District Court's but-for test as inconsistent with the principle of *Upjohn* and longstanding attorney-client privilege law.

Given the evident confusion in some cases, we also think it important to underscore that the primary purpose test, sensibly and properly applied, cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other.

After all, trying to find the one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task. It is often not useful or even feasible to try to determine whether the purpose was A or B when the purpose was A and B. It is thus not correct for a court to presume that a communication can have only one primary purpose. It is likewise not correct for a court to try to find the one primary purpose in cases where a given communication plainly has multiple purposes. Rather, it is clearer, more precise, and more predictable to articulate the test as follows: Was obtaining or providing legal advice a primary purpose of the communication, meaning one of the significant purposes of the communication? As the Reporter's Note to the Restatement says, "In general, American decisions agree that the privilege applies if one of the significant purposes of a client in communicating with a lawyer is that of obtaining legal assistance." 1 RESTATEMENT § 72, Reporter's Note. We agree with and adopt that formulation—"one of the significant purposes"—as an accurate and appropriate description of the primary purpose test. Sensibly and properly applied, the test boils down to whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communication.

In the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy. . . .

In this case, there can be no serious dispute that one of the significant purposes of the KBR internal investigation was to obtain or provide legal advice. In denying KBR's privilege claim on the ground that the internal investigation was conducted in order to comply with regulatory requirements and corporate policy and not just to obtain or provide legal advice, the District Court applied the wrong legal test and clearly erred. . . .

In re KELLOGG BROWN & ROOT, INC., 796 F.3d 137 (D.C. Cir. 2015) (KBR II)

WILKINS, Circuit Judge:

In a prior petition for writ of mandamus on this case, we noted that "[m]ore than three decades ago, the Supreme Court held that the attorney-client privilege protects confidential employee communications made during a business's internal investigation led by company lawyers." *In re Kellogg Brown & Root, Inc.* ("*In re KBR*") (citing *Upjohn Co. v. United States*). Accordingly, we granted the writ and vacated the District Court's order to produce key documents from such an investigation. We allowed, however, that the District Court might consider "timely asserted other arguments for why these documents are not covered by either the attorney-client privilege or the work-product protection."

In a series of orders on which Petitioner Kellogg Brown & Root (“KBR”) now seeks a second writ of mandamus, the District Court found that the same contested documents should be turned over in discovery. We agree that these challenged decisions suffer from the same fundamental flaw: They run contrary to precedent by injecting uncertainty into application of attorney-client privilege and work product protection to internal investigations. *See Swidler & Berlin v. United States; Upjohn; In re KBR*. Because we find the District Court’s orders irreconcilable with binding precedent, we grant the writ and vacate the orders. KBR now seeks our intervention on the District Court’s determinations that the attorney-client privilege and work product protection were impliedly waived for these same documents. . . .

KBR’s purported implied waiver runs to a February 2014 deposition of Christopher Heinrich, KBR Vice President (Legal), on behalf of KBR. *See* Fed. R. Civ. P. 30(b)(6) (requiring a corporation to “designate one or more officers” or other persons to testify “about information known or reasonably available to the organization.”). Among the subjects that Barko directed KBR to produce a representative to testify on was “Topic Q,” defined as:

Any investigation or inquiry, internal or external, formal or informal, of [the KBR employee and subcontractor at the center of the alleged fraud] or any of the matters identified in [above-listed topics]. The scope shall include knowledge of everyone who participated in the investigation.

KBR’s litigation counsel offered a “preliminary statement” at the outset of the deposition that KBR was producing Heinrich as the company’s representative on four noticed topics, including Topic Q, but was doing so “subject to the company’s claims of attorney-client privilege” and work product protection. In answer to a question from Barko’s attorney, Heinrich testified he had in preparation for the deposition reviewed the now-disputed documents related to KBR’s internal investigation (the Code of Business Conduct documents or “COBC documents”). Throughout the examination, KBR’s attorney instructed Heinrich not to answer questions about the contents of the internal investigation on the basis of attorney-client privilege and work product protection.

After Barko’s lawyer completed his examination of Heinrich, KBR’s litigation counsel conducted a cross-examination. He explained that Heinrich had been asked “several questions designed to try to determine whether or not the Code of Business Conduct investigation is privileged, and I am going to ask questions establishing that they are.” Responding to the questions that followed, Heinrich testified that KBR had a contractual reporting duty pursuant to the Anti-Kickback Act to notify the Department of Defense if it had reason to believe that a violation of the Act had occurred. Heinrich testified that KBR adhered to that obligation and had made disclosures pursuant to the same duty in other instances. And Heinrich explained that even when KBR has made a notification to the Department as required by a contract, it has never provided an internal investigation

itself to the Department because it has always treated the investigation as subject to attorney-client privilege. . . .

First, the District Court concluded that the COBC documents must be produced under Federal Rule of Evidence 612 on the theory that KBR waived attorney-client privilege and work product protection when Heinrich reviewed the documents in preparation for his deposition.

Second, the District Court concluded that KBR waived attorney-client privilege and work product protection for the COBC documents under the doctrine of “at issue” waiver.

Both rulings were in error for the reasons that follow. . . .

At Heinrich’s deposition, he stated that he had reviewed the COBC documents in preparation for his testimony. Barko thereafter sought disclosure of the COBC documents under Federal Rule of Evidence 612, which provides that where a witness has used a writing to refresh memory before testifying, the adverse party is entitled to have it produced and to introduce into evidence any portion that relates to the witness’s testimony, “if the court decides that justice requires the party to have those options.” Fed. R. Evid. 612(a)(2).

To make its decision, the District Court engaged in a balancing test. It identified several factors supporting disclosure and several factors running against disclosure. And it concluded that “fairness considerations support disclosure” based on this “context-specific determination about the fairness of the proceedings and whether withholding the documents is consistent with the purposes of attorney-client privilege.”

The balancing test was inappropriate in the first instance. Rule 612 applies only where a witness “uses a writing to refresh memory.” Fed. R. Evid. 612(a). Thus, “even if the witness consults a writing while testifying, the adverse party is not entitled to see it unless the writing influenced the witness’s testimony.” 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 612.04(2)(b)(i) (2d ed. 1997); *see, e.g., Sporck v. Peil* (granting mandamus to vacate a Rule 612(a)(2) production order where there had been no witness admission that his answers to “specific areas of questioning were informed by documents he had reviewed”). It cannot be the case that just stating the documents were privileged constitutes a testimonial reliance on their contents; else, attorney-client privilege and work product protection would mean nothing at all in that their mere invocation would entitle an adversary to production of the privileged or protected materials.

Further, even if the balancing test had been appropriate, the District Court’s conclusions were precluded by *Upjohn*. Courts have divided on how to reconcile Rule 612 balancing with attorney-client privilege and work product protection. *See generally Barrer v. Women’s Nat’l Bank* (describing conflicting authority on interaction of Rule 612 and claims of attorney-client privilege or work product protection); *cf.* H.R. Rep. No. 93-650

(1973) (“The Committee intends that nothing in [Rule 612] be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory.”). But the District Court’s balancing would allow the attorney-client privilege and work product protection covering internal investigations to be defeated routinely by a counter-party noticing a deposition on the topic of the privileged nature of the internal investigation. *Upjohn* teaches that “[a]n uncertain privilege, or one which purports to be certain but results in widely varying application by the courts, is little better than no privilege at all.” The District Court’s ruling, therefore, runs counter to *Upjohn*.

In this case, Barko noticed the deposition to cover the topic of the COBC investigation itself, as distinguished from the events that were the subject of the investigation. Both parties told us that their understanding at the time of the deposition was that Barko intended to examine whether and to what extent the COBC investigation was privileged. To prepare adequately for the deposition, Heinrich had no choice but to review documents related to the COBC investigation.

At oral argument on this Petition, Barko took the absurd position that KBR’s mistake was having Heinrich personally review the COBC documents rather than having someone give him a summary. Barko asserted that in order to avoid privilege waiver KBR should have produced a Rule 30(b)(6) representative with only second- or third-hand knowledge of the investigation rather than first-hand knowledge. This makes no sense. Such a rule would encourage entities to provide less knowledgeable corporate representatives for deposition, thus defeating the purpose of civil discovery to establish “the fullest possible knowledge of the issues and facts before trial.” *Societe Internationale Pour Participations Industrielles et Commerciales S.A. v. Brownell*.

Barko cannot “overcome the privilege by putting [the COBC investigation] in issue” at the deposition, *Koch v. Cox*, and then demanding under Rule 612 to see the investigatory documents the witness used to prepare. Allowing privilege and protection to be so easily defeated would defy “reason and experience,” Fed. R. Evid. 501, and “potentially upend certain settled understandings and practices” about the protections for such investigations, *In re KBR*.

In sum, the District Court’s Rule 612 ground for its production order was clear error because there was no basis for the fairness balancing test it conducted and, even had there been, the test failed to give due weight to the privilege and protection attached to the internal investigation materials.

The District Court also found that KBR had waived attorney-client privilege and work product protection by placing the COBC documents “at issue.” Such waivers are certainly possible: “Under the common-law doctrine of implied waiver, the attorney-client privilege is waived when the client places otherwise privileged matters in controversy.” *Ideal Elec. Sec. Co. v. Int’l Fid. Ins. Co.* (citing 6 JAMES W. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 26.49(5) (3d ed.1997)). . . .

We have explained—and the District Court noted our precedent—that a party may not use privilege “as a tool for manipulation of the truth-seeking process.” *In re Sealed Case* (“*Sealed Case* (general counsel’s files)”). As such, a party asserting attorney-client privilege “cannot be allowed, after disclosing as much as he pleases, to withhold the remainder.” *Id.* (quoting 8 JOHN H. WIGMORE & JOHN T. MCNAUGHTON, EVIDENCE IN TRIALS AT COMMON LAW § 2327 (1961); *see also Clark v. United States* (“The privilege takes flight if the relation is abused.”); *United States v. Bilzerian* (“[T]he attorney-client privilege cannot at once be used as a shield and a sword.”)). At the same time, we have held that a “general assertion lacking substantive content that one’s attorney has examined a certain matter is not sufficient to waive the attorney-client privilege.” *United States v. White*.

The District Court found that “KBR injected the COBC contents into the litigation by itself soliciting Heinrich’s Rule 30(b)(6) testimony.” It noted that excerpts from this testimony disclosing the fact of the COBC investigations and KBR’s reporting duties under Defense Department contracts were attached to KBR’s motion for summary judgment and that KBR referenced deposition language in its Statement of Material Facts as to Which There Is No Genuine Dispute, required by Local Civil Rule of Procedure 7(h)(1). And, KBR discussed the COBC “investigative mechanism” in its memorandum in support of summary judgment (in a footnote quoted in full in Part I of the body of this Opinion). All this, in the view of the District Court, added up to a “message” that the COBC reports “contain no reasonable grounds to believe a kickback occurred.” Thus, it concluded that KBR created an implied waiver by “actively” seeking “a positive inference in its favor based on what KBR claims the documents show.” The District Court also denied KBR leave to amend its pleadings to strike the sections that the District Court interpreted as waiving the privilege and protection.

To the extent the District Court relied on Heinrich’s deposition testimony or the statement of undisputed material facts, we think that—as a matter of logic—neither could possibly give rise to an inference that places the contents of the deposition at issue. The deposition transcript is simply a record of what was said, not itself an argument. The Rule 7(h)(1) statement is a required companion filing to a summary judgment motion submitting “material facts as to which the moving party contends there is no genuine issue.” Local Civ. R. 7(h)(1). The opposing party has the opportunity to respond to each asserted fact with a contention that there is a “genuine issue necessary to be litigated,” but there are no inferences to be made and none to be contested in these statements alone. This is not to say that deposition testimony or a Rule 7(h)(1) statement can never create a waiver of attorney-client privilege or work product protection. By making partial disclosures of privileged information, they surely can. But the deposition transcript and Rule 7(h)(1) statements cannot themselves give rise to inferences that place privileged materials “at issue.” *See In re Sims* (holding that privilege waiver analysis based on deposition testimony in civil action must recognize that the testimony “might never come to the attention of any decisionmaker”).

The reference to the COBC investigation in the memorandum in support of summary judgment presents what is at first glance a more difficult question. By stating that KBR performed a COBC investigation and that, afterward, KBR did not report any wrongdoing to the Department of Defense, a factfinder could infer that the investigation found no wrongdoing. The District Court concluded that KBR had asked it to draw an “unavoidable” inference by placing the footnote at the end of a sentence calling Barko’s claims “baseless.” We disagree that such an inference was unavoidable, because an alternative inference—presumably, the one Barko would ask a fact-finder to draw—is that the investigation showed wrongdoing but KBR nonetheless made no report to the government.

Pursuant to the acquisition regulations under which it contracted, KBR was required to “have in place and follow reasonable procedures designed to prevent and detect possible violations [of the Anti-Kickback statute],” to make a written report when it “ha[d] reasonable grounds to believe that a violation . . . may have occurred,” and to “cooperate fully with any Federal agency investigating a possible violation.” 48 CFR § 52.2037(c)(1)–(3). KBR has represented without dispute that it was expressly permitted to retain privilege as to the contents of its investigations, which is not unusual in federal government compliance programs. Department of Justice policy, for instance, provides that “waiving the attorney-client and work product protections has never been a prerequisite under the Department’s prosecution guidelines for a corporation to be viewed as cooperative,” U.S. Attorney’s Manual § 9–28.710, and that, with respect to internal investigations, “[a] corporation need not disclose, and prosecutors may not request, the disclosure of such attorney work product as a condition for the corporation’s eligibility to receive cooperation credit,” § 9–28.720(b). Under such compliance programs, companies know that their disclosures may receive greater credence if they choose to buttress them with otherwise-privileged information. But companies and the government can, and often do, structure legitimate compliance and reporting programs that do not involve waiving privilege. Where companies choose not to waive privilege, “[t]hey will, of course, bear the risk that their reports will not be accepted as full disclosures.” *Sealed Case* (general counsel’s files).

Read in this context, footnote 5 in KBR’s summary judgment motion is essentially a recitation of the terms of its deal with the government, including the express reservation of attorney-client privilege and work product protection. There was certainly no actual disclosure of opinion work product (the conclusions of the COBC investigation) in the footnote. Instead, the District Court found that KBR impliedly disclosed opinion work product, that is, “the substantive conclusion of its COBC investigations.” In *Sealed Case* (general counsel’s files), we found implied waiver primarily because waiver was consistent with holding the company to the terms of its bargain. Here, holding KBR to the terms of its bargain would mean deciding that “[KBR’s] reports will not be accepted as full disclosures,” rather than inferring that KBR was intending to say that its non-report to the government should be given weight and credibility as a finding of no wrongdoing.

There's the rub: Where KBR neither directly stated that the COBC investigation had revealed no wrongdoing nor sought any specific relief because of the results of the investigation, KBR has not "based a claim or defense upon the attorney's advice." *Koch*; see also *White*. As we explained in *Sealed Case* (general counsel's files):

Corporations may protect their privileges without manipulation simply by being forthright with their regulators and identifying material as to which they claim privilege at the time they submit their voluntary disclosure reports. They will, of course, bear the risk that their reports will not be accepted as full disclosures. But if they choose to make a pretense of unconditional disclosure, they bear another risk—that we will imply a waiver of privilege with respect to any material necessary for a fair evaluation of their disclosures.

Here, there was no pretense of unconditional disclosure.

Notwithstanding all this, KBR's summary judgment motion footnote said not only that it conducted a COBC investigation relating to Barko's claims and did not report any wrongdoing to the government, but also that when it discovers wrongdoing during investigations, "KBR makes such disclosures." KBR Defendants' Motion for Summary Judgment ECF No. 136. The District Court's order turned on this point and it is undoubtedly the highest hurdle to our conclusion that KBR did not waive the privilege.

But we think the context of the whole passage is essential to our clear error conclusion. First, the footnote constitutes a recitation of facts that appears only in the motion's introduction, not in an argument or claim concerning the privileged documents' contents. We previously have rejected the idea that we must treat recitations of facts as making arguments, and KBR benefits from the application of that principle here. See *Am. Wildlands v. Kempthorne* (explaining that appellant forfeited argument by explaining only its underlying facts in "the statement of the facts section of its opening brief."). Second, and in any event, "[i]t is not our practice . . . to indulge cursory arguments made only in a footnote," *C.I.R. v. Simmons*; see also *Hutchins v. District of Columbia*. Furthermore, even though KBR did not affirmatively argue that the court should find no wrongdoing because KBR's investigation had found no wrongdoing, the District Court reasoned that such an "argument" could be inferred from the footnote. But KBR was the movant for summary judgment, and it is beyond peradventure that all inferences were to be drawn against KBR at this stage of the litigation, *Anderson v. Liberty Lobby, Inc.*, and "it was error for the district court not to view [KBR]'s statements in the light most favorable to [Barko]," *Carr v. District of Columbia*. In sum, the District Court may not, in resolving the motion for summary judgment, make any inference in KBR's favor based on the contents of the privileged documents. . . . [The court's discussions of work product doctrine and standards of review are omitted.]

Who controls the privilege in the dual representation context: As will be further discussed in Chapter 15, it can be permissible in some circumstances for an attorney to simultaneously represent a corporation and the corporation's employee. The question can arise in that context who controls waiver with respect to particular communications in the course of the representation: the corporation or the individual. There is substantial case law on how to conduct waiver analysis in this context. For present purposes, one only need to see the contours of the issue, as illustrated in this recent decision in the pretrial litigation connected to the prosecution of Theranos founder Elizabeth Holmes.

UNITED STATES v. HOLMES, 2021 WL 2309980 (N.D. Cal. June 3, 2021)

NATHANAEL M. COUSINS, United States Magistrate Judge:

The government seeks to have certain Theranos corporate documents deemed admissible for trial against Defendant Elizabeth A. Holmes. . . .

In 2011, Boies Schiller Flexner LLP ("BSF") began representing Holmes and Theranos in an intellectual property dispute. After the representation began, BSF continued to offer Holmes and Theranos a variety of legal services in relation to Theranos' patent portfolio, press interactions, and inquiries from government agencies and departments. Despite the breadth and duration of BSF's involvement, Holmes and BSF did not sign an engagement letter or establish any formal guidelines describing the scope of BSF's legal representation. Holmes believed that BSF and BSF partner, David Boies, were her attorneys up to the point when she retained separate counsel to represent her in the Securities and Exchange Commission and Department of Justice investigations into Theranos in 2016.

In June 2020, the government served Holmes with its Exhibit List for trial, which included thirteen documents that Holmes claims implicate her attorney client privilege. The government worked with the Theranos Assignee, "the controller of any remaining Theranos corporate privilege," to handle the documents. Holmes' claim for attorney client privilege is predicated on her understanding that Boies and BSF jointly represented Theranos and Holmes as an individual, not as a representative of the company. The government contests this assertion, insisting that there was no joint representation, so the documents are subject only to corporate privilege. . . .

Attorney-client privilege is the oldest common law privilege for confidential communications. *Upjohn Co. v. U.S.* "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Information is covered by attorney-client privilege: (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.

Holmes opposes the government's motion on the grounds that Boies and BSF jointly represented her and Theranos. The parties disagree on whether the Court should apply a subjective belief test or the *Graf* test. Following Ninth Circuit case law, the Court applies the *Graf* test. At the December 16, 2020 hearing, Holmes argued that the Court should not use the *Graf* test because it does not apply to this case. The Court disagrees for three reasons.

First, contrary to Holmes' assertion, the Ninth Circuit's discussion of two joint representation tests in the *Graf* opinion does not limit the *Graf* test's application to specific cases. The *Graf* opinion describes the two possible tests for joint representation—the *Bevill* test and the subjective belief test—but after extensive discussion of policy and the case law in other circuits, the Ninth Circuit unambiguously chose to adopt the *Bevill/Graf* test. *U.S. v. Graf*.

Second, the facts of *Graf* are analogous to this case. Like Holmes, Graf was indicted for his involvement in the fraudulent operation of a company. *Graf*. Like Holmes, Graf was the founder of the company, and he sought to exclude the testimony of attorneys who represented the company by asserting his individual attorney-client privilege. Although Graf was not listed as an employee of the company, the Ninth Circuit determined that this classification was an effort to circumvent several cease-and-desist orders against him so it treated Graf as a "functional employee, not an independent outside consultant." These factual parallels reinforce that even if the *Graf* test did not apply to all joint representation disputes, this case would fall within its purview.

Finally, Holmes argues that *Graf* does not apply here because *Graf* addresses the question of formation while *In re Teleglobe Communications Corp.* addresses the question of scope. The Court disagrees with this characterization of the cases. To demonstrate: envision a Venn diagram with one circle for "company legal matters," another circle for "individual legal matters," and a small area of overlap for "common interests." The *Graf* test establishes that communications with corporate counsel about "individual legal matters" are controlled by the individual's privilege. *Teleglobe* states that communications in the overlapping "common interests" area are controlled by the individual's privilege and the company's privilege. Because the two tests govern different parts of the diagram, they are not conflicting tests that apply at different times; rather they work together to define who holds the privilege for what at any moment. Aside from the fact that the *Teleglobe* decision is not binding on this Court, it does not apply to this case because Holmes asserts that the documents at issue regard her individual legal matters, not "common interests." Therefore, the Court must apply the Ninth Circuit's *Graf* test.

Graf requires the person seeking to assert individual privilege to satisfy all of the following factors to establish a joint representation:

First, they must show they approached counsel for the purpose of seeking legal advice. Second, they must demonstrate that when they approached counsel they made it clear that they were seeking legal

advice in their individual rather than in their representative capacities. Third, they must demonstrate that the counsel saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with counsel were confidential. And fifth, they must show that the substance of their conversations with counsel did not concern matters within the company or the general affairs of the company.

Before analyzing admissibility of the exhibits, the Court must first apply *Graf* to determine if Holmes has an individual privilege to assert.

The Court finds that Holmes fails to establish a joint representation because she cannot satisfy the second, fourth, and fifth elements of the *Graf* test. To satisfy the *Graf* test, Holmes must show that when she approached Boies and BSF for legal advice, she made it clear that she was seeking legal advice in her personal capacity. Holmes fails to make this showing. In her opposition, Holmes insists that “Boies Schiller’s representation of Ms. Holmes (in addition to Theranos) is a matter of public record and thus there is no relationship to be implied,” but she is unable to point to any documents supporting this allegedly obvious joint representation. Holmes admits that “there was no engagement letter relating to Mr. Boies’ or his firm’s representation of Ms. Holmes and/or Theranos.” And Holmes does not point to any financial records showing that she paid Boies or BSF from her own accounts, not Theranos’. Holmes heavily relies on her belief that Boies and BSF jointly represented her and Theranos, however, Holmes’ subjective belief is not the standard. The standard is a “clear” communication that the individual sought legal advice as an individual, not as a representative of the company; and on that Holmes falls short.

Holmes also cannot show that her conversations with Boies and BSF were confidential. None of the contested documents include conversations exclusively between Holmes and Boies or BSF. Holmes argues that “with one exception, the communications are between Ms. Holmes or other senior Theranos employees, Theranos in-house attorneys, and Boies Schiller attorneys.” However, if Holmes is arguing that she sought individual legal advice, the presence of Theranos employees and attorneys destroys the privilege.

Lastly, Holmes fails to show that the substance of her conversations with Boies and BSF did not concern matters within the general affairs of the company. None of the contest exhibits discuss Holmes’ individual legal interests. All thirteen documents related to her “official duties” or the “general affairs” of the company like conversations with investors, billing, and media strategy.

In sum, the Court finds that Boies and BSF did not jointly represent Holmes and Theranos because Holmes does not satisfy the second, fourth, and fifth factors of the *Graf* test. Therefore, the holder of attorney-client privilege over the contested documents Theranos’ Assignee, and admissibility of the documents hinges on their waiver of corporate privilege. See *Commodity Futures Trading Com v. Weintraub* (finding that

“when control of a corporation passes to new management, the authority to assert and waive the corporation’s attorney-client privilege passes as well.”).

For the foregoing reasons, the Court GRANTS the government’s motion and finds that the thirteen disputed documents, labeled as Exhibits 1-13 in ECF 559-12, are not subject to Holmes’ individual privilege. The documents are only subject to the Theranos Assignee’s corporate privilege, which the Assignee has waived. . .

D. Joint Defense Agreements

Joint defense agreements (JDAs) are routine in the investigation and defense of corporate crime cases. Parties to such agreements typically include the corporation and the various employees whose conduct may be within the scope of the matter under investigation who are represented by their own counsel. The ability to share costs and information among those under government investigation can make a JDA essential to conducting an effective defense.

In the following case, the court explains the important relationship between JDAs and the attorney-client privilege. The essential and logically necessary principle about this relationship is this: A joint defense agreement cannot create or expand an attorney-client privilege; it can only limit the circumstances that will result in a *waiver* of the privilege. In other words, the so-called “common interest doctrine” is an exception to the general principles governing waiver of the attorney-client privilege. The difficulty in the joint defense situation is the avoidance of thorny conflicts of interest among the various counsel as a result of information-sharing. (Conflict of interest principles are further explored in Chapter 15.) When representing either a corporation or its individual employees, it is important to thoroughly explain the potential benefits and drawbacks of entering into a JDA, as well as the obligations a JDA does and does not impose on the parties.

UNITED STATES v. STEPNEY, 246 F. Supp. 2d 1069 (N.D. Cal. 2003)

PATEL, Chief Judge:

Defendants are charged with participation in the criminal enterprises of a street gang in the Hunter’s Point area of San Francisco. In a series of three indictments, the government has charged a total of nearly thirty defendants with over seventy substantive counts relating to the operation of the gang over a period of several years. The number of defendants and the separate crimes charged render this case extraordinarily factually complex. Defense counsel report that they have already received discovery of over 20,000 pages of police reports, FBI memos, and other law enforcement materials.

In an effort to prepare coherent defenses efficiently, various defense counsel have sought to enter into joint defense agreements that would allow defendants to share factual investigations and legal work product. Out of concern for the Sixth Amendment rights of the defendants and the integrity of the proceedings, at the parties’ initial appearance

on October 15, 2001, the court ordered that any joint defense agreements be committed to writing and provided to the court for in camera review. No joint defense agreements were ever filed with the court pursuant to this order.

More than a year after the court's initial order, the attorney for one defendant moved to withdraw his representation on the grounds that he had entered into a joint defense agreement with another defendant who he had since come to believe was cooperating with the prosecution. Although the attorney seeking to withdraw did not believe that he had obtained confidential information from the cooperating defendant, he did believe that the joint defense agreement had created an implied attorney-client relationship that included a duty of loyalty. The attorney maintained that this duty of loyalty would prevent him from cross-examining the cooperating defendant, should he testify at trial.

The court denied the motion to withdraw after conducting a colloquy in which the cooperating defendant waived any attorney-client privilege with respect to information received by the moving attorney. The court also ruled that joint defense agreements do not create in one attorney a duty of loyalty toward the defendant with whom he collaborates. In an order dated November 22, 2002, the court set forth requirements that future joint defense agreements: (1) be in writing; (2) contain a full description of the extent of the privilege shared; (3) contain workable withdrawal provisions; and (4) be signed not only by the attorneys but also by the clients who hold the privileges at issue.

The joint defense privilege is commonly described as an extension of the attorney-client privilege. Scholarly commentators have uniformly argued that the joint defense privilege differs sufficiently from the attorney-client privilege in both purpose and scope that the two should be viewed as entirely separate doctrines. To inform the analysis of the proposed joint defense agreements, the court must first examine in detail the nature of the joint defense privilege.

"The attorney-client privilege is an evidentiary rule designed to prevent the forced disclosure in a judicial proceeding of certain confidential communications between a client and a lawyer." The purpose of the privilege is to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."

The attorney-client privilege limits only the power of a court to compel disclosure of attorney-client communications or otherwise admit the communications themselves into evidence. Outside the courtroom, the privilege does not provide grounds for sanctioning an attorney's voluntary disclosure of confidential communications to third parties. This is not to say that attorneys may freely reveal their clients' confidences should they so desire.

The ethical duty of confidentiality may be enforced by more than just sanctions against an offending attorney. In a criminal case, where an attorney violates this ethical duty by revealing a client's confidences to the government, a court may suppress the resulting

evidence. Prosecutors may also be subject to sanctions where they have induced an attorney to violate her duty of confidentiality.

In criminal cases, the Constitution also protects confidential attorney-client communications from the eyes and ears of the government. An intrusion by the government into an attorney-client relationship in order to obtain confidential information may be deemed a violation of a defendant's Sixth Amendment right to effective assistance of counsel or Fifth Amendment due process rights. In such a situation, a court may suppress evidence gathered as a result of the communication or, in egregious cases where the prejudice cannot otherwise be cured, dismiss the indictment. . . .

The joint defense privilege initially arose as an extension of the attorney-client privilege against court-ordered disclosure against confidential communications. Ordinarily, the attorney-client privilege will be deemed waived where a client discloses the contents of an otherwise privileged communication to a third party or where the communication occurs in the presence of third parties. The joint defense privilege was adopted as an exception to this waiver rule, under which communications between a client and his own lawyer remain protected by the attorney-client privilege when disclosed to co-defendants or their counsel for purposes of a common defense.

Although established as an evidentiary rule which bound courts from compelling disclosure of certain evidence, the joint defense privilege was soon applied as an ethical doctrine which imposed on counsel a limited duty of confidentiality toward their client's co-defendants regarding information obtained in furtherance of a common defense. In particular, courts have ruled that an attorney may be disqualified if her client's interests require that she cross-examine (or oppose in a subsequent action) another member of a joint defense agreement about whom she has learned confidential information. . . .

"Under their supervisory power, courts have substantial authority to oversee their own affairs to ensure that justice is done." A court may exercise its supervisory powers to implement a remedy for the violation of a recognized statutory or constitutional right, or may take preemptive steps to avoid such violations by imposing procedural rules not specifically required by the Constitution or Congress.

These supervisory powers unquestionably allow courts to require disclosure of the precise nature of a criminal defendant's representation to ensure that no conflict of interest exists that would deprive a defendant of his Sixth Amendment right to effective assistance of counsel. Courts have routinely intervened—prior to any controversy arising—where the circumstances of a criminal defendant's representation raises the potential for conflict of interest during the course of the proceedings, even before intervention is required by statutory or constitutional rule. . . .

[J]oint defense agreements impose an ethical duty of confidentiality on participating attorneys, presenting the potential for conflicts of interest that might lead to the withdrawal or disqualification of a defense attorney late in the proceedings or the

reversal of conviction on appeal. When a party to a joint defense agreement decides to cooperate with the government, the potential for disclosure of confidential information also threatens other defendants' Sixth Amendment rights. "Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." . . . Given the high potential for mischief, courts are well justified in inquiring into joint defense agreements before problems arise. . . .

The threat that these agreements might pose to defendants' Sixth Amendment rights—and to the integrity of the proceedings—warrants the minimal disclosures that the court has thus far required and the restrictions imposed by this court. The court appreciates defendants' concern that disclosing who among them have signed a joint defense agreement might give the government insight into the trial strategies of various defendants. Defendants have not, however, asserted any legal grounds to prevent disclosure of joint defense agreements to the court. To the extent that joint defense agreements simply set forth the existence of attorney-client relationships—implied or otherwise—between various attorneys and defendants, the contents of such agreements do not fall within the attorney-client privilege. . . .

The proposed agreement submitted by defendants is problematic in at least two material respects. First, the proposed agreement purports to create a duty of loyalty on the part of signing attorneys that extends to all signing defendants. The proposed defense agreement also does not contain workable withdrawal provisions that adequately avoid the possibility of disqualification on the eve of trial, or even during trial.

The proposed joint defense agreement explicitly imposes on signing attorneys not only a duty of confidentiality, but a separate general duty of loyalty to all signing defendants. Such a duty has no foundation in law and, if recognized, would offer little chance of a trial unmarred by conflict of interest and disqualification.

Joint defense agreements are not contracts which create whatever rights the signatories chose, but are written notice of defendants' invocation of privileges set forth in common law. Joint defense agreements therefore cannot extend greater protections than the legal privileges on which they rest. A joint defense agreement which purports to do so does not accurately set forth the protections which would be given to defendants who sign. . . .

Courts have consistently viewed the obligations created by joint defense agreements as distinct from those created by actual attorney-client relationships. . . . [C]ourts have also consistently ruled that where an attorney represents a client whose interests diverge from a party with whom the attorney has previously participated in a joint defense agreement, no conflict of interest arises unless the attorney actually obtained relevant confidential information. This position is inconsistent with a general duty of loyalty owed to former clients, which would automatically preclude an attorney from subsequently representing a client with an adverse interest. . . .

Admittedly, there is a significant difference between the disclosure of confidential information and the use of confidential information without disclosure. Both the common law doctrine of attorney-client privilege and the ethical duty of confidentiality address only the disclosure of confidential information and not the use of confidential information, without disclosure, in a manner adverse to the client's interests. Any obligation on the part of an attorney not to use confidential information against a client arises from separate duties. An attorney might use information gained in confidence to structure an investigation for facts with which she could discredit the cooperating witness without ever disclosing the information and running afoul of either the attorney-client privilege or the duty of confidentiality. . . .

The court finds no cases recognizing joint defense agreements as creating either a true attorney-client relationship or a general duty of loyalty. . . .

There is good reason for the law to refrain from imposing on attorneys a duty of loyalty to their clients' co-defendants. A duty of loyalty between parties to a joint defense agreement would create a minefield of potential conflicts. Should any defendant that signed the agreement decide to cooperate with the government and testify in the prosecution's case-in-chief, an attorney for a non-cooperating defendant would be put in the position of cross-examining a witness to whom she owed a duty of loyalty on behalf of her own client, to whom she also would owe a duty of loyalty. This would create a conflict of interest which would require withdrawal. Thus, the existence of a duty of loyalty would require that the attorneys for all non-cooperating defendants withdraw from the case in the event that any one participating defendant decided to testify for the government.

A duty of loyalty would even require withdrawal where a defendant sought to put on a defense that in any way conflicted with the defenses of the other defendants participating in a joint defense agreement. An attorney with a duty of loyalty to defendants other than her client could not shift blame to other defendants or introduce any evidence which undercut their defenses. Nor could an attorney cross-examine a defendant who testified on his own behalf.

As these scenarios illustrate, a joint defense agreement that imposes a duty of loyalty to all members of the joint defense agreement eliminates the utility of employing separate counsel for each defendant and (for purposes of conflict analysis) effectively creates a situation in which all signing defendants are represented jointly by a team of all signing attorneys. . . .

Disqualification of attorneys late in the proceedings benefits no one—it deprives defendants of counsel whom they know and trust and perhaps even chose; it forces delays while new counsel become acquainted with the case, which harm defendants, the prosecution, and the court. . . .

Because neither precedent nor sound policy supports imposing on attorneys who sign a joint defense agreement a general duty of loyalty to all participating defendants, the court

finds the provisions of the proposed Joint Defense Agreement that purport to create a duty of loyalty unacceptable. . . .

The proposed joint defense agreement provides that any member may withdraw from the agreement by giving notice to all other members. At the hearing on the proposed agreements, defense counsel suggested that signing defendants were willing accept the risk of conflict created by a withdrawing defendant by accepting the risk that counsel might be disqualified. Ordinarily, defendants seeking to enter into representation which holds potential conflicts of interest accept risks by waiving their rights to assert the conflict, rather than by steeling themselves to assert it as defense counsel suggests. The situation created by the joint defense agreement is no exception.

A first question arising as to the nature of an appropriate waiver is at what point in the proceedings defendants should waive their rights in order to avoid conflicts. Given the highly divergent interests of defendants in the present case, the court is entitled to require that waiver provisions be included in the joint defense agreement, so that defendants who participate are fully apprised of the potential for conflict and understand the consequences both of entering into the joint defense agreement and of withdrawing from it. The alternative—deferring action on waiver until one defendant decides to testify—fails to avoid the danger of disqualification entirely.

A second and more complicated question is what sort of waiver provisions would avoid the threat of conflict while adequately protecting defendants' right to cooperate on a joint defense. . . . One court has allowed defendants to waive potential conflict by agreeing in advance that no attorney will use any information obtained by reason of the confidentiality in cross-examining defendants. This method of waiving conflict, however, stands in tension with the general principle that where an attorney has actually obtained confidential information relevant to her representation of a client, the law presumes that she cannot avoid relying on the information—however indirectly or unintentionally—in forming legal advice and trial strategy. Because the cross-examining attorney still holds relevant confidences of the witness, it is not clear that she can truly operate free from conflict. The solution also compromises one defendant's right to a fully zealous attorney for another defendant's decision to testify. The waiver is less informed, as each defendant must waive the right to use the others' confidences before knowing what those confidences are.

The better form of waiver is suggested by the American Law Institute—American Bar Association in their model joint defense agreement, which provides:

Nothing contained herein shall be deemed to create an attorney-client relationship between any attorney and anyone other than the client of that attorney and the fact that any attorney has entered this Agreement shall not be used as a basis for seeking to disqualify any counsel from representing any other party in this or any other proceeding; and no attorney who has entered into this Agreement shall be disqualified from examining or cross-examining any client who testifies at any

proceeding, whether under a grant of immunity or otherwise, because of such attorney's participation in this Agreement; and the signatories and their clients further agree that a signatory attorney examining or cross-examining any client who testifies at any proceeding, whether under a grant of immunity or otherwise, may use any Defense Material or other information contributed by such client during the joint defense; and it is herein represented that each undersigned counsel to this Agreement has specifically advised his or her respective client of this clause and that such client has agreed to its provisions.

Joint Defense Agreement, Am. Law Institute–Am. Bar Ass'n, Trial Evidence in the Federal Courts: Problems and Solutions (1999). Under this regime, all defendants have waived any duty of confidentiality for purposes of cross-examining testifying defendants, and generally an attorney can cross-examine using any and all materials, free from any conflicts of interest. This form of waiver also places the loss of the benefits of the joint defense agreement only on the defendant who makes the choice to testify. Defendants who testify for the government under a grant of immunity lose nothing by this waiver. Those that testify on their own behalf have already made the decision to waive their Fifth Amendment right against self-incrimination and to admit evidence through their cross-examination that would otherwise be inadmissible.

The conditional waiver of confidentiality also provides notice to defendants that their confidences may be used in cross-examination, so that each defendant can choose with suitable caution what to reveal to the joint defense group. Although a limitation on confidentiality between a defendant and his own attorney would pose a severe threat to the true attorney-client relationship, making each defendant somewhat more guarded about the disclosures he makes to the joint defense effort does not significantly intrude on the function of joint defense agreements. . . . Joint defense agreements, . . . serve a different purpose. Each defendant entering a joint defense agreement already has a representative, fully and confidentially informed of the client's situation. The joint defense privilege allows defendants to share information so as to avoid unnecessarily inconsistent defenses that undermine the credibility of the defense as a whole. In criminal cases where discovery is limited, such collaboration is necessary to assure a fair trial in the face of the prosecution's informational advantage gained through the power to gather evidence by searches and seizures. Co-defendants may eliminate inconsistent defenses without the same degree of disclosure that would be required for an attorney to adequately represent her client. The legitimate value of joint defense agreements will not be significantly diminished by including a limited waiver of confidentiality by testifying defendants for purposes of cross-examination only.

For the foregoing reasons, the Court rules as follows:

- (1) Any joint defense agreement entered into by defendants must be committed to writing, signed by defendants and their attorneys, and submitted in camera to the court for review prior to going into effect.

(2) Each joint defense agreement submitted must explicitly state that it does not create an attorney-client relationship between an attorney and any defendant other than the client of that attorney. No joint defense agreement may purport to create a duty of loyalty.

(3) Each joint defense agreement must contain provisions conditionally waiving confidentiality by providing that a signatory attorney cross-examining any defendant who testifies at any proceeding, whether under a grant of immunity or otherwise, may use any material or other information contributed by such client during the joint defense.

(4) Each joint defense agreement must explicitly allow withdrawal upon notice to the other defendants.

The following is a sample joint defense agreement (envisioning a civil matter; however, the terms of such an agreement in a criminal matter would be highly similar). JDAs are contracts and should be read accordingly. What would be the pluses and minuses of this form of agreement if one were representing an individual in a corporate crime investigation?

JOINT DEFENSE AGREEMENT

This Joint Defense (the “Agreement”) is made and entered into as of {DATE} by and among the undersigned counsel, for themselves and on behalf of their respective clients {LIST PARTIES} (each individually a “Party,” and collectively, “Parties”).

RECITALS

WHEREAS, the Parties {have been named as defendants/may be potential subjects of investigation} in {DESCRIPTION OF MATTER}.

WHEREAS, for purposes of this Agreement, the term “Counsel” means and includes any attorney representing any Party, including in-house attorneys, any and all paralegals, law clerks, and any outside vendors of the Parties’ respective outside counsel acting at the direction of outside counsel, and any other persons expressly agreed to in writing by the Parties. The term “Outside Counsel” means and includes any attorney representing any Party at an outside law firm, as well as paralegals and law clerks working for such attorneys. The term “Joint Defense Group” means and includes the Parties and Counsel.

WHEREAS, the Parties possess common legal interests in the analysis and defense of certain assertions and claims relating to {MATTER}, including any and all potential affirmative defenses and counterclaims. The Parties wish to ensure that their attorneys are free to share and exchange information that may be useful in the representation of each Party, without waiving the confidentiality of communications and documents protected by the attorney-client privilege, the attorney-work product doctrine, or any other applicable privilege. The undersigned attorneys consider disclosure of matters of common concern to the Parties to be conducive to the

effective representation of the Parties. Accordingly, the Parties are in agreement that all disclosures between and among the Parties and their counsel for purposes of a common defense shall be and are confidential, covered by the attorney-client privilege, the work-product doctrine, and any other applicable privileges, and that the Parties intend to preserve and extend the applicability of any applicable privilege or immunity to all information shared or exchanged pursuant to this Joint Defense Agreement in preparation for, during the defense of, and after the resolution of {MATTER}. Notwithstanding the foregoing, nothing in this Joint Defense Agreement obligates the Parties to pursue joint defenses during the course of {MATTER}.

NOW, THEREFORE, the Parties and the Parties' Counsel agree as follows:

1. Sharing Joint Defense Materials.

a. Members of the Joint Defense Group are entitled to communicate and share information with each other as they see fit, both orally and in writing, in connection with {MATTER}. To that end, the Joint Defense Group (i) may share with each other information protected by the attorney client privilege and the attorney work-product doctrine in order to assert common or joint defenses to the claims that are or may be asserted in {MATTER}, and (ii) may exchange with each other privileged and work-product information, whether oral, written, or electronic in form, including without limitation factual and/or legal analyses, mental impressions, legal memoranda, legal research, reports of witness interviews, expert reports, draft briefs and pleadings, and other information (once exchanged, the "Joint Defense Materials"). The Joint Defense Materials include, but are not limited to, the following: (a) any information or documents relating or referring to {MATTER} provided by or on behalf of any Party, (b) all copies, memoranda, summaries, analyses, and notes prepared by any Party or their respective counsel, experts or consultants relating to {MATTER}; (c) any portion, communication, or transmission of any information or documents described in this paragraph (d) information regarding the identification and description of documents relating to {MATTER}; (e) information regarding the transactions and events that are the subject of {MATTER}; (f) information and documents obtained from interviews with, and investigations of, clients, whether joint or individual; (g) information and documents obtained from interviews with, and investigations of, witnesses and potential witnesses; (h) information and documents obtained from interviews with experts or consultants; (i) drafts of pleadings and other papers; and (j) research, analyses, strategies, theories, mental impressions and other attorney work product.

b. To the extent the Parties and/or Counsel already have communicated and shared with each other confidential attorney-client communications and/or attorney work product or other information concerning {MATTER} that come within the definition of Joint Defense Materials under this Agreement, all such communications and information previously shared are subject to the terms of this Agreement.

2. **Preservation of All Privileges.**

a. Except as set forth below, unless expressly stated in writing to the contrary, any communications among the Joint Defense Group concerning Joint Defense Materials are confidential and remain protected from disclosure to any third party by the attorney-client privilege, work product protection and the joint defense doctrine, and any other applicable privileges, to the maximum extent permitted by law. Any inadvertent or purposeful disclosure of information exchanged pursuant to this Agreement, including by one member of the Joint Defense Group to another, shall not constitute a waiver of any privilege or protection.

b. No member of the Joint Defense Group may waive, intentionally or otherwise, any privilege possessed by any other member of the Joint Defense Group. In the event any Party or Counsel purports to waive any privilege of another member of the Joint Defense Group, intentionally or otherwise, that waiver shall not be considered a waiver of the privilege by the Party or Counsel possessing the privilege and cannot be construed against the Party or Counsel possessing the privilege.

3. **No Disclosure to Third Parties.** Each member of the Joint Defense Group shall take reasonable steps to preserve the confidentiality of the Joint Defense Materials. Except as set forth in this Agreement, the Joint Defense Group members shall not disclose Joint Defense Materials to third parties without the consent of the member of the Joint Defense Group who provided the Joint Defense Materials pursuant to this Agreement. The Joint Defense Group members are not third parties, and disclosure to any other member of the Joint Defense Group conforms to this Agreement and is not a waiver of the attorney-client privilege, work product protection or the joint defense privilege. All persons permitted access to any Joint Defense Information shall be informed in writing that such information is confidential and privileged and subject to the terms of this Agreement, and shall agree to comply with the terms of this Agreement with respect to the confidentiality of such information by signing Exhibit A.

4. **No Agency or Fiduciary Relationship.** The existence of this Agreement or of a joint defense effort in connection with the Lawsuit shall not be deemed to create any new attorney-client relationship between any attorney and any Party, nor any new fiduciary or agency relationships between any attorney and any Party. Any attorney-client or fiduciary relationships shall be determined without reference to this Agreement. This Agreement shall not be used offensively or defensively in any dispute between the signatories to this Agreement involving any issues relating to or deriving from {MATTER}. Nothing in this Agreement is intended to affect, waive or otherwise modify any agreement to defend or indemnify, or any reservation of rights in connection with same, between any Parties to this Agreement.

5. **No Conflict of Interest.** No Party to this Agreement will claim that counsel for any other Party is now or will be in the future disqualified from representing any Party in any proceeding by reason of this Agreement or the joint defense effort. Nothing in this Agreement shall create a conflict of interest requiring disqualification of counsel,

and the Parties to this Agreement hereby knowingly and willingly waive any such conflict of interest. Each attorney represents that he or she has informed his or her client of the general nature of the conflicts that might arise, and that his or her client has knowingly and intelligently waived any conflict of interest that may arise on account of the Agreement, including, specifically from an attorney member of this Agreement (other than his or her own attorney) examining him or her at trial or any other proceeding relating to the Lawsuit. Therefore, the attorneys, for themselves and on behalf of their clients, hereby waive any right to seek the disqualification of counsel for the other Party based on a communication of joint defense privileged information made in accordance with this Agreement.

6. **Withdrawal.** Any Party may withdraw from this Agreement upon prior written notice to all other members of the Joint Defense Group, in which case this Agreement shall no longer apply to the withdrawing Party prospectively, but shall continue to protect all Joint Defense Materials communicated or exchanged prior to such withdrawal. Notwithstanding the termination of or withdrawal from this Agreement, the confidentiality obligations set forth herein shall survive as binding obligations of the Joint Defense Group and shall remain in full force and effect without regard to whether {MATTER} is terminated by final judgment, settlement or otherwise. In the event any Party withdraws from the Agreement, the remaining members of the Joint Defense Group are free to use the Joint Defense Materials and make derivative use of any privileged information, including information that they obtained from the withdrawing member, in {MATTER} pursuant to the terms of this Agreement.

7. **Compliance With Discovery Obligations.** Nothing in this Agreement shall be interpreted as requiring or suggesting that any Party has agreed to withhold any materials properly discoverable under applicable law. This Agreement is not intended to and should not be construed to evidence any agreement to prevent disclosure of all properly discoverable information, documents and materials.

8. **Notice of Discovery Demands or Disclosure.** The Joint Defense Group, and each of them, shall claim, assert and defend the joint defense privilege and any other applicable privilege for the Joint Defense Materials. Should any member of the Joint Defense Group become aware of a request for, or actual, disclosure to a third party of any materials or information protected by this Agreement, whether pursuant to subpoena or otherwise, the member will immediately notify the Joint Defense Group of such request or disclosure, and take all reasonable steps necessary or appropriate to permit the assertion of applicable rights with respect to such Joint Defense Information. In the event of any efforts by a third party to compel disclosure of information obtained solely as a result of this Agreement, the target of the subpoena or other form of compulsory process shall promptly notify the Joint Defense Group so as to afford the Joint Defense Group the opportunity to seek protection from the disclosure of such information.

9. **No Waiver of Defenses.** By entering into this Agreement, none of the members is waiving any claim or defense in connection with {MATTER} or otherwise.

10. **Return of Joint Defense Information.** At the resolution of {MATTER}, the Parties and Counsel shall within thirty (30) business days, return to the producing Party, or destroy, all Joint Defense Materials provided to that Party by the other Parties and shall provide written confirmation of the same.

11. **Modifications.** No amendment or modification of this Agreement shall be effective unless it is in writing and signed by the other members of the Joint Defense Group.

12. **Governing Law.** This Agreement is governed by the laws of {JURISDICTION} and may be enforced by any of the parties to this Agreement in any court of appropriate jurisdiction. The Joint Defense Group members agree that the rights, privileges and interests protected by this Agreement are unique and that any violation of this Agreement will result in irreparable harm and injury to the other members. Therefore, the Joint Defense Group agrees that the terms of this Agreement may be enforced by appropriate injunctive or other equitable relief. The Joint Defense Group further agrees that this paragraph is not intended to limit the rights or remedies of the parties to this Agreement in any manner.

13. **Actions Between Members of the Joint Defense Group.** For avoidance of doubt, the Joint Defense Group's community of interest shall not include any claims, actions, proceedings or suits by any member of the Joint Defense Group against any other member of the Joint Defense Group.

14. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, and all counterparts taken together shall constitute one agreement. A telefax or PDF signature on a copy of this Agreement shall be deemed as effective and binding as if it were an original signature.

15. **Entire Agreement.** This Agreement constitutes the complete agreement of the Parties with respect to the subject matter hereto, and memorializes and supersedes any prior or written agreements, and applies to all prior and future communications and exchanges of Joint Defense Materials.

16. **Confidentiality of Agreement.** This Agreement and its terms are confidential and may not be produced or disclosed in discovery or offered in evidence in any proceedings, for any purpose, except to prove its existence and the agreement of the Parties hereto.

IN WITNESS THEREOF, the parties hereto have executed this Agreement as of the date and year first written above.

Problem 14-2
Explain joint defense agreements to your client Shirley and advise her on whether she should consent to enter into a JDA in her matter.

E. Waiver and Prosecutorial Discretion

There was a major controversy over prosecutors' handling of the corporate attorney-client privilege between roughly 2002 and 2008—specifically, a DOJ practice of requesting or expecting waiver as part of credit for cooperation. The controversy has since quieted but has not disappeared. The following two cases provide examples of the possible issues that attorneys may face when balancing the need to protect privileged information with the benefits of cooperation with enforcement authorities. The first case, which involved an individual prosecution following an FCPA investigation, also includes a helpful restatement of privilege law. Bear in mind that these are both decisions of judges in district court. The specific waiver issues they raise have not yet been addressed in detail by a federal appellate court and the D.C. Circuit's decision in the *KBR* decisions above indicate at least that court's support for a strong corporate privilege.

UNITED STATES v. COBURN, 2022 WL 357217 (D. N.J.)

McNULTY, United States District Court Judge:

A [] limit on what may be obtained by [a pretrial subpoena under Rule 17] is a legitimate claim of privilege that is not waived. Here, the relevant privileges are the attorney-client privilege and the work product doctrine.

The Third Circuit has stated that the attorney-client privilege applies only 1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

In re Grand Jury Investigation.

The party asserting the attorney-client privilege bears the burden to show that it applies. *See In re Grand Jury Empaneled Feb. 14, 1978*. “Because the attorney-client privilege obstructs the truth-finding process, it is construed narrowly” and “protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege.” *Westinghouse Elec. Corp. v. Republic of Philippines*; see also *Fisher v. United States* (“[S]ince the privilege has the effect of withholding relevant information from the fact-finder, . . . it protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege”). Moreover, the privilege guards only against the disclosure of the protected

communication, not against disclosure of facts underlying those communications. *See Upjohn Co. v. United States*.

The attorney-client privilege unquestionably applies to both corporations and individuals. *See Upjohn*; *Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp.* However, because “a corporation must act through its agents,” adjudicating claims of privilege “in the case of corporations . . . presents special problems.” *Id.* (quoting *Commodity Futures Trading Comm’n v. Weintraub*). The privilege will extend to the communications of a corporation’s management and employees when doing so would give effect to the purposes of the privilege, *see Upjohn*, and is “equally available to a corporation’s in-house counsel.” *Leonen v. Johns-Manville* (citing *Hasso v. Retail Credit Company* and *International Telephone and Telegraph Corporation v. United Telephone Company of Florida*). However, the privilege’s protections vanish where the communication is not in furtherance of the securing of *legal* advice. Advice that is predominantly concerned with corporate business, technical issues, or public relations is not protected. *See e.g., Dejewski v. Nat’l Beverage Corp.; Louisiana Mun. Police Emps. Ret. Sys. v. Sealed Air Corp.*

The work product doctrine safeguards documents from discovery where such documents are “materials prepared or collected by an attorney ‘in the course of preparation for possible litigation.’” *In re Grand Jury Investigation* (quoting *Hickman v. Taylor*); *see also* Fed. R. Civ. P. 26(b)(3) (“Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative”). The party asserting work product protection bears the burden of showing that the doctrine applies. *See Conoco, Inc. v. U.S. Dep’t of Justice*. Courts in this Circuit have generally applied a two-pronged inquiry for determining whether a document should be protected under the work-product doctrine—first, looking to whether “litigation could reasonably have been anticipated” at the time the document was made, and second, looking to whether the document was “prepared or obtained because of the prospect of litigation.” *In re Gabapentin Patent Litig.* Documents created in the ordinary course of business are not protected by the work-product doctrine. Since, like other privileges, work product protections may “obstruct the search for truth,” both it and the attorney-client privilege “should be recognized only when necessary to achieve their respective purposes.” *In re Chevron Corp.*

Although disclosure of ostensibly privileged communications to a third party “has long been considered inconsistent with an assertion of the privilege,” a waiver of attorney-client privilege does not necessarily constitute a waiver of work product protection, or vice versa. *See Westinghouse*. Generally, the attorney-client privilege aims to promote frank, honest communication between client and lawyer, and it is thus waived when a client discloses otherwise privileged communications to a third party. Such third-party disclosures usually imply that the clients “would also have divulged [the information] to their attorneys, even without the protection of the privilege,” and thus that “the basic justification for the privilege no longer applies.” On the other hand, however, where

such “disclosure to a third party is necessary for the client to obtain informed legal advice,” such disclosure will not trigger a waiver of the privilege.

For work product protections to be waived, disclosure to a third party must be such as would “enable an adversary to gain access to the information.” Such disclosure inherently negates the secrecy rationale of these protections, i.e., to guard “the confidentiality of papers prepared by or on behalf of attorneys in anticipation of litigation” and “enabl[e] attorneys to prepare cases without fear that their work product will be used against their clients.” *Id.* (citing *Hickman*). . . .

If there is a waiver, the court must determine its scope. “When a disclosure waives privilege or work-product protection, that waiver will extend to undisclosed documents or communications if: 1) the waiver is intentional; 2) the disclosed and undisclosed communications or information concern the same subject matter; and 3) they ought in fairness be considered together.” *Shire LLC v. Amneal Pharms.* (citing Fed. R. Evid. 502(a) (providing for subject matter waiver “[w]hen the disclosure is made . . . to a federal office or agency”). This “subject matter waiver” is most often found by courts in this District “when the privilege-holder has attempted to use the privilege as both ‘a sword’ and ‘a shield’ or when the party attacking the privilege will be prejudiced at trial.” *Id.* (quoting *Koch Materials Company v. Shore Slurry Seal, Inc.*); *see also Westinghouse* (noting that where a partial waiver disadvantages the disclosing party’s adversary “by, for example, allowing the disclosing party to present a one-sided story to the court, the privilege will be waived as to all communications on the same subject”). . . .

Defendants argue that Cognizant [the corporation] has improperly withheld or redacted documents, including those concerning conversations in which Schwartz allegedly authorized the payment of bribes, claiming attorney-client privilege. Such documents, according to Defendants, “may contain facts or material unrelated to the provision of legal advice,” and in any event, any privilege was waived by Cognizant’s disclosure of these documents to the Government. Indeed, they claim that Cognizant has waived any privilege regarding the entire subject of Cognizant’s internal investigation and must also disclose documents revealing all statements made by Cognizant employees describing conversations with Schwartz related to this investigation. Cognizant maintains that it properly asserted attorney-client privilege over documents containing legal advice or otherwise within the permissible ambit of the privilege. Moreover, it urges that it did not effectuate a subject matter waiver of attorney client privilege over the entire internal investigation simply by cooperating with DOJ or disclosing portions of investigative documents.

The first category in dispute consists of Cognizant’s draft press releases and public disclosures. I agree with Defendants that these materials were not created for the predominant purpose of obtaining legal advice, or in order to prepare for litigation. *See In re Grand Jury Investigation*. Instead, they fall squarely within the type of non-legal, business or public relations advice that are not privileged. *See Fisher; Westinghouse*.

Similarly, Cognizant's communications with public relations firms Finsbury and CLS Strategies concerning "public disclosure, communications, potential litigation and related legal strategy" relevant to Cognizant's internal investigation are not protected by either privilege because they bear too tenuous a connection to the provision of legal advice or confidential preparations for litigation. *See e.g., Dejewski; Louisiana Mun. Police Emps. Ret. Sys.*

A second disputed category of documents consists of Cognizant's records pertaining to document retention and collection policies. Documents relating to legal advice concerning the formulation of such policies are facially privileged and will not be produced. More generally, Cognizant represents that certain records were made when Cognizant was facing criminal and civil liability in connection with the allegations against Defendants. According to Cognizant, they include (1) communications among Cognizant's executives, in-house counsel, and outside counsel; and (2) litigation hold memoranda and other documents that relate to the areas to be investigated and the custodians and document sources to be searched. Such records clearly pertain to litigation strategy and the provision of legal advice in advance of litigation, and were created at a time when litigation was reasonably anticipated. Thus, Cognizant's assertion of attorney client and work product privilege over them is proper. *See Upjohn; Leonen; In re Gabapentin Patent Litig.*

A caveat: I will require that the document retention policies themselves, and the dates of their promulgation, be produced, as they do not bear the earmarks of privilege and are relevant to understanding the document production itself.

A third disputed category consists of Cognizant's communications with the accounting firm E&Y concerning Cognizant's internal investigation and related updates given to the Board of Directors, DOJ, and SEC are closely related to the provision of legal advice. Indeed, the nature of the allegations against Defendants and the scope of Cognizant's internal investigation would understandably make accounting expertise vital to any law firm representing Cognizant. *See United States v. Kovel* (holding that a client's communications to an accountant employed by the client's attorney were reasonably related to the legal representation and remained privileged). As to those communications, the privilege is appropriately asserted.

A fourth, more general category consists of Cognizant's internal investigation. As to the existence of the privilege as such, this category is less controversial; by its nature it consists of attorneys' fact gathering for the purpose of rendering legal advice. Here, the real issue is the scope of any waiver of the privilege.

I next turn to Defendants' argument that Cognizant effected a subject matter waiver over broad categories of documents—namely, any communications regarding conduct alleged in the indictment and any materials related to Cognizant's internal investigation—by disclosing a summary of its investigation's findings to DOJ. While Defendants characterize this waiver too expansively, I agree that there was a significant waiver here.

To begin with, Cognizant may not now claim privilege over materials that it furnished to the Government. These disclosures, referred to as the “DLA Downloads” in the parties’ briefing, consist of “detailed accounts of 42 interviews of 19 Cognizant employees, including Defendants.” By disclosing this information to the Government while under threat of prosecution, Cognizant handed these materials to a potential adversary and destroyed any confidentiality they may have had, undermining the purpose of both attorney-client and work-product privileges. *See Chevron* (holding that “purposeful disclosure of [] purportedly privileged material to a third-party” may waive attorney-client and work product privileges “if that disclosure undermines the purpose behind each privilege”).

The next question concerns the breadth of the waiver. Cognizant’s voluntary turnover of materials or revelation of the fruits of its investigation to the DOJ also entailed a waiver of the privilege as to communications that “concern the same subject matter” and “ought in fairness be considered together” with the actual disclosures to DOJ. *Shire LLC v. Amneal Pharms.* (citing Fed. R. Evid. 502(a)).

First, to the extent that summaries of interviews were conveyed to the government, whether orally or in writing, the privilege is waived as to all memoranda, notes, summaries, or other records of the interviews themselves. Second, to the extent the summaries directly conveyed the contents of documents or communications, those underlying documents or communications themselves are within the scope of the waiver. Third, the waiver extends to documents and communications that were reviewed and formed any part of the basis of any presentation, oral or written, to the DOJ in connection with this investigation. . . .

SEC v. HERRERA, 2017 WL 6041750 (S.D. Fla. Dec. 5, 2017)

GOODMAN, United States Magistrate Judge:

This Order concerns the legal consequences, if any, which arise when a major law firm conducting an internal corporate investigation into its client’s financial and business activities produces what the parties here call “oral downloads” of witness interview notes and memoranda to the regulatory agency investigating its client. To be more specific, the primary issue addressed here (but there are other issues, as well) is whether that law firm waived work product protection when it voluntarily gave the Securities and Exchange Commission oral summaries of the work product notes and memoranda its attorneys prepared about interviews of its client’s executives and employees. The memoranda and notes summarize the relevant portions of the witness interviews (or at least what the attorney participating in the interview deemed to be relevant enough to include in these materials).

Because there is little or no substantive distinction for waiver purposes between the actual physical delivery of the work product notes and memoranda and reading or orally summarizing the same written material’s meaningful substance to one’s legal adversary, the Undersigned concludes that the Morgan Lewis & Bockius LLP law firm (“ML”)

waived work product protection and must provide to Defendants the interview notes and memoranda that were orally downloaded. To that extent, the Undersigned grants Defendants' motion to compel against ML. The waiver, however, is *limited* to only the witnesses whose interview notes and memoranda were orally provided, which is far less than all the witnesses ML interviewed.

In addition, the Undersigned rejects Defendants' additional argument that ML should produce to them *all* the witness-interview notes and memoranda on the ground that ML also provided all witness-interview notes and memoranda to its client's auditor, Deloitte & Touche ("Deloitte"). The Undersigned finds persuasive those cases holding that disclosure of work product information to an auditor does not generate a waiver.

Unlike the SEC, Deloitte is not the adversary of ML's client, General Cable Corp. ("GCC"), the publicly-traded company being investigated. As such, the Undersigned is not persuaded by Defendants' argument that the accounting firm is actually an adversary (based on the theory that Deloitte was worried that the SEC was also investigating its auditing services, and therefore had motive to suggest that GCC did not timely and fully provide accurate information for the financial statements that needed to be restated and which led to a hefty fine against GCC by the SEC). So the Undersigned denies that portion of the motion to compel.

Finally, the Undersigned also rejects the defense argument that additional work product material should be provided because Defendants have a substantial need for it. Under the present circumstances, that is an inadequate ground to compel production of additional work-product information, especially attorney work-product memoranda. The Undersigned therefore denies that portion of the motion to compel as well.

The SEC filed its lawsuit against Mathias Francisco Sandoval Herrera, Maria D. Cidre, and another defendant who entered into a consent judgment with the SEC shortly after the lawsuit was filed. Herrera was the CEO and Cidre was the CFO of GCC's Latin American operation. The Complaint is based on allegations that Herrera and Cidre concealed the manipulation of accounting systems at the Brazilian operations of GCC, a global manufacturer of wire and cable products. The lawsuit alleges that Defendants hid from GCC's executive management material inventory accounting errors at GCC's Brazilian subsidiary, including the overstatement of inventory. . . .

The origins of the specific discovery dispute date back to late 2012, when GCC retained ML to provide legal advice concerning accounting errors at the Brazilian subsidiary. ML conducted an internal investigation, which included interviewing dozens of GCC personnel. ML attorneys then prepared notes and memoranda about those interviews. According to Defendants, "many" of the witnesses were interviewed "live" in Brazil.

After ML disclosed in November 2012 to the SEC that it was conducting an investigation of GCC's accounting errors, the SEC began its own investigation of the company. In doing so, it issued several requests to GCC. In response, GCC produced documents,

including e-mail communications to and from Defendants and the persons who ML interviewed.

The SEC also asked for the investigative findings, and ML provided the SEC with information about its findings, including a presentation prepared for the SEC and information about specific witness interviews, which were provided orally. An April 15, 2013 PowerPoint presentation that ML made to the SEC contained, among other things, an events timeline, the names of witnesses whom ML had already interviewed, a breakdown of the transactions deemed to be at the heart of the accounting discrepancy, and the results of its investigation. This 28-page PowerPoint presentation is now in the public record of this lawsuit, as Defendants filed it as an exhibit to their motion. The cover page of the ML-produced PowerPoint says “FOIA Confidential Treatment Request,” however.

On October 29, 2013, ML attorneys met with SEC staff and provided oral downloads of 12 witness interviews.

In addition, during the investigation, Deloitte asked for information from ML about its investigative steps and findings, including information obtained through ML-conducted witness interviews. ML provided Deloitte with the information and says that it did so because it believed “Deloitte would keep it confidential, consistent with Deloitte’s professional obligations to its client [GCC].” Although ML provided the SEC with oral downloads of only 12 witness interviews, it provided Deloitte with information about all the interviews notes and memoranda. It appears as though this was accomplished through the reading (by an ML attorney) of memoranda and interview notes to Deloitte and generalized “access” to review interview notes selected by Deloitte’s investigative team. . . .

The party claiming work product immunity (which is ML in this dispute) has the burden to establish the claimed protection. *Hinchee*. There is no dispute here that the notes and memoranda prepared by ML attorneys are in fact work product material. Rather, the dispute is over the *waiver* of the work-product doctrine protection.

Although the party seeking work-product protection bears the initial burden for establishing that the documents are entitled to such protection, after that initial burden is met, the burden shifts to the party asserting waiver to show that the party claiming the privilege has waived its right to do so. *Mitsui Sumitomo Ins. Co. v. Carbel, LLC*. In the context of work product, the question is not, as in the case of the attorney-client privilege, *whether* confidential communications are disclosed, but *to whom* the disclosure is made—because the protection is designed to protect an attorney’s mental processes from discovery by *adverse* parties. *See generally Jordan v. U.S. Dep’t of Justice*. . . .

The SEC was the adversary of ML’s client, GCC. The SEC was investigating GCC for alleged misstatements in its financial reports submitted as a public company and eventually imposed a \$6.5 million civil penalty against it. And it does not appear as though ML takes the position that the SEC was not an adversary, as it explains in its

response that “Morgan Lewis does not contend that [GCC] and the SEC shared a common interest[.]”

So the Undersigned easily concludes that the disclosure to the SEC was one made to an adversary. . . .

ML contends that no waiver occurred, however, because it never actually produced the notes and memoranda of the witness interviews to the SEC. ML argues that there is a meaningful distinction between the actual production of a witness interview note or memo and providing the same or similar information *orally*. The Undersigned is not convinced. *See S.E.C. v. Vitesse Semiconductor Corp.* (“While it is undisputed that NuHo did not actually produce the notes themselves to the SEC, after reviewing the SEC’s notes the Court found that NuHo effectively produced these notes to the SEC through its oral summaries.”); *S.E.C. v. Berry* (finding waiver of privilege in interview memoranda for five witnesses where attorneys orally disclosed to the SEC facts contained in the interviews); *S.E.C. v. Roberts* (“to the extent that Howrey orally disclosed to the government factual information contained in any of the written material identified by Roberts, Howrey has waived the attorney-client and work product privileges with respect to that information.”).

ML does not contend that it provided only vague references of the witness notes and memoranda to the SEC, nor does it argue that only detail-free conclusions or general impressions were orally provided. To the contrary, it factually concedes that its attorneys provided oral downloads of the substance of the 12 witness interview notes. . . .

ML also argues that Defendants’ claim—that they seek to “level the playing field”—is an argument which “rings hollow” because “the SEC does not have what the Defendants are seeking.” But that is an incomplete argument. Yes, it is true that the SEC does not have the *actual* witness notes and memoranda—but it has the functional equivalent of them by receiving the oral summaries of the interview materials. The cases discussed above reject this crabbed theory. *See, e.g., Vitesse Semiconductor.* . . .

After describing Defendants’ motion concerning the purported waiver by production to Deloitte as based on “scant facts,” ML then explains that it does not contest that it read interviews notes and memoranda to Deloitte for purposes of this motion. According to its response memorandum, 38 witnesses were interviewed. ML’s argument here is different from the argument it made for the materials provided to the SEC; it contends that even the actual physical production of work product to a company’s auditors does not waive work-product protection because an independent or outside auditor typically shares a common interest with the corporation for purpose of the work product and waiver doctrines.

The Undersigned agrees with ML that documents shared with Deloitte are protected from disclosure. *See United States v. Deloitte LLP* (holding that documents disclosed to Deloitte by client did not waive work product protection); *In re Weatherford Int’l Sec. Litig.* (“Ernst & Young functioned as Weatherford’s outside auditor. In this circuit,

disclosure to an outside auditor does not generally waive work product protection.”); *see also Regions Fin. Corp. v. United States* (finding same, because “E & Y was an independent auditor [and] not a potential adversary of Regions.”); *Gutter v. E.I. Dupont de Nemours & Co.* (“Transmittal of documents to a company’s outside auditors does not waive the work product privilege because such a disclosure cannot be said to have posed a substantial danger at the time that the document would be disclosed to plaintiffs.”).

In their motion, Defendants say that there is a “split” on the legal consequences arising from disclosures to a corporation’s accountants or auditors but then concede that “the majority” of courts hold that auditing and accounting firms typically do share a common interest. Nevertheless, they have crafted a theory to distinguish the precedent adopting the common-interest approach: they say that Deloitte “itself was on the SEC’s radar and entered into a tolling agreement with the SEC regarding its own conduct.” Therefore, Defendants argue, Deloitte was a “*potential* adversary” to GCC “because Deloitte was motivated to claim that GCC personnel had misled Deloitte regarding the accounting practices at GCC.”

The Undersigned is not persuaded by this effort to treat Deloitte differently from those cases that hold that an outside auditor has a common interest with the corporation for work-product waiver issues. First, the SEC never brought an enforcement action against Deloitte concerning this investigation.

Second, the SEC’s request for a tolling agreement with Deloitte occurred ten months after ML shared the results of its interviews with Deloitte.

Third, Defendants have not adequately established that ML or GCC knew at the time the witness interview materials were shared with Deloitte that the SEC was interested in a tolling agreement with Deloitte.

Fourth, Defendants have not cited any legal authority, binding or otherwise, to support the notion that a common interest disappears under factually analogous scenarios.

And fifth, even if Deloitte was a potential adversary on *that* issue, it still had a common interest for *other* purposes. *See generally Visual Scene, Inc. v. Pilkington Bros., plc.* (noting that “common interests exception applies where the parties, although nominally aligned on the same side of the case, are antagonistic as to some issues, but united as to others” and holding that both attorney-client privileged and work product-protected information exchanged between parties retained status under common interest doctrine even though the parties “in another respect” were “adversaries in the litigation and aligned as plaintiff and defendant respectively”). . . .

Although this Order compels ML to produce to Defendants the witness interview notes and memoranda for the 12 witnesses flagged in Defendants’ motion, Defendants also argue that they are entitled to *all* of the material because they have a substantial need for it.

According to Defendants' motion, ML has pledged to continue to assist *only* the SEC—but not Defendants—by making witnesses, including current and former GCC employees whom ML represents, available for further interviews and testimony in the United States, without regard for territorial limits. And Defendants similarly contend that, armed with ML's prior disclosures and ongoing cooperation, the SEC can cherry-pick which witnesses to call and which to avoid and ML's counsel can prepare those witnesses to testify with the benefit of a panoramic view of what all witnesses previously stated.

In the same vein, Defendants also say that the SEC is similarly advantaged with regard to the Deloitte witnesses by having access to the ML interviews, and therefore, having knowledge of what all witnesses previously stated. They note that many of the witnesses are in Brazil, which means that they have no workable alternative to interview them other than letters rogatory, which they say is time-consuming and likely to be unhelpful (because, for example, they must submit the questions in advance and be only observers in a judge-conducted questioning procedure). And they express concern over the fact that the witnesses' memories have faded—and that the interview notes and memoranda from a few years ago would be more accurate and helpful.

The Undersigned is not persuaded.

First, ML points out that Defendants have all of the 400,000-plus documents which GCC produced to the SEC, including contemporaneous e-mail communications among the witnesses at issue, which can be used to refresh recollections. Second, if the letters-rogatory process does in fact take longer than a traditional deposition, then Defendants can seek appropriate extensions of time. Third, and perhaps most importantly, Defendants are seeking the additional disclosure of attorney work product, which is entitled to heightened protection.

An attorney's notes and memoranda of interviews performed in the course of an internal investigation are "classic attorney work product." *See, e.g., Hickman v. Taylor* ("the privacy of an attorney's course of preparation is . . . essential to an orderly working of our system of legal procedure[.]"). Therefore, as the Supreme Court has explained, "Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes[.]" *Upjohn Co. v. United States*.

"Substantial need cannot be overcome simply with an argument that documents are relevant and will assist in bolstering a party's affirmative defenses." *Beaubrun v. GEICO Gen. Ins. Co.* And courts must not allow parties to claim substantial need as a means to "short-cut" preparation of cases. *See Stern*.

ML waived work-product protection for the witnesses whose interview notes and memoranda its attorneys disclosed to the SEC in the so-called "oral downloads." Defendants advise that "at least twelve" interview memos were orally relayed, so the Undersigned is using that number, as well. If it turns out that ML provided information

to the SEC about other witness interviews besides the 12 already identified, then it shall disclose to Defendants the additional notes and memoranda. ML shall provide the notes and memoranda within 7 days of this Order. . . .

Bottom line for now, alas: it is not entirely clear how much a company can disclose in the name of cooperation before the privilege is waived. DOJ used to routinely request waivers of the privilege in corporate criminal investigations. Now it doesn't ask anymore, at least not explicitly. Defense counsel sometimes complain that waiver is still expected and rewarded. What are the legitimate interests here of both firms and the government? How should they be balanced? Consider what DOJ's policy on waiver, which is set out in the Justice Manual excerpt below, means in light of the law of attorney-client privilege and waiver as detailed in this Chapter.

U.S. DEPARTMENT OF JUSTICE, JUSTICE MANUAL, SECTION 9-28.000. PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS (Excerpts)

9-28.700. The Value of Cooperation

Cooperation is a mitigating factor, by which a corporation—just like any other subject of a criminal investigation—can gain credit in a case that otherwise is appropriate for indictment and prosecution. Of course, the decision not to cooperate by a corporation (or individual) is not itself evidence of misconduct, at least where the lack of cooperation does not involve criminal misconduct or demonstrate consciousness of guilt (*e.g.*, suborning perjury or false statements, or refusing to comply with lawful discovery requests). Thus, failure to cooperate, in and of itself, does not support or require the filing of charges with respect to a corporation any more than with respect to an individual.

A. General Principle: In order for a company to receive any consideration for cooperation under this section, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about the individuals involved, its cooperation will not be considered a mitigating factor under this section. Nor, if a company is prosecuted, will the Department support a cooperation-related reduction at sentencing. *See* U.S.S.G. § 8C2.5(g), cmt. (n.13) (“A prime test of whether the organization has disclosed all pertinent information” necessary to receive a cooperation-related reduction in its offense level calculation “is whether the information is sufficient . . . to identify . . . the individual(s) responsible for the criminal conduct.”). If a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible for consideration for cooperation credit. To be clear, a company is not required to waive its attorney-client privilege and attorney work product protection in order satisfy this threshold. *See* USAM 9-28.720. The extent of the cooperation credit earned will depend on all the various factors that have traditionally applied in making this assessment (*e.g.*,

the timeliness of the cooperation, the diligence, thoroughness and speed of the internal investigation, and the proactive nature of the cooperation).

B. Comment: In investigating wrongdoing by or within a corporation, a prosecutor may encounter several obstacles resulting from the nature of the corporation itself. It may be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a corporation's cooperation may be critical in identifying potentially relevant actors and locating relevant evidence, among other things, and in doing so expeditiously.

This dynamic—*i.e.*, the difficulty of determining what happened, where the evidence is, and which individuals took or promoted putatively illegal corporate actions—can have negative consequences for both the government and the corporation that is the subject or target of a government investigation. More specifically, because of corporate attribution principles concerning actions of corporate officers and employees, *see* USAM 9.28-210, uncertainty about who authorized or directed apparent corporate misconduct can inure to the detriment of a corporation. For example, it may not matter under the law which of several possible executives or leaders in a chain of command approved of or authorized criminal conduct; however, that information if known might bear on the propriety of a particular disposition short of indictment of the corporation. It may not be in the interest of a corporation or the government for a charging decision to be made in the absence of such information, which might occur if, for example, a statute of limitations were relevant and authorization by any one of the officials were enough to justify a charge under the law. Moreover, a protracted government investigation of such an issue could disrupt the corporation's business operations or even depress its stock price.

For these reasons and more, cooperation can be a favorable course for both the government and the corporation. Cooperation benefits the government by allowing prosecutors and federal agents, for example, to avoid protracted delays, which compromise their ability to quickly uncover and address the full extent of widespread corporate crimes. With cooperation by the corporation, the government may be able to reduce tangible losses, limit damage to reputation, and preserve assets for restitution. At the same time, cooperation may benefit the corporation—and ultimately shareholders, employees, and other often blameless victims—by enabling the government to focus its investigative resources in a manner that will not unduly disrupt the corporation's legitimate business operations. In addition, cooperation may benefit the corporation by presenting it with the opportunity to earn credit for its efforts.

The requirement that companies cooperate completely as to individuals does not mean that Department attorneys should wait for the company to deliver the information about

individual wrongdoers and then merely accept what companies provide. To the contrary, Department attorneys should be proactively investigating individuals at every step of the process—before, during, and after any corporate cooperation. Department attorneys should vigorously review any information provided by companies and compare it to the results of their own investigation, in order to best ensure that the information provided is indeed complete and does not seek to minimize the behavior or role of any individual or group of individuals.

Department attorneys should strive to obtain from the company as much information as possible about responsible individuals before resolving the corporate case. In addition, the company's continued cooperation with respect to individuals may be necessary post-resolution. If so, the corporate resolution agreement should include a provision that requires the company to provide information about all individuals involved and that is explicit enough so that a failure to provide the information results in specific consequences, such as stipulated penalties and/or a material breach. . . .

9-28.710. Attorney-Client and Work Product Protections

The attorney-client privilege and the attorney work product protection serve an extremely important function in the American legal system. The attorney-client privilege is one of the oldest and most sacrosanct privileges under the law. *See Upjohn v. United States*. As the Supreme Court has stated, “[i]ts purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” The value of promoting a corporation's ability to seek frank and comprehensive legal advice is particularly important in the contemporary global business environment, where corporations often face complex and dynamic legal and regulatory obligations imposed by the federal government and also by states and foreign governments. The work product doctrine serves similarly important goals.

For these reasons, waiving the attorney-client and work product protections has never been a prerequisite under the Department's prosecution guidelines for a corporation to be viewed as cooperative. Nonetheless, a wide range of commentators and members of the American legal community and criminal justice system have asserted that the Department's policies have been used, either wittingly or unwittingly, to coerce business entities into waiving attorney-client privilege and work-product protection. Everyone agrees that a corporation may freely waive its own privileges if it chooses to do so; indeed, such waivers occur routinely when corporations are victimized by their employees or others, conduct an internal investigation, and then disclose the details of the investigation to law enforcement officials in an effort to seek prosecution of the offenders. However, the contention, from a broad array of voices, is that the Department's position on attorney-client privilege and work product protection waivers has promoted an environment in which those protections are being unfairly eroded to the detriment of all.

The Department understands that the attorney-client privilege and attorney work product protection are essential and long-recognized components of the American legal system. What the government seeks and needs to advance its legitimate (indeed, essential) law enforcement mission is not waiver of those protections, but rather the facts known to the corporation about the putative criminal misconduct under review. In addition, while a corporation remains free to convey non-factual or “core” attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so. The critical factor is whether the corporation has provided the facts about the events, as explained further herein.

9-28.720. Cooperation: Disclosing the Relevant Facts

Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection. Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant *facts* concerning such misconduct. In this regard, the analysis parallels that for a non-corporate defendant, where cooperation typically requires disclosure of relevant factual knowledge and not of discussions between an individual and his attorneys.

Thus, when the government investigates potential corporate wrongdoing, it seeks the relevant facts. For example, how and when did the alleged misconduct occur? Who promoted or approved it? Who was responsible for committing it? In this respect, the investigation of a corporation differs little from the investigation of an individual. In both cases, the government needs to know the facts to achieve a just and fair outcome. The party under investigation may choose to cooperate by disclosing the facts, and the government may give credit for the party’s disclosures. If a corporation wishes to receive credit for such cooperation, which then can be considered with all other cooperative efforts and circumstances in evaluating how fairly to proceed, then the corporation, like any person, must disclose the relevant facts of which it has knowledge.

(a) Disclosing the Relevant Facts—Facts Gathered Through Internal Investigation

Individuals and corporations often obtain knowledge of facts in different ways. An individual knows the facts of his or others’ misconduct through his own experience and perceptions. A corporation is an artificial construct that cannot, by definition, have personal knowledge of the facts. Some of those facts may be reflected in documentary or electronic media like emails, transaction or accounting documents, and other records. Often, the corporation gathers facts through an internal investigation. Exactly how and by whom the facts are gathered is for the corporation to decide. Many corporations choose to collect information about potential misconduct through lawyers, a process that may confer attorney-client privilege or attorney work product protection on at least some of the information collected. Other corporations may choose a method of fact-gathering that does not have that effect—for example, having employee or other witness statements collected after interviews by non-attorney personnel. Whichever process the

corporation selects, the government's key measure of cooperation must remain the same as it does for an individual: has the party timely disclosed the relevant facts about the putative misconduct? That is the operative question in assigning cooperation credit for the disclosure of information—*not* whether the corporation discloses attorney-client or work product materials. Accordingly, a corporation should receive the same credit for disclosing facts contained in materials that are not protected by the attorney-client privilege or attorney work product as it would for disclosing identical facts contained in materials that are so protected. On this point the Report of the House Judiciary Committee, submitted in connection with the attorney-client privilege bill passed by the House of Representatives (H.R. 3013), comports with the approach required here:

[A]n . . . attorney of the United States may base cooperation credit on the facts that are disclosed, but is prohibited from basing cooperation credit upon whether or not the materials are protected by attorney-client privilege or attorney work product. As a result, an entity that voluntarily discloses should receive the same amount of cooperation credit for disclosing facts that happen to be contained in materials not protected by attorney-client privilege or attorney work product as it would receive for disclosing identical facts that are contained in materials protected by attorney-client privilege or attorney work product. There should be no differentials in an assessment of cooperation (*i.e.*, neither a credit nor a penalty) based upon whether or not the materials disclosed are protected by attorney-client privilege or attorney work product.

H.R. Rep. No. 110-445 (2007).

In short, the company may be eligible for cooperation credit regardless of whether it chooses to waive privilege or work product protection in the process, if it provides all relevant facts about the individuals who were involved in the misconduct. But if the corporation does not disclose such facts, it will not be entitled to receive any credit for cooperation.

Two final and related points bear noting about the disclosure of facts, although they should be obvious. First, the government cannot compel, and the corporation has no obligation to make, such disclosures (although the government can obviously compel the disclosure of certain records and witness testimony through subpoenas). Second, a corporation's failure to provide relevant information about individual misconduct alone does not mean the corporation will be indicted. It simply means that the corporation will not be entitled to mitigating credit for that cooperation. Whether the corporation faces charges will turn, as it does in any case, on the sufficiency of the evidence, the likelihood of success at trial, and all of the other factors identified in USAM 9-28.300. If there is insufficient evidence to warrant indictment, after appropriate investigation has been completed, or if the other factors weigh against indictment, then the corporation should not be indicted, irrespective of whether it has earned cooperation credit. The converse is also true: The government may charge even the most cooperative corporation pursuant

to these Principles if, in weighing and balancing the factors described herein, the prosecutor determines that a charge is required in the interests of justice. Put differently, even the most sincere and thorough effort to cooperate cannot necessarily absolve a corporation that has, for example, engaged in an egregious, orchestrated, and widespread fraud. Cooperation is a potential mitigating factor, but it alone is not dispositive.

(b) Legal Advice and Attorney Work Product

Separate from (and usually preceding) the fact-gathering process in an internal investigation, a corporation, through its officers, employees, directors, or others, may have consulted with corporate counsel regarding or in a manner that concerns the legal implications of the putative misconduct at issue. Communications of this sort, which are both independent of the fact-gathering component of an internal investigation and made for the purpose of seeking or dispensing legal advice, lie at the core of the attorney-client privilege. Such communications can naturally have a salutary effect on corporate behavior—facilitating, for example, a corporation’s effort to comply with complex and evolving legal and regulatory regimes. Except as noted in subparagraphs (b)(i) and (b)(ii) below, a corporation need not disclose and prosecutors may not request the disclosure of such communications as a condition for the corporation’s eligibility to receive cooperation credit.

Likewise, non-factual or core attorney work product—for example, an attorney’s mental impressions or legal theories—lies at the core of the attorney work product doctrine. A corporation need not disclose, and prosecutors may not request, the disclosure of such attorney work product as a condition for the corporation’s eligibility to receive cooperation credit.

(i) Advice of Counsel Defense in the Instant Context

Occasionally a corporation or one of its employees may assert an advice-of-counsel defense, based upon communications with in-house or outside counsel that took place prior to or contemporaneously with the underlying conduct at issue. In such situations, the defendant must tender a legitimate factual basis to support the assertion of the advice-of-counsel defense. *See, e.g., Pitt v. Dist. of Columbia; United States v. Wenger; United States v. Cheek.* The Department cannot fairly be asked to discharge its responsibility to the public to investigate alleged corporate crime, or to temper what would otherwise be the appropriate course of prosecutive action, by simply accepting on faith an otherwise unproven assertion that an attorney—perhaps even an unnamed attorney—approved potentially unlawful practices. Accordingly, where an advice-of-counsel defense has been asserted, prosecutors may ask for the disclosure of the communications allegedly supporting it.

(ii) Communications in Furtherance of a Crime or Fraud

Communications between a corporation (through its officers, employees, directors, or agents) and corporate counsel that are made in furtherance of a crime or fraud are, under settled precedent, outside the scope and protection of the attorney-client privilege. See *United States v. Zolin*; *United States v. BDO Seidman, LLP*. As a result, the Department may properly request such communications if they in fact exist. . . .

For a thorough summary of the controversy over waiver of attorney-client privilege in corporate investigations, see Julie R. O’Sullivan, *Does DOJ’s Privilege Waiver Policy Threaten the Rationales Underlying the Attorney-Client Privilege and Work Product Doctrine? A Preliminary “No,”* 45 AM. CRIM. L. REV. 1237 (2008). O’Sullivan argues that corporations have pushed hard against the DOJ’s treatment of the privilege because Fourth and Fifth Amendment law leaves corporations, unlike individuals, legally unprotected in criminal investigations. Thus, the attorney-client privilege is the only doctrine remaining to afford some measure of informational protection or advantage in this high-stakes adversarial setting. It is also undeniable that the privilege is particularly important, including economically, to the corporate bar.

Problem 14-3

- (a) You work as an associate at the firm of BigLaw2. BigLaw2 has been retained by BigPharma to represent all of its employees in their initial contacts with the Department of Justice and the SEC, which have commenced an investigation of BigPharma for potential Foreign Corrupt Practices Act violations in connection with its operations in Vietnam. The BigLaw2 partner who landed the assignment for the firm has chosen you to handle the representation of Wally, a plant manager at BigPharma's main facility in Vietnam. The firm BigLaw1 represents BigPharma as a corporation and recommended that BigLaw2 be retained to represent the employees.

An initial interview of Wally with the SEC and DOJ is scheduled to take place in Washington at the DOJ offices. You accompany a jet-lagged Wally to the interview room that morning, in which—unusually, to say the least—you find three government lawyers, two FBI agents, and two lawyers from BigLaw1.

Wally turns to you and asks to speak to you in the hallway. You go outside and he says, "What is going on here? I'm totally confused about who is here and why, what my rights are, whom I should talk to, and what I should say. Please straighten me out!" Advise Wally and determine how to proceed. (You may have to ask everyone else at the meeting to go get a cup of coffee or two.)

- (b) Under English law, there are two privileges relevant to corporate investigations. One is the "legal advice privilege," which protects communications between corporate personnel and attorneys for the corporation for purposes of providing legal advice; it applies only to communications between counsel and those corporate personnel who can control the work of counsel (*i.e.*, it follows something akin to the "control test" rejected in *Upjohn*). The second is the "litigation privilege," which covers all communications between lawyers and corporate personnel for the purposes of preparing for litigation and similar proceedings; it applies only when it is "reasonably likely" that an action will be brought against the corporation. How might the scope of these privileges affect the investigation of corporate crime in the United Kingdom?
- (c) If you were representing a corporation before the DOJ in a major criminal investigation, how would you strategically advise the corporation to, on balance, (i) conduct a full and effective internal investigation, (ii) protect its attorney-client privilege to the maximum extent possible, and (iii) position itself to obtain the greatest possible credit for cooperation from the DOJ.

15. SIXTH AMENDMENT AND INDIVIDUALS

The Sixth Amendment to the U.S. Constitution guarantees the right to the assistance of counsel, which has been interpreted to mean “effective” counsel.

The right to effective counsel has been said to include: the right to an attorney of one’s choosing; the right to spend one’s own money (indeed, all of it), but not necessarily someone else’s money, on a defense; the right to have a defense paid for by the state if one is indigent; the right to conflict-free counsel—a right in which the public also has an interest; and the right to counsel who performs adequately under the Supreme Court’s decision in *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny. The last right is very important in street crime but rarely leads to litigation in white collar crime.

Representation rights are important to understand in the field of corporate crime principally because the corporation may have a role in individual representation in two ways: by paying for private counsel for employees; and by interacting directly with employees through lawyers who represent the corporation. Thus, the main issues in the corporate crime context relate to the funding of counsel and conflicts of interest. Access to corporate funding of counsel for employees may be afforded by statute and/or by employment contract—according, generally speaking, to whether one occupies a senior position in a large corporation—or may not be legally guaranteed but commonly provided as a matter of a corporation’s ordinary business practices.

A. Relevant Legal Provisions

These issues implicate several bodies of law, including the Sixth Amendment of the U.S. Constitution, state corporate codes (this chapter focuses on Delaware, as that is the leading jurisdiction for incorporation), and the ABA’s Model Rules of Professional Conduct, all provided below.

U.S. Constitution Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, **and to have the assistance of counsel for his defense.**

Delaware Code § 145

(a) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, or is or was serving at the request

of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with such action, suit or proceeding if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that the person's conduct was unlawful. . . .

(c) To the extent that a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b) of this section, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith. . . .

(e) Expenses (including attorneys' fees) incurred by an officer or director of the corporation in defending any civil, criminal, administrative or investigative action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the corporation as authorized in this section. Such expenses (including attorneys' fees) incurred by former directors and officers or other employees and agents of the corporation or by persons serving at the request of the corporation as directors, officers, employees or agents of another corporation, partnership, joint venture, trust or other enterprise may be so paid upon such terms and conditions, if any, as the corporation deems appropriate. . . .

(g) A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not the corporation would have the power to indemnify such person against such liability under this section. . . .

ABA Model Rules of Professional Conduct

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules. . . .

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include

the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement. . . .

Rule 1.9 Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. . . .

Rule 1.13 Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those

paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

B. Conflicts of Interest

In the following case, the Sixth Amendment right to an attorney of one's own choosing collides with the right to conflict-free counsel, which turns out to have a public interest dimension according to the Supreme Court. This problem often comes up in sophisticated federal criminal practice: A defendant wishes to have a particular lawyer who also happens to have a conflict, the prosecutor thinks that should not be allowed, and the court has to decide what to do. *Wheat* is the foundational case.

WHEAT v. UNITED STATES, 486 U.S. 153 (1988)

Chief Justice REHNQUIST delivered the opinion of the Court.

The issue in this case is whether the District Court erred in declining petitioner's waiver of his right to conflict-free counsel and by refusing to permit petitioner's proposed substitution of attorneys.

Petitioner Mark Wheat, along with numerous codefendants, was charged with participating in a far-flung drug distribution conspiracy. . . . Also charged in the conspiracy were Juvenal Gomez-Barajas and Javier Bravo, who were represented in their criminal proceedings by attorney Eugene Iredale. Gomez-Barajas was tried first and was acquitted on drug charges overlapping with those against petitioner. To avoid a second trial on other charges, however, Gomez-Barajas offered to plead guilty to tax evasion and illegal importation of merchandise. . . .

At the conclusion of Bravo's guilty plea proceedings on August 22, 1985, Iredale notified the District Court that he had been contacted by petitioner and had been asked to try petitioner's case as well.

. . . [T]he Government objected to petitioner's proposed substitution on the ground that Iredale's representation of Gomez-Barajas and Bravo created a serious conflict of interest. The Government's position was premised on two possible conflicts. First, the District Court had not yet accepted the plea and sentencing arrangement negotiated between Gomez-Barajas and the Government; in the event that arrangement were rejected by the court, Gomez-Barajas would be free to withdraw the plea and stand trial. He would then be faced with the prospect of representation by Iredale, who in the meantime would have acted as petitioner's attorney. Petitioner, through his participation in the drug distribution scheme...was thus likely to be called as a witness for the Government at any subsequent trial of Gomez-Barajas. This scenario would pose a conflict of interest for Iredale, who would be prevented from cross-examining petitioner and thereby from effectively representing Gomez-Barajas.

Second, and of more immediate concern, Iredale's representation of Bravo would directly affect his ability to act as counsel for petitioner. . . . [T]he Government contacted Iredale and asked that Bravo be made available as a witness to testify against petitioner, and agreed in exchange to modify its position at the time of Bravo's sentencing. In the likely event that Bravo were called to testify, Iredale's position in representing both men would become untenable, for ethical proscriptions would forbid him to cross-examine Bravo in any meaningful way. By failing to do so, he would also fail to provide petitioner with effective assistance of counsel. Thus, because of Iredale's prior representation of Gomez-Barajas and Bravo and the potential for serious conflict of interest, the Government urged the District Court to reject the substitution of attorneys.

In response, petitioner emphasized his right to have counsel of his own choosing and the willingness of Gomez-Barajas, Bravo, and petitioner to waive the right to conflict-free counsel. Petitioner argued that the circumstances posited by the Government that would create a conflict for Iredale were highly speculative and bore no connection to the true relationship between the co-conspirators. If called to testify, Bravo would simply say that he did not know petitioner and had no dealings with him; no attempt by Iredale to impeach Bravo would be necessary. Further, in the unlikely event that Gomez-Barajas went to trial on the charges of tax evasion and illegal importation, petitioner's lack of involvement in those alleged crimes made his appearance as a witness highly improbable. Finally, and most importantly, all three defendants agreed to allow Iredale to represent petitioner and to waive any future claims of conflict of interest. In petitioner's view, the Government was manufacturing implausible conflicts in an attempt to disqualify Iredale, who had already proved extremely effective in representing Gomez-Barajas and Bravo.

. . . The court then ruled:

[B]ased upon the representation of the Government in [its] memorandum that the Court really has no choice at this point other than to find that an irreconcilable conflict of interest exists. I don't think it can be waived, and accordingly, Mr. Wheat's request to substitute Mr. Iredale in as attorney of record is denied.

Petitioner proceeded to trial with his original counsel and was convicted. . . .

The Sixth Amendment to the Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." . . . [T]his right was designed to assure fairness in the adversary criminal process. Realizing that an unaided layman may have little skill in arguing the law or in coping with an intricate procedural system, we have held that the Sixth Amendment secures the right to the assistance of counsel, by appointment if necessary, in a trial for any serious crime. We have further recognized that the purpose of providing assistance of counsel "is simply to ensure that criminal defendants receive a fair trial," and that in evaluating Sixth Amendment claims, "the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such." Thus, while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.

The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects. Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court. Similarly, a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant. Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party, even when the opposing party is the Government. The question raised in this case is the extent to which a criminal defendant's right under the Sixth Amendment to his chosen attorney is qualified by the fact that the attorney has represented other defendants charged in the same criminal conspiracy.

In previous cases, we have recognized that multiple representation of criminal defendants engenders special dangers of which a court must be aware. While "permitting a single attorney to represent codefendants . . . is not per se violative of constitutional guarantees of effective assistance of counsel," a court confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflicts warrant separate counsel. As we said in *Holloway*:

Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. . . . [A] conflict may . . . prevent an attorney from challenging the admission of evidence

prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another.

Petitioner insists that the provision of waivers by all affected defendants cures any problems created by the multiple representation. But no such flat rule can be deduced from the Sixth Amendment presumption in favor of counsel of choice. Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them. Both the American Bar Association's Model Code of Professional Responsibility and its Model Rules of Professional Conduct, as well as the rules of the California Bar Association (which governed the attorneys in this case), impose limitations on multiple representation of clients. . . . Not only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation.

For this reason, the Federal Rules of Criminal Procedure direct trial judges to investigate specially cases involving joint representation. In pertinent part, Rule 44(c) provides:

[T]he court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

Although Rule 44(c) does not specify what particular measures may be taken by a district court, one option suggested by the Notes of the Advisory Committee is an order by the court that the defendants be separately represented in subsequent proceedings in the case. This suggestion comports with our instructions . . . that the trial courts, when alerted by objection from one of the parties, have an independent duty to ensure that criminal defendants receive a trial that is fair and does not contravene the Sixth Amendment.

To be sure, this need to investigate potential conflicts arises in part from the legitimate wish of district courts that their judgments remain intact on appeal. As the Court of Appeals accurately pointed out, trial courts confronted with multiple representations face the prospect of being "whip-sawed" by assertions of error no matter which way they rule. If a district court agrees to the multiple representation, and the advocacy of counsel is thereafter impaired as a result, the defendant may well claim that he did not receive effective assistance. On the other hand, a district court's refusal to accede to the multiple representation may result in a challenge such as petitioner's in this case. Nor does a waiver by the defendant necessarily solve the problem, for we note, without passing judgment on, the apparent willingness of Courts of Appeals to entertain ineffective-assistance claims from defendants who have specifically waived the right to conflict-free counsel.

Thus, where a court justifiably finds an actual conflict of interest, there can be no doubt that it may decline a proffer of waiver, and insist that defendants be separately represented. . . .

Unfortunately for all concerned, a district court must pass on the issue whether or not to allow a waiver of a conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly. The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials. It is a rare attorney who will be fortunate enough to learn the entire truth from his own client, much less be fully apprised before trial of what each of the Government's witnesses will say on the stand. A few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants. These imponderables are difficult enough for a lawyer to assess, and even more difficult to convey by way of explanation to a criminal defendant untutored in the niceties of legal ethics. Nor is it amiss to observe that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them.

For these reasons we think the district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses. In the circumstances of this case, with the motion for substitution of counsel made so close to the time of trial, the District Court relied on instinct and judgment based on experience in making its decision. We do not think it can be said that the court exceeded the broad latitude which must be accorded it in making this decision. Petitioner of course rightly points out that the Government may seek to "manufacture" a conflict in order to prevent a defendant from having a particularly able defense counsel at his side; but trial courts are undoubtedly aware of this possibility, and must take it into consideration along with all of the other factors which inform this sort of a decision. . . .

Viewing the situation as it did before trial, we hold that the District Court's refusal to permit the substitution of counsel in this case was within its discretion and did not violate petitioner's Sixth Amendment rights. Other district courts might have reached differing or opposite conclusions with equal justification, but that does not mean that one conclusion was "right" and the other "wrong". The District Court must recognize a presumption in favor of petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court. . . .

The following case involves a famous prosecution in which the Second Circuit approved a trial judge's decision to prevent attorneys, including for the notorious mafia boss John

Gotti, from representing at trial defendants on grounds that the lawyers' "house counsel" status and other factors created non-waivable conflicts under *Wheat*.

UNITED STATES v. LOCASCIO, 6 F.3d 924 (2d Cir. 1993)

ALTIMARI, Circuit Judge:

On July 18, 1991, a grand jury in the Eastern District of New York returned a thirteen count superseding indictment against [John] Gotti and [Frank] Locascio. The indictment also named two other defendants, Salvatore Gravano and Thomas Gambino, who are not parties to this appeal. All four defendants were charged with violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), for unlawfully conducting and participating in the affairs of a criminal enterprise through a pattern of racketeering activity. The charged enterprise was the Gambino Organized Crime Family of La Cosa Nostra ("the Gambinos," "The Gambino Family," or "the Gambino Crime Family"). Gotti was charged as the head of the organization, and Locascio was accused of being the "underboss," or second-in-command.

Gravano was charged as the "consigliere," or advisor, to Gotti. Following the indictment, Gravano pleaded guilty to a superseding racketeering charge and testified at length at trial against Gotti and Locascio. The charges against Gambino, a "captain" in the organization, were severed. . . .

The government's proof to support the allegations that Gotti and Locascio had been in command of an extensive criminal enterprise was comprised mostly of lawfully intercepted tape-recorded conversations of the defendants-appellants and other alleged members of the Gambino Family. The government introduced tape recordings from four different locations over an eight-year period. . . .

The tape recordings, combined with Gravano's testimony, presented to the jury a picture of a large-scale enterprise involved in various criminal activities. The jury heard evidence on the structure and inner workings of the Gambino Family, and learned of the miscellaneous crimes with which Gotti and Locascio were charged: murders, obstruction of legal proceedings, conspiracies, gambling operations, and loansharking activities. . . .

Prior to trial, the district court disqualified [the] attorney for . . . Gotti. . . . Gotti . . . now contend[s] that this [disqualification was] unwarranted and violated [his] Sixth Amendment rights.

The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. The accused, however, does not have the absolute right to counsel of her own choosing. As the Court stated in *Wheat*,

while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal

defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.

Similarly, although a criminal defendant can waive her Sixth Amendment rights in some circumstances, that right to waiver is not absolute, since “[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.” The question of disqualification therefore implicates not only the Sixth Amendment right of the accused, but also the interests of the courts in preserving the integrity of the process and the government’s interests in ensuring a just verdict and a fair trial.

In deciding a motion for disqualification, the district court recognizes a presumption in favor of the accused’s chosen counsel, although this presumption can be overcome by a showing of an actual conflict or potentially serious conflict.

There are many situations in which a district court can determine that disqualification of counsel is necessary. The most typical is where the district court finds a potential or actual conflict in the chosen attorney’s representation of the accused, either in a multiple representation situation, or because of the counsel’s prior representation of a witness or co-defendant. Courts have also considered disqualification where the chosen counsel is implicated in the allegations against the accused and could become an unsworn witness for the accused, or where the chosen counsel is somehow unable to serve without unreasonable delay or inconvenience in completing the trial. . . .

Bruce Cutler served as Gotti’s attorney in previous criminal trials in federal court. Prior to trial, the government moved to disqualify Cutler from acting as Gotti’s attorney. Although the motion also dealt with the disqualification of other Gotti attorneys, only the disqualification of Cutler has been challenged on appeal.

The district court granted the motion to disqualify on several grounds. Judge Glasser, in a thoughtful and well-reasoned opinion, found that Cutler had acted as “house counsel” to the Gambino Crime Family by receiving “benefactor payments” from Gotti to represent others in the criminal enterprise. The district court based this conclusion on excerpts from the government’s taped transcripts, which left “little doubt that Gotti paid significant sums of money for legal services rendered to others.”

The district court further determined that Cutler’s participation in government-taped conversations at which illegal activity was discussed would impair his representation of Gotti. Specifically, the court noted that Cutler’s mere presence at trial could make him an “unsworn witness” before the jury in explaining his own conduct and interpreting Gotti’s conversations on the tapes. Even if Gotti waived the conflict, and even if the government did not intend to call Cutler as a witness, the district court found that Cutler’s representation would still compromise the integrity of the proceeding.

Third, the district court found that Cutler's prior representation of Michael Coiro, a potential government witness, gave rise to a conflict of interest. The court reasoned that this conflict mandated disqualification both because Cutler was privy to events surrounding an obstruction charge, and because Cutler's cross examination of Coiro at trial would be circumscribed by the prior representation.

Finally, the district court also found disqualification warranted because of the implication by Gotti in taped conversations that he had paid Cutler money "under the table." This made Cutler a potential accomplice as well as a potential witness to Gotti's tax fraud.

In conclusion, the district court noted that it was mindful that disqualification is a drastic remedy for conflict problems, but that no less severe alternatives were viable. The court therefore held that "the grave peril the continued representation by [Cutler] poses to the integrity of the trial process" mandated disqualification.

Gotti now appeals the district court's ruling, arguing that the disqualification was an abuse of discretion. We disagree, and affirm the disqualification on two grounds: (1) Cutler's role as house counsel to the Gambino Crime Family; and (2) Cutler's anticipated role as an "unsworn witness" for Gotti had he been allowed to serve. . . .

Gotti argues that the facts before the district court did not merit the conclusion that Cutler had acted as "house counsel" to the Gambino Crime Family. Rather, Gotti argues that Cutler was merely his personal attorney.

Ethical considerations warn against an attorney accepting fees from someone other than her client. As we stated in a different context, the acceptance of such "benefactor payments" "may subject an attorney to undesirable outside influence" and raises an ethical question "as to whether the attorney's loyalties are with the client or the payor." In this context, proof of house counsel can be used by the government to help establish the existence of the criminal enterprise under RICO, by showing the connections among the participants.

Contrary to Gotti's assertions, there was sufficient evidence for the district court to determine that Cutler had acted as house counsel to the Gambino Crime Family. For example, the court cited one conversation in which Gotti, in the time-honored tradition of legal clients, complained about his legal fees:

I gave youse [sic] 300,000 in one year. Youse [sic] didn't defend me. I wasn't even mentioned in none of these [expletive deleted] things. I had nothing to do with none of these [expletive deleted] people. What the [expletive deleted] is your "beef?" Before youse [sic] made a court appearance, youse [sic] got 40,000, 30,000 and 25,000. That's without counting [attorney] John Pollok. . . . You standing there in the hallway with me last night, and you're plucking me. . . . "Tony Lee's" lawyer, but you're plucking me. I'm paying for it. . . . Where does it end?

Gambino Crime Family? This is the Shargel, Cutler and who do you call it Crime Family.

Gotti thus demonstrated that he was incurring the legal fees for representation of others. As support for disqualification, the government indicated that it would introduce the testimony of Michael Coiro, who would testify that he had paid nothing to Cutler and another attorney for their services to him, presumably because Gotti paid for his defense.

Cutler's role as house counsel to the Gambinos raised a credible issue of the ethical propriety of his representation of Gotti in this case. An attorney cannot properly serve two masters, and the evidence before the district court indicated that Cutler had represented the Gambino Family as a whole. Moreover, Cutler's status as house counsel was potentially part of the proof of the Gambino criminal enterprise. We cannot say that the district court abused its discretion in disqualifying Cutler on this basis, considering the volume of proof of Cutler's proximity to the affairs of the Gambino Crime Family offered by the government in this case.

An even stronger basis for disqualification, however, was the possibility that Cutler would function in his representational capacity as an unsworn witness for Gotti. An attorney acts as an unsworn witness when his relationship to his client results in his having first-hand knowledge of the events presented at trial. If the attorney is in a position to be a witness, ethical codes may require him to withdraw his representation.

Even if the attorney is not called, however, he can still be disqualified, since his performance as an advocate can be impaired by his relationship to the events in question. For example, the attorney may be constrained from making certain arguments on behalf of his client because of his own involvement, or may be tempted to minimize his own conduct at the expense of his client. Moreover, his role as advocate may give his client an unfair advantage, because the attorney can subtly impart to the jury his first-hand knowledge of the events without having to swear an oath or be subject to cross examination.

The district court disqualified Cutler partially on the ground that his representation of Gotti would place him in the role of such an unsworn witness. The clearest support for this finding was Cutler's presence during the Ravenite Apartment discussions taped by the government. The government was legitimately concerned that, when Cutler argued before the jury for a particular interpretation of the tapes, his interpretation would be given added credibility due to his presence in the room when the statements were made. This would have given Gotti an unfair advantage, since Cutler would not have had to take an oath in presenting his interpretation, but could merely frame it in the form of legal argument.

Gotti argues, however, that the district court erred in disqualifying Cutler where the government had no intention of calling Cutler. He also maintains that Cutler's presence and participation on the government's tapes could have been redacted to eliminate references to and statements by Cutler, thereby eliminating the unsworn witness

problem. The first contention is meritless, since the district court explicitly and correctly noted that “whether the government will or will not call . . . Cutler . . . has no significance for this motion.” The second contention is equally unavailing, since the district court explicitly found that redaction of the tapes would have eviscerated the government’s case. We are not in a position to second-guess the district court’s clearly supported factual findings on review. Moreover, we agree with the district court that the government’s case should not be unfairly impaired so that an accused can continue with conflicted counsel.

The unsworn witness problem arises not only in relation to the Ravenite tapes, but to other grounds cited by the district court in support of disqualification. For example, the court found that Gotti’s references to Cutler’s acceptance of fees “under the table” were relevant to the government’s case on the tax fraud count. Had Cutler argued Gotti’s defense to that count, he would not only have had a conflict of interest but he would have been arguing as to events in which he was allegedly involved.

We are aware that disqualification is a drastic remedy to the unsworn witness problem. We are also, however, cognizant that this is an unusual case, in that Cutler had allegedly entangled himself to an extraordinary degree in the activities of the Gambino Crime Family: he is recorded on government tapes when discussions of allegedly illegal activity took place; he is allegedly involved in the tax fraud count against Gotti; his role as house counsel could be used to prove the criminal enterprise; and his representation of government witnesses caused a conflict with his representation of Gotti. Although we are cognizant of the right of the accused to secure representation, we are also conscious of the institutional interest in protecting the integrity of the judicial process. If an attorney will not perform his ethical duty, it is up to the courts to perform it for him. Bruce Cutler had no place representing John Gotti in this case, and the district court properly determined that he should be disqualified. . . .

Although disqualification is a drastic measure, the district court is in the best position to evaluate what is needed to ensure a fair trial. Here, the district court made careful findings of fact on each disqualification, and supported its decisions with well-reasoned opinions. We conclude that the district court properly exercised its discretion

Conflicts of interest may also arise when corporate counsel offers to represent an employee simultaneously with the corporation. As you read the following ethics opinion out of New York, consider how these issues may be further complicated by anti-solicitation rules.

NEW YORK COUNTY LAWYERS ASSOCIATION

PROFESSIONAL ETHICS COMMITTEE

FORMAL OPINION 747

June 9, 2014

TOPIC: Whether corporate counsel's offer to represent corporate employee or former employee constitutes improper solicitation within the meaning of Rule of Professional Conduct (RPC) 7.3.

DIGEST: A lawyer representing a corporation in a lawsuit has arranged to interview unrepresented corporate employees and former employees, who are potential parties or witnesses, for purposes of learning relevant information. The corporation has requested the lawyer to offer to represent the individuals in connection with the lawsuit if the lawyer would not have a conflict of interest and the individuals would benefit from representation. If the lawyer reasonably concludes based on an interview that the multiple representation is permissible under the conflict of interest rules, the lawyer may personally offer to represent the employee or former employee without violating the rule against solicitation (RPC 7.3).

RULES OF PROFESSIONAL CONDUCT: 1.6, 1.7, 1.13, 7.3

OPINION: Corporations and other entities frequently provide legal representation to current or former officers or employees who are potential testifying witnesses or parties in legal proceedings. In some situations, the corporation is contractually or statutorily obligated to provide legal representation, or has an internal policy so providing. In other situations, the decision to provide counsel to corporate constituents is made on an ad hoc basis in connection with the particular lawsuit. The corporation may compensate separate counsel for representing the corporate constituent or, where consistent with conflict of interest rules, for jointly representing multiple constituents. However, for financial and/or strategic reasons, the corporation may prefer that its own lawyer concurrently represent one or more corporate constituents, insofar as it is permissible under the conflict of interest rules. The corporation may therefore authorize its lawyer to offer representation to an otherwise unrepresented employee or former employee who may benefit from representation in a lawsuit. One question this raises is whether, consistently with the rule against solicitation, the lawyer may personally offer to represent the employee or former employee. This opinion addresses the question in the context where the lawyer begins by interviewing the current or former employee as a non-client to learn potentially relevant information and, based on the information acquired, concludes that a joint representation of the corporation and employee is permissible.

By way of background, the ordinary practice is for the corporation's lawyer initially to meet with the employee or former employee in his or her capacity as a non-client who is a potential witness, not as a prospective client. The corporation may arrange the

meeting or the lawyer may do so independently. The purpose will be to learn relevant information from the individual in order to advance the representation of the corporate client in the lawsuit. The lawyer will provide any necessary warnings under Rules 1.13(a) and 4.3 to ensure that the individual understands the lawyer's role as counsel only for the corporation.⁶ One reason to make clear at this stage that the lawyer represents only the corporation is to avoid assuming a confidentiality obligation to the current or former employee under Rule 1.18. In communications with the witness, the lawyer should avoid assuming a confidentiality obligation to the employee that might later conflict with the lawyer's duties to the corporation.

After interviewing the employee, the lawyer should be in a position to determine whether the employee would benefit from legal representation. If not, establishing a lawyer-client representation solely to benefit the corporate client may be impermissible from the perspective of the individual, who may be misled regarding the need for a lawyer or who may be burdened by a representation that exclusively benefits the employer. If the representation is established in bad faith, it may also be impermissible from the perspective of the opposing party, who may be disabled by Rule 4.2 from communicating directly with the represented employee. Whether a lawyer may permissibly represent an employee or former employee exclusively for the corporation's benefit, where the individual has no need of legal services as a party or potential testifying witness in the lawsuit, is a question beyond the scope of this opinion. For purposes of this opinion, we assume the representation does serve the interests of the current or former employee as well as the corporate employer.

After the initial interview, the lawyer should also be in a position to determine whether a joint representation of the corporation and employee is permissible under Rules 1.7 and 1.13(d) with the respective clients' informed consent. *See* N.Y. City Bar Assoc. Comm. on Prof'l and Jud. Ethics, Formal Op. 2004-2 (2004) (discussing representation of a corporation and its constituents in a government investigation). Rule 1.7, the conflict of interest rule, is implicated when the lawyer's representation of two or more clients "will involve the lawyer in representing differing interests," which is often the case when the lawyer represents both a corporation and its individual employee in connection with a lawsuit. In that event, the representation is permissible only if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to

⁶ When an organization's interests may differ from those of the organization's individual constituent (e.g., officer or employee), Rule 1.13(a) requires the organization's lawyer to advise the individual that the lawyer represents the organization, not the individual. Rule 4.3 requires a client's lawyer communicating with an unrepresented person to avoid stating or implying that the lawyer is disinterested; to avoid giving legal advice other than to retain counsel; and, if the person misunderstands the lawyer's role in the matter, to "make reasonable efforts to correct the misunderstanding." In some circumstances, lawyers elaborate on the required warnings or provide additional legal information, such as an explanation that the organization will control the attorney-client privilege with regard to the constituent's statements to counsel. *See generally United States v. Int'l Bhd. of Teamsters*, 119 F.3d 210, 217 (2d Cir. 1997); Gary H. Collins & David Z. Seide, WARNING THE WITNESS: A GUIDE TO INTERNAL INVESTIGATIONS AND THE ATTORNEY-CLIENT PRIVILEGE (ABA 2010).

each affected client” and “each affected client gives informed consent, confirmed in writing.” Among other things, “informed consent” requires an understanding of the risks of, and alternatives to, the joint representation; whether and to what extent confidences will be shared between the joint clients; and what will occur if a client withdraws from the joint representation or a later conflict arises that precludes continuing the joint representation.

If the lawyer reasonably concludes that the current or former employee would benefit from legal assistance and that the conflict of interest rules allow joint representation, the lawyer may seek to convey the corporation’s willingness to compensate the lawyer to represent the employee. This raises a question concerning the application of Rule 7.3(a), which forbids “solicitation . . . [b]y in-person or telephone contact” with an individual who is not “a close friend, relative, former client or existing client.” Rule 7.3(b) defines “solicitation” for purposes of this Rule to mean

any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

Rule 1.0(a), in turn, defines “advertisement” to mean “any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm’s services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.”

Under Rule 7.3(b), the question of whether the lawyer properly may offer in-person (rather than in writing) to represent the corporation’s employee following the conclusion of the interview depends on whether the “primary purpose” of the lawyer’s “private communication” with the employee “is the retention of the lawyer or law firm, and a significant motive for [the communication] is pecuniary gain.” We conclude that conveying the corporation’s offer, and following up if the employee expresses interest, would not constitute a “solicitation” for several reasons.

First, the primary purpose of the in-person meeting at its inception is not to offer the lawyer’s services to the employee, but to interview the employee as a potential witness. Indeed, in many cases, that may turn out to be the exclusive purpose of the meeting, if the lawyer concludes that the employee does not require legal representation or that the lawyer cannot provide it. Second, when the lawyer initially offers to represent the employee, the lawyer is acting on behalf of the corporation, as its lawyer and agent, primarily for purposes of conveying the corporation’s offer to secure legal representation for an employee in need of legal assistance. The corporation could, of course, have one of its non-lawyer officers or its in-house counsel extend the offer on behalf of the corporation. But, as the corporation’s lawyer and agent, the lawyer may be in a better

position to do so, because the lawyer may be better qualified to answer questions and provide information about the implications of the representation. Moreover, in conveying the corporation's offer and, if the employee is interested, following up by offering representation, the lawyer's "primary purpose" is not to secure legal fees from a new client but to render competent representation to a current corporate client by enabling it to fulfill its objective (and, in some cases, its statutory or contractual obligation or internal policy) of making legal assistance available to an employee who may need counsel. *See, e.g., Wells Fargo Bank, N.A. v. LaSalle Bank Nat. Ass'n* (finding that offering to represent corporate client's former employees at corporation's expense was not improper solicitation: "[D]efense counsel was attempting to represent its client, the corporation, and also to protect the interests of the former employees whose conduct forms the basis for Plaintiff's claims in this case. In addition, Defense counsel would have spent a great deal of time with these individuals, regardless of whether they were clients, in order to fully and competently represent Defendant."). . . .

CONCLUSION: When a corporation's lawyer conveys in person or by telephone an offer to represent a corporate employee in connection with a lawsuit, the application of the solicitation rule, Rule 7.3(a), depends on the factual context and the lawyer's motivation. Under *Rivera*, the communication would be improper if the lawyer's motivation was exclusively "to gain a tactical advantage in th[e] litigation by insulating [witnesses] from any informal contact with plaintiff's counsel." However, we conclude that an offer of representation at the corporation's request would be proper where the lawyer initially interviews the employee as a non-client witness in order to learn relevant information and subsequently determines that the individual is in need of legal services as a party or potential testifying witness and that the concurrent representation would be permissible.

Note that Model Rule 4.2, the ethics rule against lawyers contacting represented persons directly without going through counsel, presents potential complications for prosecutors in the investigation of corporate crime. When corporations (as they commonly do) arrange counsel for their employees early in an investigation, prosecutors will be prohibited (including by acting through their agents) from engaging in the surreptitious and surprise contacts that are common and often effective in the investigation of street crime. *See United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988); *see also Massiah v. United States*, 377 U.S. 201 (1964) (finding a Sixth Amendment dimension to government contacts with charged defendants represented by counsel).

Even if individual corporate employees do not yet have their own counsel, Rule 4.2 may restrict prosecutors and their agents. Some courts have held that if a corporation is represented by counsel (as nearly all are), contact with employees, at least at the management level, may constitute contact with a "represented person," on the theory that a corporation is a "person" that can be communicated with only through its human agents. *See, e.g., Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621 (S.D.N.Y. 1990); *Meachum v. Outdoor World Corp.*, 654 N.Y.S.2d 240 (Sup. Ct. 1996);

see also U.S. DEP'T OF JUSTICE, JUSTICE MANUAL, Crim. Resource Manual § 296 (summarizing the uneven state of the law on contacts with represented corporations and advising federal prosecutors to study local law before acting).

C. Funding of Counsel

On the matter of who bears the costs of lawyers in corporate crime investigations and prosecutions, policy considerations intersect with constitutional law.⁷ As always, follow the money. One cannot think about the Sixth Amendment issues here without thinking about the economics. Recall that the Delaware General Corporation Law includes several provisions regarding mandatory and permissive indemnification, as well as permissive fee advancement. The Constitution does not impose any such regulations on corporations, of course, but it is an open question the extent to which the Constitution may limit government action that affects access to corporate funding of counsel.

CAPLIN & DRYSDALE, CTD. v. UNITED STATES, 491 U.S. 617 (1989)

Justice WHITE delivered the opinion of the Court.

We are called on to determine whether the federal drug forfeiture statute includes an exemption for assets that a defendant wishes to use to pay an attorney who conducted his defense in the criminal case where forfeiture was sought. Because we determine that no such exemption exists, we must decide whether that statute, so interpreted, is consistent with the Fifth and Sixth Amendments. We hold that it is.

In January 1985, Christopher Reckmeyer was charged in a multicount indictment with running a massive drug importation and distribution scheme. The scheme was alleged to be a continuing criminal enterprise (CCE), in violation of 84 Stat. 1265, as amended, 21 U.S.C. § 848 (1982 ed., Supp. V). Relying on a portion of the CCE statute that authorizes forfeiture to the Government of “property constituting, or derived from . . . proceeds . . . obtained” from drug-law violations, § 853(a), the indictment sought forfeiture of specified assets in Reckmeyer’s possession. At this time, the District Court, acting pursuant to § 853(e)(1)(A), entered a restraining order forbidding Reckmeyer to transfer any of the listed assets that were potentially forfeitable.

Sometime earlier, Reckmeyer had retained petitioner, a law firm, to represent him in the ongoing grand jury investigation which resulted in the January 1985 indictments. Notwithstanding the restraining order, Reckmeyer paid the firm \$25,000 for preindictment legal services a few days after the indictment was handed down; this sum was placed by petitioner in an escrow account. Petitioner continued to represent Reckmeyer following the indictment.

⁷ For a discussion of legal funding arrangements in a number of high-profile white collar cases as well as complications that may arise as a result of these arrangements, see Andrew Ross Sorkin, *Wall St. Debates Who Pays Legal Bills*, N.Y. TIMES (Aug. 12, 2013, 8:50 PM), <https://dealbook.nytimes.com/2013/08/12/wall-st-debates-who-should-pay-legal-bills>.

On March 7, 1985, Reckmeyer moved to modify the District Court's earlier restraining order to permit him to use some of the restrained assets to pay petitioner's fees; Reckmeyer also sought to exempt from any postconviction forfeiture order the assets that he intended to use to pay petitioner. However, one week later, before the District Court could conduct a hearing on this motion, Reckmeyer entered a plea agreement with the Government. Under the agreement, Reckmeyer pleaded guilty to the drug-related CCE charge, and agreed to forfeit all of the specified assets listed in the indictment. The day after the Reckmeyer's plea was entered, the District Court denied his earlier motion to modify the restraining order, concluding that the plea and forfeiture agreement rendered irrelevant any further consideration of the propriety of the court's pretrial restraints. Subsequently, an order forfeiting virtually all of the assets in Reckmeyer's possession was entered by the District Court in conjunction with his sentencing.

After this order was entered, petitioner filed a petition under § 853(n), which permits third parties with an interest in forfeited property to ask the sentencing court for an adjudication of their rights to that property; specifically, § 853(n)(6)(B) gives a third party who entered into a bona fide transaction with a defendant a right to make claims against forfeited property, if that third party was "at the time of [the transaction] reasonably without cause to believe that the [defendant's assets were] subject to forfeiture." *See also* § 853(c). Petitioner claimed an interest in \$170,000 of Reckmeyer's assets, for services it had provided Reckmeyer in conducting his defense; petitioner also sought the \$25,000 being held in the escrow account, as payment for preindictment legal services. Petitioner argued alternatively that assets used to pay an attorney were exempt from forfeiture under § 853, and if not, the failure of the statute to provide such an exemption rendered it unconstitutional. The District Court granted petitioner's claim for a share of the forfeited assets. . . .

Petitioner contends that the statute infringes on criminal defendants' Sixth Amendment right to counsel of choice, and upsets the "balance of power" between the Government and the accused in a manner contrary to the Due Process Clause of the Fifth Amendment. We consider these contentions in turn.

Petitioner's first claim is that the forfeiture law makes impossible, or at least impermissibly burdens, a defendant's right "to select and be represented by one's preferred attorney." *Wheat v. United States*. Petitioner does not, nor could it defensibly do so, assert that impecunious defendants have a Sixth Amendment right to choose their counsel. The Amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts. "[A] defendant may not insist on representation by an attorney he cannot afford." *Wheat*. Petitioner does not dispute these propositions. Nor does the Government deny that the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds. Applying these principles to the statute in question here, we observe that nothing in § 853 prevents a defendant from

hiring the attorney of his choice, or disqualifies any attorney from serving as a defendant's counsel. Thus, unlike *Wheat*, this case does not involve a situation where the Government has asked a court to prevent a defendant's chosen counsel from representing the accused. Instead, petitioner urges that a violation of the Sixth Amendment arises here because of the forfeiture, at the instance of the Government, of assets that defendants intend to use to pay their attorneys.

Even in this sense, of course, the burden the forfeiture law imposes on a criminal defendant is limited. The forfeiture statute does not prevent a defendant who has nonforfeitable assets from retaining any attorney of his choosing. Nor is it necessarily the case that a defendant who possesses nothing but assets the Government seeks to have forfeited will be prevented from retaining counsel of choice. Defendants like Reckmeyer may be able to find lawyers willing to represent them, hoping that their fees will be paid in the event of acquittal, or via some other means that a defendant might come by in the future. The burden placed on defendants by the forfeiture law is therefore a limited one.

Nonetheless, there will be cases where a defendant will be unable to retain the attorney of his choice, when that defendant would have been able to hire that lawyer if he had access to forfeitable assets, and if there was no risk that fees paid by the defendant to his counsel would later be recouped under § 853(c). It is in these cases, petitioner argues, that the Sixth Amendment puts limits on the forfeiture statute.

This submission is untenable. Whatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond "the individual's right to spend his own money to obtain the advice and assistance of . . . counsel." *Walters v. National Assn. of Radiation Survivors*. A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice. A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his; the Government does not violate the Sixth Amendment if it seizes the robbery proceeds and refuses to permit the defendant to use them to pay for his defense. "[N]o lawyer, in any case, . . . has the right to . . . accept stolen property, or . . . ransom money, in payment of a fee. . . . The privilege to practice law is not a license to steal." *Laska v. United States*. Petitioner appears to concede as much, as respondent in *Monsanto* clearly does.

Petitioner seeks to distinguish such cases for Sixth Amendment purposes by arguing that the bank's claim to robbery proceeds rests on "pre-existing property rights," while the Government's claim to forfeitable assets rests on a "penal statute" which embodies the "fictive property-law concept of . . . relation-back" and is merely "a mechanism for preventing fraudulent conveyances of the defendant's assets, not . . . a device for determining true title to property." In light of this, petitioner contends, the burden placed on defendant's Sixth Amendment rights by the forfeiture statute outweighs the Government's interest in forfeiture.

The premises of petitioner's constitutional analysis are unsound in several respects. First, the property rights given the Government by virtue of the forfeiture statute are more substantial than petitioner acknowledges. In § 853(c), the so-called "relation-back" provision, Congress dictated that "[a]ll right, title and interest in property" obtained by criminals via the illicit means described in the statute "vests in the United States upon the commission of the act giving rise to forfeiture." As Congress observed when the provision was adopted, this approach, known as the "taint theory," is one that "has long been recognized in forfeiture cases," including the decision in *United States v. Stowell*. See S. Rep. No. 98-225 (1983). In *Stowell*, the Court explained the operation of a similar forfeiture provision (for violations of the Internal Revenue Code) as follows:

"As soon as [the possessor of the forfeitable asset committed the violation] of the internal revenue laws, the forfeiture under those laws took effect, and (though needing judicial condemnation to perfect it) operated from that time as a statutory conveyance to the United States of all the right, title and interest then remaining in the [possessor]; and was as valid and effectual, against all the world, as a recorded deed. The right so vested in the United States could not be defeated or impaired by any subsequent dealings of the . . . [possessor]." *Stowell*.

In sum, § 853(c) reflects the application of the long-recognized and lawful practice of vesting title to any forfeitable assets, in the United States, at the time of the criminal act giving rise to forfeiture. Concluding that Reckmeyer cannot give good title to such property to petitioner because he did not hold good title is neither extraordinary or novel. Nor does petitioner claim, as a general proposition that the relation-back provision is unconstitutional, or that Congress cannot, as a general matter, vest title to assets derived from the crime in the Government, as of the date of the criminal act in question. Petitioner's claim is that whatever part of the assets that is necessary to pay attorney's fees cannot be subjected to forfeiture. But given the Government's title to Reckmeyer's assets upon conviction, to hold that the Sixth Amendment creates some right in Reckmeyer to alienate such assets, or creates a right on petitioner's part to receive these assets, would be peculiar.

There is no constitutional principle that gives one person the right to give another's property to a third party, even where the person seeking to complete the exchange wishes to do so in order to exercise a constitutionally protected right. While petitioner and its supporting *amici* attempt to distinguish between the expenditure of forfeitable assets to exercise one's Sixth Amendment rights, and expenditures in the pursuit of other constitutionally protected freedoms, there is no such distinction between, or hierarchy among, constitutional rights. If defendants have a right to spend forfeitable assets on attorney's fees, why not on exercises of the right to speak, practice one's religion, or travel? The full exercise of these rights, too, depends in part on one's financial wherewithal; and forfeiture, or even the threat of forfeiture, may similarly prevent a defendant from enjoying these rights as fully as he might otherwise. Nonetheless, we are

not about to recognize an ant forfeiture exception for the exercise of each such right; nor does one exist for the exercise of Sixth Amendment rights.

Petitioner's "balancing analysis" to the contrary rests substantially on the view that the Government has only a modest interest in forfeitable assets that may be used to retain an attorney. Petitioner takes the position that, in large part, once assets have been paid over from client to attorney, the principal ends of forfeiture have been achieved: dispossessing a drug dealer or racketeer of the proceeds of his wrongdoing. We think that this view misses the mark for three reasons.

First, the Government has a pecuniary interest in forfeiture that goes beyond merely separating a criminal from his ill-gotten gains; that legitimate interest extends to recovering *all* forfeitable assets, for such assets are deposited in a Fund that supports law-enforcement efforts in a variety of important and useful ways. *See* 28 U.S.C. § 524(c), which establishes the Department of Justice Assets Forfeiture Fund. The sums of money that can be raised for law-enforcement activities this way are substantial, and the Government's interest in using the profits of crime to fund these activities should not be discounted.

Second, the statute permits "rightful owners" of forfeited assets to make claims for forfeited assets before they are retained by the Government. *See* 21 U.S.C. § 853(n)(6)(A). The Government's interest in winning undiminished forfeiture thus includes the objective of returning property, in full, to those wrongfully deprived or defrauded of it. Where the Government pursues this restitutionary end, the Government's interest in forfeiture is virtually indistinguishable from its interest in returning to a bank the proceeds of a bank robbery; and a forfeiture-defendant's claim of right to use such assets to hire an attorney, instead of having them returned to their rightful owners, is no more persuasive than a bank robber's similar claim.

Finally, as we have recognized previously, a major purpose motivating congressional adoption and continued refinement of the racketeer influenced and corrupt organizations (RICO) and CCE forfeiture provisions has been the desire to lessen the economic power of organized crime and drug enterprises. *See Russell v. United States*. This includes the use of such economic power to retain private counsel. As the Court of Appeals put it: "Congress has already underscored the compelling public interest in stripping criminals such as Reckmeyer of their undeserved economic power, and part of that undeserved power may be the ability to command high-priced legal talent." The notion that the Government has a legitimate interest in depriving criminals of economic power, even insofar as that power is used to retain counsel of choice, may be somewhat unsettling. But when a defendant claims that he has suffered some substantial impairment of his Sixth Amendment rights by virtue of the seizure or forfeiture of assets in his possession, such a complaint is no more than the reflection of "the harsh reality that the quality of a criminal defendant's representation frequently may turn on his ability to retain the best counsel money can buy." *Morris v. Slappy*. Again, the Court of Appeals put it aptly: "The modern day Jean Valjean must be satisfied with appointed counsel. Yet the drug

merchant claims that his possession of huge sums of money . . . entitles him to something more. We reject this contention, and any notion of a constitutional right to use the proceeds of crime to finance an expensive defense.” . . .

The Court in *Caplin & Drysdale* held that the Sixth Amendment right to counsel does not include the right to spend someone else’s money on a criminal defense, including money that the government has a legal right to take by forfeit. In *Kaley v. United States*, 571 U.S. 320 (2014), the Court held that this is true even when forfeiture law allows the government to freeze assets, and thereby block the accused’s access to funds that could be used to pay for a defense, upon a grand jury’s finding of mere probable cause and before a trial on the merits. In *Luis v. United States*, 136 S. Ct. 1083 (2016), the Court held that the Sixth Amendment *does* bar the government from using an asset freeze to prevent a defendant from accessing funds for the purpose of paying counsel if those funds are frozen only as “substitute assets” under forfeiture law—that is, monies that are not tainted by criminal proceeds but which the government seeks to forfeit as a substitute for “dirty” money that, for whatever reason, the government can no longer find or obtain.

Problem 15-1

What is the difference, for purposes of law and legal theory, between “house counsel” for the mob and counsel for the corporation when each deals with witnesses in an investigation? Why is the former treated as a situation rife with conflict, while the latter viewed as routine and necessary?

The next case involves KPMG again, this time on review before the Second Circuit after the trial judge harshly criticized the government. The initial district court opinion in *Stein*, which we read in Chapter 12, found that the government, through the state action of its enforcement policies and practices, deprived certain KPMG employees of both their Fifth and Sixth Amendment rights. On the government’s appeal to the Second Circuit, the appellate court, as you will see, addressed only the part of the district court ruling that related to the Sixth Amendment right to counsel.

It seems under the reasoning of this case that perhaps there *is* a Sixth Amendment right to spend someone else’s money on your defense in certain circumstances. Does the court’s constitutional analysis hold up? What are the limits of this case?

UNITED STATES v. STEIN, 541 F.3d 130 (2d Cir. 2008)

DENNIS JACOBS, Chief Judge:

The United States appeals from an order of the United States District Court for the Southern District of New York (Kaplan, J.), dismissing an indictment against thirteen former partners and employees of the accounting firm KPMG, LLP. Judge Kaplan found that, absent pressure from the government, KPMG would have paid defendants’ legal fees and expenses without regard to cost. Based on this and other findings of fact, Judge

Kaplan ruled that the government deprived defendants of their right to counsel under the Sixth Amendment by causing KPMG to impose conditions on the advancement of legal fees to defendants, to cap the fees, and ultimately to end payment. Judge Kaplan also ruled that the government deprived defendants of their right to substantive due process under the Fifth Amendment.

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

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

. . . In December 2006—after the events in this prosecution had transpired—the Department of Justice replaced the Thompson Memorandum with the McNulty Memorandum, under which prosecutors may consider a company's fee advancement policy only where the circumstances indicate that it is "intended to impede a criminal investigation," and even then only with the approval of the Deputy Attorney General.

Mem. from Paul J. McNulty, Deputy Att’y Gen., U.S. Dep’t of Justice, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006).

After Senate subcommittee hearings in 2002 concerning KPMG’s possible involvement in creating and marketing fraudulent tax shelters, KPMG retained Robert S. Bennett of the law firm Skadden, Arps, Slate, Meagher & Flom LLP (“Skadden”) to formulate a “cooperative approach” for KPMG to use in dealing with federal authorities. Bennett’s strategy included “a decision to ‘clean house’—a determination to ask Jeffrey Stein, Richard Smith, and Jeffrey Eischeid, all senior KPMG partners who had testified before the Senate and all now [Defendants-Appellees] here—to leave their positions. . . . Stein resigned with arrangements for a three-year \$100,000-per-month consultancy, and an agreement that KPMG would pay for Stein’s representation in any actions brought against Stein arising from his activities at the firm. KPMG negotiated a contract with Smith that included a similar clause; but that agreement was never executed.

In February 2004, KPMG officials learned that the firm and 20 to 30 of its top partners and employees were subjects of a grand jury investigation of fraudulent tax shelters. On February 18, 2004, KPMG’s CEO announced to all partners that the firm was aware of the United States Attorney’s Office’s (“USAO”) investigation and that “[a]ny present or former members of the firm asked to appear will be represented by competent coun[sel] at the firm’s expense.”

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

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

Skadden then reported back to KPMG. In notes of the meeting, a KPMG executive wrote the words “[p]aying legal fees” and “[s]everance” next to “not a sign of cooperation.”

On March 2, 2004, Bennett told AUSA Weddle that although KPMG believed it had no legal obligation to advance fees, “it would be a big problem” for the firm not to do so given its partnership structure. But Bennett disclosed KPMG’s tentative decision to limit the amount of fees and condition them on employees’ cooperation with prosecutors.

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

On a March 11 conference call with Skadden, AUSA Weddle recommended that KPMG tell employees that they should be “totally open” with the USAO, “even if that [meant admitting] criminal wrongdoing,” explaining that this would give him good material for cross-examination. That same day, Skadden wrote to counsel for the KPMG employees who had been identified as subjects of the investigation. 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.

The government was copied on this correspondence.

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

The prosecutors expressed by letter their “disappoint[ment] with [the] tone” of this memorandum and its “one-sided presentation of potential issues,” and “demanded that KPMG send out a supplemental memorandum in a form they proposed.” The government’s alternative language, premised on the “assum[ption] that KPMG truly is committed to fully cooperating with the Government’s investigation,” [and] advised employees that they could “meet with investigators without the assistance of counsel.” KPMG complied, and circulated a memo advising that employees “may deal directly with government representatives without counsel.”

At a meeting in late March, Skadden asked the prosecutors to notify Skadden in the event any KPMG employee refused to cooperate. Over the following year, the prosecutors regularly informed Skadden whenever a KPMG employee refused to cooperate fully, such as by refusing to proffer or by proffering incompletely (in the government’s view). Skadden, in turn, informed the employees’ lawyers that fee advancement would cease unless the employees cooperated. The employees either knuckled under and submitted to interviews, or they were fired and KPMG ceased advancing their fees. For example,

Watson and Smith attended proffer sessions after receiving KPMG's March 11 letter announcing the Fees Policy, and after Skadden reiterated to them that fees would be terminated absent cooperation. They did so because (they said, and the district court found) they feared that KPMG would stop advancing attorneys fees—although Watson concedes he attended a first session voluntarily. As Bennett later assured AUSA Weddle: "Whenever your Office has notified us that individuals have not . . . cooperat[ed], KPMG has promptly and without question encouraged them to cooperate and threatened to cease payment of their attorney fees and . . . to take personnel action, including termination."

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

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

On August 29, 2005—the same day KPMG executed the DPA—the government indicted six of the Defendants. . . . A superseding indictment filed on October 17, 2005 named ten additional employees. . . . Pursuant to the Fees Policy, KPMG promptly stopped advancing legal fees to the indicted employees who were still receiving them.

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

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

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." . . .

We review first the government's challenges to the district court's factual findings, including its finding that but for the Thompson Memorandum and the prosecutors' conduct KPMG would have paid employees' legal fees—pre-indictment and post-indictment—without regard to cost. Next, . . . we decide whether the promulgation and enforcement of KPMG's Fees Policy amounted to state action under the Constitution and whether the government deprived defendants of their Sixth Amendment right to counsel. . . .

The government points out that the Thompson Memorandum lists "fees advancement" as just one of many considerations in a complex charging decision, and thus argues that Judge Kaplan overread the Thompson Memorandum as a threat that KPMG would be indicted unless it ceased advancing legal fees to its employees.

. . . KPMG was faced with the fatal prospect of indictment; it could be expected to do all it could, assisted by sophisticated counsel, to placate and appease the government. As Judge Kaplan noted, KPMG's chief legal officer, Sven Erik Holmes, testified that he considered it crucial "to be able to say at the right time with the right audience, we're in full compliance with the Thompson Memorandum." Moreover, KPMG's management and counsel had reason to consider the impact of the firm's indictment on the interests of the firm's partners, employees, clients, creditors and retirees.

The government reads the Thompson Memorandum to say that fees advancement is to be considered as a negative factor only when it is part of a campaign to "circle the wagons," i.e., to protect culpable employees and obstruct investigators. . . . But even if the government's reading is plausible, the wording nevertheless empowers prosecutors to determine which employees will be deprived of company-sponsored counsel: prosecutors may reasonably foresee that employees they identify as "culpable" will be cut off from fees. . . .

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." During the March 11 phone call between the prosecutors and Skadden, AUSA Weddle demanded that KPMG tell its employees to be "totally open" with the USAO, "even if that [meant admitting] criminal wrongdoing," so that he could gather material for cross-examination. On March 12, the prosecutors prevailed upon KPMG to supplement its first advisory letter with another, which clarified that employees could meet with the government without counsel. In addition, 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.

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. 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. Although it “is far from certain” that KPMG is legally obligated to advance defendants’ legal fees, a firm may have potent incentives to advance fees, such as the ability to recruit and retain skilled professionals in a profession fraught with legal risk. Also, there is evidence that, before the prosecutors’ intervention, KPMG executed an agreement under which it would advance Stein’s legal fees without cap or condition (and negotiated toward an identical agreement with Smith). . . . Indeed, KPMG itself represented to the court that the Thompson Memorandum and the prosecutors’ conduct “substantially influenced [its] determination(s) with respect to the advancement of legal fees.” . . .

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.” The government protests that KPMG’s adoption and enforcement of its Fees Policy was private action, outside the ambit of the Sixth Amendment. . . .

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.” 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, or when an entity is merely subject to governmental regulation. “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.” 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.”

Although Supreme Court cases on this issue “have not been a model of consistency,” some principles emerge. “A nexus of state action exists between a private entity and the state when the state exercises coercive power, is entwined in the management or control of the private actor, or provides the private actor with significant encouragement, either overt or covert, or when the private actor operates as a willful participant in joint activity with the State or its agents, is controlled by an agency of the State, has been delegated a public function by the state, or is entwined with governmental policies.”

The government argues: KPMG simply took actions in the shadow of an internal DOJ advisory document (the Thompson Memorandum) 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 non-cooperation, 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. We disagree.

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. The government brought home to KPMG that its survival depended on its role in a joint project with the government to advance government prosecutions. The government is therefore legally "responsible for the specific conduct of which the [criminal defendants] complain[]."

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

The prosecutors reinforced this message by inquiring into KPMG's fees obligations, referring to the Thompson Memorandum as "a point that had to be considered," and warning that "misconduct" should not or cannot "be rewarded" under "federal guidelines." The government had KPMG's full attention. It is hardly surprising, then, that KPMG decided to condition payment of fees on employees' cooperation with the government and to terminate fees upon indictment: only that policy would allow KPMG to continue advancing fees while minimizing the risk that prosecutors would view such advancement as obstructive.

To ensure that KPMG's new Fees Policy was enforced, prosecutors became "entwined in the . . . control" of KPMG. They intervened in KPMG's decisionmaking, expressing their "disappoint[ment] with [the] tone" of KPMG's first advisory memorandum, 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." . . . The prosecutors thus steered KPMG toward their preferred fee advancement policy and then supervised its application in individual cases. Such "overt" and "significant encouragement" supports the conclusion that KPMG's conduct is properly attributed to the State. . . .

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

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

The district court's ruling on the Sixth Amendment was based on the following analysis (set out here in *précis*). The Sixth Amendment protects "an individual's right to choose the lawyer or lawyers he or she desires," and "to use one's own funds to mount the defense that one wishes to present." The goal is to secure "a defendant's right to spend his own money on a defense." Because defendants reasonably expected to receive legal fees from KPMG, the fees "were, in every material sense, their property." The government's interest in retaining discretion to treat as obstruction a company's advancement of legal fees "is insufficient to justify the government's interference with the right of individual criminal defendants to obtain resources lawfully available to them in order to defend themselves." Defendants need not make a "particularized showing" of how their defense was impaired, because "[v]irtually everything the defendants do in this case may be influenced by the extent of the resources available to them," such as selection of counsel and "what the KPMG Defendants can pay their lawyers to do." Therefore, the Sixth Amendment violation "is complete irrespective of the quality of the representation they receive."

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

"The Sixth Amendment right of the 'accused' to assistance of counsel in 'all criminal prosecutions' is limited by its terms: it does not attach until a prosecution is commenced." "Attachment" refers to "when the [Sixth Amendment] right may be asserted"; it does not concern the separate question of "what the right guarantees," i.e., "what the substantive guarantee of the Sixth Amendment" is at that stage of the prosecution. The Supreme Court has "pegged commencement [of a prosecution] to 'the

initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” “The rule is not ‘mere formalism,’ but a recognition of the point at which ‘the government has committed itself to prosecute,’ ‘the adverse positions of government and defendant have solidified,’ and the accused ‘finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.’” . . .

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

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

We now consider “what the [Sixth Amendment] right guarantees.” The Sixth Amendment ensures that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” Thus “the Sixth Amendment guarantees the defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.” “[A]n element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him.”

The government must “honor” a defendant’s Sixth Amendment right to counsel:

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

This is intuitive: the right to counsel in an adversarial legal system would mean little if defense counsel could be controlled by the government or vetoed without good reason.

Consistent with this principle of non-interference, courts have identified violations of the Sixth Amendment right to counsel where the government obtains incriminating statements from a defendant outside the presence of counsel and then introduces those statements at trial. Likewise, the government violates the Sixth Amendment when it intrudes on the attorney-client relationship, preventing defense counsel from “participat[ing] fully and fairly in the adversary factfinding process.”

Defendants-Appellees do not say that they were deprived of constitutionally effective counsel. Their claim is that the government unjustifiably interfered with their relationship with counsel and their ability to mount the best defense they could muster. . .

The holding of *Caplin & Drysdale* is narrow: the Sixth Amendment does not prevent the government from reclaiming its property from a defendant even though the defendant had planned to fund his legal defense with it. It is easy to distinguish the case of an employee who reasonably expects to receive attorneys’ fees as a benefit or perquisite of employment, whether or not the expectation arises from a legal entitlement. As has been found here as a matter of fact, these defendants would have received fees from KPMG but for the government’s interference. Although “there is no Sixth Amendment right for a defendant to obtain counsel using tainted funds, [a defendant] still possesses a qualified Sixth Amendment right to use wholly legitimate funds to hire the attorney of his choice.”

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

The government points out that KPMG’s past fee practice was voluntary and subject to change, and that defendants therefore could have had no reasonable expectation of the ongoing advancement of fees. But this argument simply quarrels with Judge Kaplan’s finding that absent any state action, KPMG would have paid defendants’ legal fees and expenses without regard to cost. Therefore, unless the government’s interference was justified, it violated the Sixth Amendment.

The government is sometimes allowed to interfere with defendants’ choice or relationship with counsel, such as to prevent certain conflicts of interest. However, the government has failed to establish a legitimate justification for interfering with KPMG’s advancement of legal fees. . . .

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

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

The following recent trial court decision deals with conflicts and state action in the context of privilege waiver rather than funding of counsel. It is most important for its fact pattern, which can serve as a kind of roadmap to the dangers that individual corporate employees may face from dealing with corporate counsel in the earlier phases of an investigation. Never a bad idea to have personal counsel review any agreement that corporate counsel asks one to sign!

UNITED STATES v. TOURNANT, 2023 WL 5276776 (S.D.N.Y. Aug. 15, 2023)

LAURA TAYLOR SWAIN, Chief United States District Judge

In May 2022, Mr. Tournant was indicted on a number of charges alleging that he engaged in a scheme to defraud investors while he was employed at Allianz Global Investors U.S. LLC ("AGI"), a company which was a subsidiary of Allianz SE ("Allianz"), one of the world's largest financial services firms. Mr. Tournant worked as a portfolio manager at AGI, overseeing a number of high-profile investment funds worth billions of dollars.

Most notably, Mr. Tournant oversaw the management of a group of funds known as the Structured Alpha Funds (the "Funds"), a series of private investment funds that employed bespoke investment strategies which were "marketed . . . as providing broad

market exposure while maintaining specific risk protections to safeguard against losses in the event of a market crash.” The Indictment alleges that Mr. Tournant, as manager of this funds group, engaged in a scheme to deceive and defraud investors by essentially “understating the risk to which investors’ asserts were exposed, and therefore how the returns they touted were actually generated.” This scheme was allegedly carried out by Mr. Tournant (and his employees) in three ways: (1) by “overstat[ing] the level of independent oversight that AGI US and its parent company Allianz were exercising over the Funds’ strategy,” (2) by “misrepresent[ing] the hedging and other risk-mitigation strategies they were undertaking to protect investor funds,” and (3) “fraudulently alter[ing] documents” that AGI provided to investors and failing to “disclose relevant risk information” to investors. In March 2020, following the onset of the pandemic, the Funds lost more than \$7 billion in market value, and were eventually shut down. The indictment alleges that Mr. Tournant personally benefited from this fraudulent scheme, earning over \$60 million during the relevant time period.

The Securities and Exchange Commission (“SEC”) began investigating the Funds’ closure, notified Allianz of its civil inquiry in August 2020, and filed its civil complaint against Allianz in September 2020. Allianz also initiated its own internal investigation into the circumstances surrounding the Funds’ collapse. The United States Attorney’s Office for the Southern District of New York (the “Government”) began a separate criminal investigation into the Funds around the same time. The Government’s investigation, however, remained covert for some time, and was not formally announced to Allianz until June 10, 2021.

In the fall of 2020, Mr. Tournant and other Allianz employees retained counsel in connection with the SEC’s investigation. First, Mr. Tournant retained Milbank LLP (“Milbank”) as his personal counsel to represent him in connection with the internal investigation and the SEC investigation. Second, two different law firms, Sullivan & Cromwell (“S&C”) and Ropes & Gray (collectively, the “Firms”), began a joint representation of Allianz and Mr. Tournant, in connection with the internal investigation and the SEC civil matter. The Firms also assisted Allianz in conducting its internal investigation. Mr. Tournant signed an engagement letter with S&C on November 17, 2020, which set out the terms and scope of the joint representation. In the Agreement, Mr. Tournant acknowledged that he understood both the “benefits and the risks involved” with proceeding with a joint representation and stated that, should S&C conclude that a conflict of interest had arisen between Mr. Tournant and Allianz, S&C would “discuss the situation” with Mr. Tournant “with a view to arriving at a mutually agreeable solution.” The Agreement also provided that, if Allianz deemed it appropriate, Allianz could release Mr. Tournant’s confidential information to the Government and could waive any applicable claim of privilege, which would “mean that the protections of the attorney-client privilege that [Mr. Tournant] may have for such [confidential materials] would no longer apply.”

The investigations continued throughout the winter and spring of 2021. On May 5, 2021, Allianz (together with S&C) presented the preliminary findings of Allianz’s internal

investigation to the SEC. Allianz denied any wrongdoing and maintained that “the collapse [of the Fund] had been caused by the unforeseeable market downturns” of the early pandemic. On May 20 and 21, 2021, Stephen Bond-Nelson, another Allianz portfolio manager who worked on the Funds alongside Mr. Tournant, testified before the SEC. During his testimony, Mr. Bond-Nelson was represented by his individual counsel, as well as by the Firms (who appeared on behalf of both Mr. Bond-Nelson and Allianz). Mr. Bond-Nelson was questioned extensively about the Funds and certain alterations that had been made to documents sent out to investors, and he initially maintained that “any alterations had not been fraudulent but had instead been attempts to make investor documents more accurate.” During the second day of questioning, however, Mr. Bond-Nelson abruptly adjourned his testimony and refused to answer further questions. His individual counsel then communicated to the SEC that Mr. Bond-Nelson wished to cooperate with the SEC's investigation and with any parallel criminal investigation, and Mr. Bond-Nelson disengaged the Firms as his counsel. Mr. Bond-Nelson thereafter began cooperating with both the SEC and the Government, implicating Mr. Tournant as the “mastermind” who had “directed the fraud” behind the Funds collapse.

Mr. Tournant maintains that this event was a key “inflection point in the Firms’ strategy in representing Allianz”—namely, that Mr. Bond-Nelson's testimony and cooperation caused the Firms to shift from their initial strategy of denying any wrongdoing by Allianz and Mr. Tournant, to a new strategy of “shift[ing] the blame” to Mr. Tournant in order to “serve him up as a scapegoat to avoid the worst sanctions for Allianz.” As an example of this shift in strategy, the defense points to presentation materials prepared by S&C which expressly state that, “[i]mmediately after Bond-Nelson's SEC testimony,” Allianz “assumed control and pledged full cooperation in connection with the investigations” and “[c]ommissioned a forensic review” of the suspected fraud issues involving the Funds. The defense asserts that, at this point in May 2021, the Firms should have realized that the interests of Allianz and Mr. Tournant had diverged to such an extent that joint representation was no longer ethical, and that they should have apprised Mr. Tournant of this potential conflict before continuing the representation.

After Mr. Bond-Nelson’s testimony, S&C arranged to meet with Mr. Tournant on June 3, 2021, for the dual purposes of continuing Allianz's internal investigation and helping Mr. Tournant to prepare for his anticipated SEC testimony. At the time the meeting took place, the Government’s criminal investigation was still covert and had not been announced to Allianz. Two days before the meeting, S&C re-sent Mr. Tournant (through his individual counsel) a copy of his engagement letter with S&C, and reminded him that, “under the terms of Mr. Tournant’s engagement letter with [S&C], AllianzGI could decide to disclose Mr. Tournant’s statements to the Firm” to third parties if it so chose. During the meeting, S&C attorneys engaged in a mock cross-examination of Mr. Tournant and asked him about various topics relating to his role in overseeing the Funds, including detailed questions about the altered documents that were sent to investors, and about Mr. Tournant’s communications with Mr. Bond-Nelson.

Toward the end of the meeting, the S&C attorneys “ambushed” Mr. Tournant by questioning him about whether he had used a second cell phone, what the phone was used for, and why he had failed to disclose his use of a second phone during prior interviews. They confronted Mr. Tournant with previously undisclosed documents relating to the second cell phone. The meeting concluded shortly after this questioning. The defense asserts that the true purpose of this June 3 meeting was to elicit incriminating information from Mr. Tournant that could be used against him in the Government’s criminal proceeding, in an effort to secure cooperation credit for Allianz. After this meeting, Mr. Tournant cut off direct contact with the Firms and, on June 5, 2021, the Firms informed Mr. Tournant that they would be terminating their representation of him, explaining in their termination letters that Mr. Tournant’s interests had “potentially diverged from those of the Allianz Entities.” The Firms continued to represent Allianz.

On June 10, 2021, the Government contacted Allianz and several employees directly to inform them of the criminal investigation into the collapse of the Funds, and began making document requests to Allianz. Over the next several months, the Government engaged in an intensive investigation into Allianz, an effort which involved “reviewing thousands of documents, engaging subject-matter experts, and interviewing more than 20 individuals, including 10 AGI employees,” and in the meantime Allianz continued its own internal investigation into the misconduct. At various points during the Government’s investigation, Allianz made presentations to the Government to report on the findings of its internal investigation.

During the course of the criminal investigation, the Government began to suspect that Mr. Tournant had engaged in obstructive conduct with regard to the SEC investigation—specifically, that Mr. Tournant had directed Mr. Bond-Nelson to lie when responding to SEC inquiries about alterations to investor documents. The Government informed Allianz in October 2021 that it was “looking into efforts by Allianz employees to obstruct the SEC investigation,” and asked Allianz to “provide the Government with any facts Allianz had learned during its internal interviews regarding the purported rationale for altering risk reports.” In November 2021, in response to this inquiry, Allianz provided the Government with “partial summaries” of several interviews conducted during the internal investigation, including the June 3 interview of Mr. Tournant. Further, in January 2022, Allianz provided the Government with a full oral summary of the June 3 interview.

On January 20, 2022, S&C made a presentation to the Government which expressly advocated for the prosecution of Mr. Tournant and others in lieu of charging Allianz. For example, S&C stated that “Tournant, Taylor, and Bond-Nelson engaged in serious misconduct intended to understate [the] risk of the SA Funds,” that there was no “knowledge or involvement in the misconduct” by Allianz management, and that a guilty plea by Allianz/AGI was “unnecessary because DOJ action against individuals will satisfy the goals of federal prosecution.”

The parties dispute when, precisely, the Government became aware of S&C's prior joint representation of Mr. Tournant and Allianz. The defense asserts that the Government should have "understood that Mr. Tournant was personally represented by the Firms" sometime in 2021 based on several events that occurred during the investigation. The defense states that the SEC was clearly aware of the Firms' joint representation, because the SEC sent legal documents directly to Ropes & Gray as Mr. Tournant's counsel in April 2021, and the Firms appeared as counsel for Mr. Bond-Nelson and Allianz during Bond-Nelson's SEC testimony in May 2021. The defense also notes that, based on the notes summary of the June 3 interview that was provided to the Government in November 2021, it was "clear that the Firms were acting as Mr. Tournant's counsel" during that meeting.

The Government asserts that it did not become aware of the joint representation until January 2022. The Government notes that, during the multiple meetings it had with Mr. Tournant during the fall of 2021 and winter of 2022, Mr. Tournant was either represented by his individual counsel (Milbank) or his present counsel. The Government also notes that, when Allianz shared the June 3 interview materials with the Government, "counsel for Allianz did not disclose that the company had shared counsel with Tournant, a fact that remained unknown to the Government." Shortly after Mr. Tournant's new counsel entered the case (on January 28, 2022), Mr. Tournant's new counsel informed the Government that, during the June 3 interview, Mr. Tournant had been represented by the Firms—which the Government asserts was "the first time the Government learned of the joint representation." It was also during this time that Mr. Tournant's new counsel first raised the defense claims of privilege violations, informing the Government that Allianz's disclosure of Mr. Tournant's confidential information to the Government may have tainted the Government's investigation.

Upon receiving this information, the Government "promptly and carefully evaluated the issue," and concluded that, based on the engagement letters that Mr. Tournant had signed with the Firms, S&C acted "within its rights to provide information to the Government" and that "Tournant's privilege had not been breached by [S&C's] recounting of the [June 3] interview to the Government." Nevertheless, "in an abundance of caution" the Government elected to treat the disputed materials as "potentially privileged." The specific categories of materials (the "disputed materials") that the Government set aside encompassed: "notes of Tournant's statements to [S&C] during the [June 3] interview; references to those statements in Allianz's presentations to the Government; and documents that were (i) produced by Allianz pursuant to the non-waiver agreement, (ii) created during the period that Tournant was jointly represented, and (iii) included Tournant." The disputed materials were segregated by a filter team and made unavailable to the main prosecution team. On Feb 25, 2022, the Government informed Mr. Tournant's counsel that, in bringing any criminal case against Mr. Tournant, it would not rely on any of the disputed materials. . . .

Here, there is no dispute that, barring waiver, Mr. Tournant's communications with his attorneys—including, most notably, his communications with S&C during the June 3,

2021 interview—would be protected by the attorney-client privilege. These communications occurred between Mr. Tournant and his counsel, were intended to be confidential, and were designed, at least from Mr. Tournant’s perspective, to provide legal advice.

The attorney client privilege can be waived, either expressly or impliedly. *See In re Grand Jury Proc.* “It is well settled that ‘the burden of establishing the existence of an attorney-client privilege, in all of its elements, rests with the party asserting [the privilege].’” “The party claiming privilege also carries the burden of showing that it has not been waived.” *Hollis v. O’Driscoll*. Because “enforcement of a claim of privilege acts in derogation of the overriding goals of liberal discovery and adjudication of cases on their merits . . . ; privileges are disfavored and generally to be construed narrowly.” *Bowne of New York City, Inc. v. AmBase Corp.* The attorney-client privilege can be expressly waived by the client, including through a contract. *See Lugosch v. Congel* (noting that a client may waive privilege when “the client’s communication(s) or the legal advice given [are] shared, in some form or fashion, with a third party,” and that a “waiver such as this may be done explicitly or implicitly, or conversely, intentionally or inadvertently”).

Here, Mr. Tournant signed an engagement letter with S&C on November 17, 2020, that set out “the terms of S&C’s joint representation of you [Tournant] and the Allianz Entities.” (Mtn., Exhibit A (“the Agreement”)). The Agreement stated, in relevant part, as follows:

By execution of this Letter Agreement, you acknowledge that you understand the implications of this joint representation, including the benefits and the risks involved. Such benefits include, but are not limited to, the efficiencies from avoiding duplicative efforts by different lawyers and the advice of counsel who has been engaged in the matter and is familiar with its facts, circumstances, and issues. The risks or potential disadvantages of such joint representation may include, but are not limited to, the possibility that if a conflict of interest arises, you may need to proceed solely with Milbank LLP (or another counsel of your choosing) . . .

The mutual interests of the Allianz Entities and you may be best served by sharing oral or written confidential information (“Materials”). Some or all of the Materials may be protected from disclosure to anyone else as a result of the attorney-client privilege, the work-product doctrine, or other applicable privileges. You agree that S&C may share such Materials (when and if S&C deems it appropriate) with the Allianz Entities, representatives of the Allianz Entities, third parties retained by S&C, and other persons. You agree that if management of the Allianz Entities deems it appropriate, the Allianz Entities may decide to release Materials to the government and to other persons outside of the Allianz Entities who agree to keep such Materials confidential, to release Materials in response to legal process, and to waive any applicable privileges to the disclosure of such Materials. You understand that such

disclosure may mean that the protections of the attorney-client privilege that you may have for such Material would no longer apply.

The Government argues that this Agreement effectuated a clear and valid waiver of any claim of privilege Mr. Tournant might hold over the disputed materials, and that Mr. Tournant has not met his burden of showing a lack of waiver. The defense, however, argues that the Advance Waiver provision was invalidated by the conflict of interest that arose between Allianz and Mr. Tournant during the course of the joint representation. According to the defense, once this conflict of interest arose, S&C had an obligation to either disclose the conflict to Mr. Tournant and obtain a new written waiver; or to terminate the joint representation. The defense points to two bases for this alleged duty to disclose: (1) the provisions of the Agreement that set out S&C's obligations to Tournant; and (2) the basic ethical duties that apply to all attorneys. The Court addresses these arguments in turn. . . .

In particular, the defense argues that S&C failed to abide by the following provision of the Agreement:

In the event we [S&C] conclude, as the facts concerning the Structured Alpha Matter and the positions of you and the Allianz Entities develop, that the interests of the Allianz Entities and/or other individuals whom we may represent in the Structured Alpha Matters are in conflict with your interests (including, for example, because the Allianz Entities of are the view that the joint representation imposes constraints on its ability to cooperate with any government investigation) such that it may become inadvisable or improper for us to continue to represent you, we will discuss the situation with you with a view to arriving at a mutually agreeable solution. You agree that, if there is such a conflict that we cannot otherwise resolve to our mutual satisfaction, [S&C] may terminate its relationship with you. . . .

The defense asserts that this conflict of interest arose “no later than” May 22, 2021—the time at which Allianz “changed their entire approach and started cooperating” with the Government. In support of this position, the defense notes that, according to S&C's own documents, “immediately after Bond-Nelson's [May 21, 2021] SEC testimony,” Allianz “[a]ssumed control and pledged full cooperation in connection with the [Government and SEC] investigations.” On May 22, 2021, Allianz initiated a large-scale internal forensic review, a “primary goal of which,” according to the defense, was to “build the Government's case against Mr. Tournant and serve him up as a scapegoat.” Moreover, in the weeks leading up to the June 3 interview, S&C investigated and developed evidence regarding Mr. Tournant's second cell phone, without his knowledge and with the intent to “ambush” him with this evidence at the interview.

The defense argues that, after these events, it was objectively clear that a conflict had developed between the interests of Allianz and the interests of Mr. Tournant, which triggered S&C's contractual obligation to “discuss the situation with [Mr. Tournant] with a view to arriving at a mutually agreeable solution.” According to the defense,

S&C's subsequent failure to discuss the conflict with Mr. Tournant resulted in a material breach of the Agreement. Relatedly, the defense, pointing to a portion of the Agreement in which "S&C and the Allianz Entities" confirmed that they were "not presently aware of any such conflict" of interest at the time the letter was signed, argues that the Agreement "premised S&C's joint representation on the absence of a conflict between Allianz and Mr. Tournant," such that the Advance Waiver provision ceased to be effective at the time that a conflict developed. In other words, the defense appears to argue that the Advance Waiver provision was conditioned on S&C's promise to provide Mr. Tournant with warning of conflicts of interest that could later arise, and that S&C's failure to provide such warnings when needed invalidated the Advance Waiver provision. . . .

The Court concludes, based on the plain language of the Agreement, that, whether or not the provision requiring discussion of a conflict was breached, S&C's failure to apprise Mr. Tournant of the potential conflict did not vitiate the Agreement's Advance Waiver provision. First, the Court notes that it is unclear whether the Agreement's Conflict Disclosure provision was even triggered in this case—the Agreement provides that S&C will "discuss the situation" with Tournant "in the event [S&C] conclude[s] . . . that the interests of the Allianz Entities . . . are in conflict with [Tournant's] interests." The defense argues that the events of late May 2021 should have indicated to S&C that a conflict had arisen between Allianz and Mr. Tournant. However, the Agreement does not impose an obligation on S&C to act when it should have perceived a conflict. Rather, the Conflict Disclosure provision sets a subjective standard, requiring action when S&C itself actually concludes that a conflict exists. Although the defense has presented facts that, in hindsight, may suggest that S&C could or should have concluded earlier that there was a potential conflict, there is no indication that S&C was truly aware of an actual conflict between Allianz and Mr. Tournant, or had reached a conclusion that such a conflict existed, at any time prior to the day that S&C terminated the representation.

Second, and more to the point, nothing in the Agreement indicates that the two provisions the defense cites—the Advance Waiver provision and the Conflict Disclosure provision—were interdependent. The two provisions are located in different paragraphs on different pages of the Agreement, deal with different topics, and discuss the rights and the conduct of different actors. The Advance Waiver provision grants Allianz unilateral control over the disclosure of privileged materials should Allianz determine that such disclosure is appropriate, while the Conflict Disclosure provision deals with the status of the attorney-client relationship between Mr. Tournant and S&C. The latter provision obligated S&C to engage in discussion with Mr. Tournant in aid of seeking a mutually acceptable resolution if it concluded that there was a conflict and provides that, if no such mutually acceptable resolution were reached, S&C had no further obligations to Mr. Tournant and could "terminate its relationship" with him. Nothing in the Conflict Disclosure provision purports to limit Mr. Tournant's grant of disclosure authority to Allianz.

Finally, the record indicates that Mr. Tournant entered into this Agreement knowingly, intelligently, and with the benefit of the advice of his independent counsel. At the time that Mr. Tournant signed the Agreement, he was represented by his own independent counsel from Milbank, who would have been available to advise him fully of the risks, benefits, and implications of signing the joint representation Agreement. . . .

The defense further argues that S&C's conduct invalidated Mr. Tournant's waiver of the attorney client privilege because S&C violated professional ethical rules. Specifically, Mr. Tournant argues that (1) the events of late May 2021 (prior to the June 3 interview) created an un-waivable conflict of interest between Allianz and Mr. Tournant; and (2) in the alternative, even if the conflict was waivable, in order to ethically continue the representation after the events of late May 2021, S&C was required to make full disclosures to Mr. Tournant and obtain his updated consent in writing. As a consequence of this conflict of interest, the defense contends, the Advance Waiver provision “does not apply” and “was not enforceable” following S&C's failure to obtain updated informed consent from Mr. Tournant.

As an initial matter, this defense argument appears to be based on a conflation of two different types of advance waivers—advance confidentiality waivers, and advance conflict waivers. In an advance conflict waiver, a client agrees to waive “the firm's potential future conflicting engagements” as to other clients, so that he may hire the attorney of his choosing despite those potential future conflicts.

In contrast, in an advance confidentiality waiver, a client agrees to waive future claims of attorney-client privilege, thus allowing his attorney to share his otherwise-confidential information with third parties.

The Agreement at issue here features an advance confidentiality waiver, under which Mr. Tournant agreed that Allianz would control the privilege, and that in the future Allianz might decide to release Mr. Tournant's confidential materials to third parties, including government authorities, in which case Mr. Tournant would “waive any applicable privileges to the disclosure of such Materials.” The Agreement does not, however, contain an advance conflict waiver regarding the joint representation—Mr. Tournant never agreed to waive any future conflicts of interest by S&C that might later develop during the representation. Instead, the Agreement simply provides that, if an unresolvable conflict of interest should later arise, S&C “may terminate its relationship” with Mr. Tournant.

The defense has made a variety of arguments concerning the actions that S&C should have taken during late May 2021 with respect to the joint representation. For example, the defense argues that S&C was required to apprise Mr. Tournant of the potential conflict “the moment that [the] conflict arose” (*i.e.*, the moment that Allianz shifted its strategy and decided to begin cooperating with the Government investigation), because “once the circumstances change, no blanket waiver is valid,” and the attorney must make a “full disclosure of the entire set of [new] information” to the client and obtain a new waiver “in writing.” In support of these arguments, the defense relies on portions of an

ethics opinion dealing with advance *conflict* waivers, which suggest that a lawyer engaging in joint representation should “revisit the issues at the time the actual or potential conflicts arise” because, even if an initial conflict waiver is valid, in some cases it may be necessary for the lawyer to secure a “second waiver from [the] client” for a later-arising conflict. (2004 NY Bar Op.)

The defense does not, however, explain how the existence of a conflict of interest (whether waivable or un-waivable) or a breach of state ethical rules could invalidate the wholly separate portion of the Agreement dealing with the waiver of confidentiality. . .

Moreover, the rule that the defense asks the Court to adopt—under which the Government could be held to account for, and its ability to prosecute alleged criminal activity impeded by, an attorney's failure to apprise joint clients of every potential conflict during the course of the representation prior to the commencement of prosecution of a former client—would be unworkable and highly impractical. As the Government commented at oral argument, such a rule “would require the Government to impermissibly wade into attorney-client relationships on a massive scale” by requiring it to “engage with corporate counsel” in detail about “the status of their joint representation” every time the Government asked “for a voluntary production of documents.”

Based on all of these considerations, the Court concludes that the defense has not met its burden of demonstrating that the Advance Waiver provision was invalid and has failed to establish grounds for dismissal of the indictment or further inquiry into the Government's use of the material provided to it by Allianz's counsel on the basis of invasion of Mr. Tournant's attorney-client privilege. . . .

The Court next addresses the defense argument that the Government obtained improper access to privileged materials under circumstances that would render the continued prosecution of this case violative of Mr. Tournant's constitutional rights. This argument fails because (1), as explained above, Mr. Tournant had granted Allianz control over waiver of his claim of privilege with respect to his confidential communications from the outset of the joint representation; (2) the defense has not shown that the Government's interaction with S&C in this case was of a manifestly corrupt character; and (3) the defense has not shown that the Government's general encouragement of cooperation by corporate defendants is of so coercive a character as to be manifestly corrupt and require dismissal of the indictment. . .

The Court concludes that Mr. Tournant has not demonstrated any manifest corruption or violation of his constitutional rights by the Government. First, as explained above, there has been no disclosure of materials as to which Mr. Tournant retained the ability to assert his claim of privilege. It is elementary that a defendant cannot sustain a claim for unconstitutional intrusion into his attorney-client privilege when he has made no showing that his communications were privileged when the government received them. Second, even if the communications had been privileged, nothing in the proffered

evidence indicates that the Government improperly intruded into the attorney-client relationship, or that the Government otherwise took any corrupt or outrageous actions with regard to its relations with S&C and Allianz. . . .

Specifically, the defense argues that S&C's conduct was legally attributable to the Government because the Government's cooperation guidelines incentivize corporations to provide information regarding the misconduct of individual employees. These arguments are insufficient to raise a material issue regarding improper government conduct. . . .

Here . . . there is no indication that a government policy forced Allianz or its counsel to take any particular action, or directly intervened in its decision-making. The decision to include the Advance Waiver provision in the retainer agreement for joint representation was consistent with Allianz's interest in facilitating both its employees' ability to obtain legal services and its own ability to develop its knowledge of the relevant circumstances. Allianz' [sic] decision to invoke the Advance Waiver provision when it perceived that its interests had diverged from Mr. Tournant's (and that it would be in a better position under the Principles if it provided information to the Government) was consistent with Allianz' [sic] self-interest and with the express language of the Advance Waiver provision to which Mr. Tournant had agreed.

The Court accordingly concludes that Mr. Tournant has failed to provide a plausible basis for any inference that the Government's actions in this case were manifestly corrupt and his motion to dismiss the indictment on constitutional grounds must be denied.

Problem 15-2

As anyone familiar with the work of innocence projects—much less anyone paying attention to the criminal justice system—knows, deficient performance by underfunded and less than competent appointed counsel is endemic to the U.S. legal system, even in capital cases. At the same time, numerous defendants in high-profile corporate crime cases have spent tens of millions of dollars on their defenses, some spending well over \$50 million on a single defense. What, if anything, is wrong with this situation? How might one go about changing it?

16. INDIVIDUAL PLEAS AND SETTLEMENTS

Well over 90 percent of all criminal cases in the federal system, including white collar cases, are disposed of by guilty pleas prior to trial. That means—somewhat amazingly—that for lawyers representing individuals in federal court, understanding the plea negotiation process might be more important than knowing how to try a case.

This chapter looks at the major building blocks of the plea-bargaining machine, as they relate to white collar cases. Bear in mind that we already have one such building block from the early chapters: the substantive criminal statutes that (broadly) define offenses and set (relatively high) maximum punishments, supplying prosecutors with much of their leverage in plea bargaining.

A. Applicable Rules

This puts the cart before the horse a bit, but once the defendant has a plea agreement (or no plea agreement—the rules permit a defendant to “plead straight up” to the indictment), the following rule governs the plea proceeding. The most important things here are (1) understanding the difference between “(B) pleas” and “(C) pleas” under Rule 11(c)(1), and (2) seeing the policy concerns that motivate many of the provisions in Rule 11.

Federal Rule of Criminal Procedure 11. Pleas

(a) Entering a Plea.

- (1) *In General.* A defendant may plead not guilty, guilty, or (with the court’s consent) nolo contendere.
- (2) *Conditional Plea.* With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.
- (3) *Nolo Contendere Plea.* Before accepting a plea of nolo contendere, the court must consider the parties’ views and the public interest in the effective administration of justice.
- (4) *Failure to Enter a Plea.* If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

- (1) *Advising and Questioning the Defendant.* Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the

court must inform the defendant of, and determine that the defendant understands, the following:

- (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;
 - (B) the right to plead not guilty, or having already so pleaded, to persist in that plea;
 - (C) the right to a jury trial;
 - (D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;
 - (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
 - (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;
 - (G) the nature of each charge to which the defendant is pleading;
 - (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;
 - (I) any mandatory minimum penalty;
 - (J) any applicable forfeiture;
 - (K) the court's authority to order restitution;
 - (L) the court's obligation to impose a special assessment;
 - (M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and
 - (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.
- (2) *Ensuring That a Plea Is Voluntary.* Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

- (3) *Determining the Factual Basis for a Plea.* Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) *Plea Agreement Procedure.*

- (1) *In General.* An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

- (A) not bring, or will move to dismiss, other charges;
- (B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or
- (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

- (2) *Disclosing a Plea Agreement.* The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) *Judicial Consideration of a Plea Agreement.*

- (A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.
- (B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

- (4) *Accepting a Plea Agreement.* If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

- (5) *Rejecting a Plea Agreement.* If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):
- (A) *inform* the parties that the court rejects the plea agreement;
 - (B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and
 - (C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.
- (d) *Withdrawing a Guilty or Nolo Contendere Plea.* A defendant may withdraw a plea of guilty or nolo contendere:
- (1) before the court accepts the plea, for any reason or no reason; or
 - (2) after the court accepts the plea, but before it imposes sentence if:
 - (A) the court rejects a plea agreement under 11(c)(5); or
 - (B) the defendant can show a fair and just reason for requesting the withdrawal.
- (e) *Finality of a Guilty or Nolo Contendere Plea.* After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.
- (f) *Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements.* The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.
- (g) *Recording the Proceedings.* The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).
- (h) *Harmless Error.* A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

In addition to Rule 11(f), the admissibility of pleas, plea discussions, and related statements is also governed by Federal Rule of Evidence 410. Why do these rules exist? Are they necessary?

FEDERAL RULE OF EVIDENCE 410. PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS

- (a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:
- (1) a guilty plea that was later withdrawn;
 - (2) a nolo contendere plea;
 - (3) a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or
 - (4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.
- (b) Exceptions. The court may admit a statement described in Rule 410(a)(3) or (4):
- (1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or
 - (2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

B. The Proffer Process

Many plea negotiations begin with the government taking a “proffer” from the defendant. This is an essential step in enlisting any cooperating witness, as it provides prosecutors with the opportunity to assess an individual’s credibility and the value of that person’s information before committing to granting any benefits in a plea agreement. Such discussions typically take place under a written proffer agreement that affords the individual a limited form of “use immunity” so that the person is not required to, in effect, provide a full confession before knowing whether a plea bargain will be reached.

You will see a lot of proffer agreements in corporate crime practice. The careful lawyer will often insist on such protection before allowing a client to talk to the government, even if the lawyer thinks the client may not be charged and thus may not need to engage in plea bargaining with prosecutors. A proffer agreement is a temporary or limited contract executed on the way to a plea agreement, or as protection for the purpose of talking to the government for a day when the ultimate results of an ongoing investigation remain unclear. (You may hear these agreements referred to by some practitioners, in an unfortunate and hackneyed phrase, as “queen for a day” agreements.)

Consider the terms of the following sample proffer agreement. What does it give the client? What does it give the government? What does it *not* give both parties? (Hint: recall the materials on immunity from Chapter 12.)

[SAMPLE PROFFER AGREEMENT]

With respect to the meeting of _____ (“Client”) and his attorney _____, Esq., with Assistant United States Attorney _____ to be held at the Office of the United States Attorney for the Southern District of New York on [Meeting Date] (“the meeting”), the following understandings exist:

(1) THIS IS NOT A COOPERATION AGREEMENT, The Client has agreed to provide the Government with information, and to respond to questions, so that the Government may evaluate Client’s information and responses in making prosecutive decisions. By receiving Client’s proffer, the Government does not agree to make a motion on the Client’s behalf or to enter into a cooperation agreement, plea agreement, immunity or non-prosecution agreement. The Government makes no representation about the likelihood that any such agreement will be reached in connection with this proffer.

(2) In any prosecution brought against Client by this Office, except as provided below the Government will not offer in evidence on its case-in-chief, or in connection with any sentencing proceeding for the purpose of determining an appropriate sentence, any statements made by Client at the meeting, except in a prosecution for false statements, obstruction of justice or perjury with respect to any acts committed or statements made during or after the meeting or testimony given after the meeting.

Notwithstanding item (2) above: (a) the Government may use information derived directly or indirectly from the meeting for the purpose of obtaining leads to other evidence, which evidence may be used in any prosecution of Client by the Government; (b) in any prosecution brought against Client, the Government may use statements made by Client at the meeting and all evidence obtained directly or indirectly therefrom for the purpose of cross-examination should Client testify; and (c) the Government may also use statements made by Client at the meeting to rebut any evidence or arguments offered by or on behalf of Client (including arguments made or issues raised sua sponte by the District Court) at any stage of the criminal prosecution (including bail, all phases of trial, and sentencing) in any prosecution brought against Client.

(3) The Client understands and agrees that in the event the Client seeks to qualify for a reduction in sentence under Title 18, United States Code, Section 3553(f) or United States Sentencing Guidelines, Sections 2D 1.1(b) (6) or 5C1.2, the Office may offer in evidence, in connection with the sentencing, statements made by the Client at the meeting and all evidence obtained directly or indirectly therefrom.

(4) To the extent that the Government is entitled under this Agreement to offer in evidence any statements made by Client or leads obtained therefrom, Client shall

assert no claim under the United States Constitution, any statute, Rule 11(e)(6) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal rule that such statements or any leads therefrom should be suppressed. It is the intent of this Agreement to waive all rights in the foregoing respects.

(5) If this Office receives a request from another prosecutor's office for access to information obtained pursuant to this Proffer Agreement, this Office may furnish such information but will do so only on the condition that the requesting office honor the provisions of this Agreement.

(6) It is further understood that this Agreement is limited to the statements made by Client at the meeting and does not apply to any oral, written or recorded statements made by Client at any other time. No understandings, promises, agreements and/or conditions have been entered into with respect to the meeting other than those set forth in this Agreement and none will be entered into unless in writing and signed by all parties.

(7) The understandings set forth in paragraphs 1 through 7 above extend to the continuation of this meeting on the dates that appear below.

(8) Client and Attorney acknowledge that they have fully discussed and understand every paragraph and clause in this Agreement and the consequences thereof.

The following case is about the kinds of disputes that can arise during the enforcement of a proffer agreement and helps explain what protections a typical proffer agreement provides and does not provide to a defendant. The obvious lesson here is that it may be nearly impossible for an individual to testify in her own defense at a trial after she has made a full proffer to the government.

UNITED STATES v. VELEZ, 354 F.3d 190 (2d Cir. 2004)

JOSÉ A. CABRANES, Circuit Judge:

On November 21, 2001, defendant was indicted for being a convicted felon in possession of a firearm shipped and transported in interstate commerce, in violation of 18 U.S.C. § 922(g)(1). The charge was based on the observations of three New York Police Department officers—namely, that on August 18, 2001 the officers saw defendant pull a gun from his waistband, heard the sound of metal hitting pavement, and then recovered a gun from the ground where defendant had been standing.

Shortly after being charged, defendant participated in two proffer sessions. In a first session on January 14, 2002, defendant, accompanied by counsel, asserted his innocence, claiming that he did not possess the gun found on the ground where he had been standing. The Government did not credit defendant's statements.

On May 9, 2002, defendant, again accompanied by counsel, participated in a second proffer session, which he had requested. (At this session, defendant was represented by his second attorney, because the District Court had granted defendant's request that he be relieved of his prior counsel.) Before participating in the meeting, defendant signed an agreement in which he waived, in certain circumstances, the protection otherwise applicable to his proffer statements that prohibits use of those statements as evidence against him. Relevant to this appeal, the waiver provision to which defendant agreed provides:

[T]he Government may . . . use statements made by [defendant] at the meeting to rebut any evidence or arguments offered by or on behalf of [defendant] (including arguments made or issues raised *sua sponte* by the District Court) at any stage of the criminal prosecution (including bail, all phases of trial, and sentencing) in any prosecution brought against [defendant].

Accordingly, by signing the proffer agreement that included this waiver provision, defendant authorized the Government to introduce defendant's proffer statements at trial if defendant introduced evidence or arguments that were inconsistent with his proffer statements.

In the second proffer session, defendant recanted his claims of innocence at the initial session and admitted facts pertaining to one element of the charged offense—namely, that he owned and possessed the firearm that the officers found on the ground near him.

Defendant thereafter requested a third proffer session, which the Government scheduled, but defendant canceled the meeting and elected to proceed to trial.

Before the start of trial, however, defendant presented two issues to the District Court. First, he requested that the Court again appoint new defense counsel, on the ground that he would not receive a fair trial because his current (second) counsel had stated that he was “limited to attack[ing] certain areas,” which, as defendant contended, was due to counsel's presence at the proffer session. The District Court denied defendant's request.

Second, through his attorney at a pretrial conference and in an *in limine* motion, defendant sought a preliminary ruling from the District Court on the scope of the defense's arguments and defense witness testimony that would open the door to the Government's use of defendant's proffer statements. In response to defendant's argument at the pretrial conference, the Government informed the Court that it did not seek to introduce defendant's proffer statements in its case-in-chief, but that it reserved the right “to introduce such statements if they are deemed necessary to rebut testimony or arguments made by or on behalf of the defendant that are inconsistent with statements made by the defendant during the proffer session.”

The District Court initially did not rule on defendant's motion, but it noted that certain anticipated defense witness testimony would “come ‘close’ to opening the door to [the

Government's] introduction of [defendant's] proffer statements." When defense counsel informed the Court that it would not elicit that testimony, the District Court provided additional time for the defense to reconsider its decision. However, later in the day, the District Court stated that if the anticipated defense witness testimony were introduced, the Court would indeed permit the Government to introduce defendant's proffer admissions, thereby implicitly finding that the proffer agreement was enforceable. Defendant did not introduce the anticipated testimony.

After a three-day trial, the jury convicted defendant of the sole count of the indictment, which yielded a sentencing range of 100 to 125 months' imprisonment under applicable guidelines. At sentencing, in the context of offering mitigation to warrant a sentence at the low end of the range, defendant stated that he had been "trap[ped]" into making his admissions at the second proffer session. The District Court declined to credit defendant's statement as relevant to mitigation, and on December 16, 2002, sentenced defendant principally to 120 months' imprisonment.

On appeal, defendant argues that the waiver provision in the proffer agreement—which permits the Government to offer a proffer admission by the defendant in rebuttal to contradictory evidence or argument—violates defendant's constitutional rights to mount a defense, to the effective assistance of counsel, and to a fair trial. We disagree. . . .

Ordinarily, statements made by a defendant during plea negotiations, including proffer sessions, are inadmissible at trial. Fed. R. Evid. 410. However, a defendant can waive the protection afforded by Rule 410 as long as there is no "affirmative indication that the agreement [to waive] was entered into unknowingly or involuntarily." *Mezzanatto*. In *Mezzanatto*, as defendant correctly points out, the Supreme Court considered and enforced a narrow waiver provision in which the defendant permitted the Government to use his plea-negotiation statements only when responding to contrary testimony by the defendant himself. *Id.* at 198. Here we face a more expansive waiver of Rule 410 because, in the proffer agreement at issue, defendant waived his exclusionary privilege in all circumstances in which the defense presents contradictory testimony, evidence, or arguments—whether or not defendant himself testifies. We agree with the District Court's implicit decision that the agreement is enforceable.

In contending that the agreement is unenforceable, defendant relies principally on *United States v. Duffy*, in which the district court refused to enforce a waiver provision in a proffer agreement similar to the one we consider here. The *Duffy* ruling determined that the waiver provision "prevent[ed defense counsel] from making any sort of *meaningful* defense," and that it "exploit[ed]" a disparity of bargaining power between the Government and the defendant. The court stated: "After signing the standard proffer agreement, the terms of which are dictated by the government, the only thing that a defendant is guaranteed is the chance to convince the prosecutor to enter a deal. At the same time, the defendant bears all of the risk." Concluding that the waiver provision effectively forfeited the defendant's fundamental rights to present a defense and to the

effective assistance of counsel and, in doing so, implicated important public interests, the district court held the waiver provision unenforceable.

For the reasons that follow, we respectfully decline to adopt the position advanced in *Duffy*. . . .

As the *Gomez* ruling points out, “fairness dictates that the agreement be enforced.” “If the proffer agreement is not enforced, a defendant will have less incentive to be truthful, for he will know that his proffer statements cannot be used against him at trial as long as he does not testify, even if he presents inconsistent evidence or arguments.”

In addition, invalidating a waiver provision like the one before us would clearly interfere with plea bargaining and cooperation efforts—in direct contravention of the criminal justice system’s legitimate goal of encouraging plea bargaining in appropriate circumstances. The Supreme Court has noted that, “[i]f prosecutors were precluded from securing [waiver] agreements, they might well decline to enter into cooperation discussions in the first place and might never take this potential first step toward a plea bargain.”

We do not lightly dismiss the observation in *Duffy* that the Government holds significant bargaining power in arranging proffer sessions and securing a waiver provision as a prerequisite for a defendant’s participation. However, “[t]he mere potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing negotiation altogether.” *Mezzanatto*. Indeed, to the extent there is a disparity between the parties’ bargaining positions, it is likely attributable to the Government’s evidence of the defendant’s guilt. We thus reject the argument that defendant, relying on *Duffy*, makes in this case—that the asserted disparity of power between the Government and a defendant in proffers renders waiver provisions in proffer agreements unenforceable.

Finally, a defendant remains free to present evidence inconsistent with his proffer statements, with the fair consequence that, if he does, “the Government [is] then . . . permitted to present the defendant’s own words in rebuttal.” *Gomez*. With this avenue open to him, a defendant who has consented to a waiver provision like the one at issue here has not forfeited his constitutional right to present a defense, to the effective assistance of his counsel, or to a fair trial.

Accordingly, we reject defendant’s claim that the waiver provision is unconstitutional, and we hold that, where a proffer agreement is entered into knowingly and voluntarily, a provision in which defendant waives his exclusionary privilege under Federal Rule of Evidence 410 by permitting the Government to introduce defendant’s proffer statements to rebut contrary evidence or arguments presented by the defense, whether or not defendant testifies, is enforceable. . . .

C. Plea Bargaining and the Constitution

A key element in understanding the power of prosecutors in plea negotiations, and the prevalence of guilty pleas, is the limited constitutional constraints on the practice of plea bargaining. The following two cases are the foundational Supreme Court decisions on the subject. Why do these rulings give so much power to the prosecutor? What is the rationale for doing so? What is potentially wrong with that power? If one wanted the prosecutor to have less power, could the Court have decided these cases differently? Exactly how?

BRADY v. UNITED STATES, 397 U.S. 742 (1970)

Mr. Justice WHITE delivered the opinion of the Court.

In 1959, petitioner was charged with kidnaping in violation of 18 U.S.C. § 1201(a). Since the indictment charged that the victim of the kidnaping was not liberated unharmed, petitioner faced a maximum penalty of death if the verdict of the jury should so recommend. Petitioner, represented by competent counsel throughout, first elected to plead not guilty. Apparently because the trial judge was unwilling to try the case without a jury, petitioner made no serious attempt to reduce the possibility of a death penalty by waiving a jury trial. Upon learning that his codefendant, who had confessed to the authorities, would plead guilty and be available to testify against him, petitioner changed his plea to guilty. His plea was accepted after the trial judge twice questioned him as to the voluntariness of his plea. Petitioner was sentenced to 50 years' imprisonment, later reduced to 30.

In 1967, petitioner sought relief under 28 U.S.C. § 2255, claiming that his plea of guilty was not voluntarily given because § 1201(a) operated to coerce his plea, because his counsel exerted impermissible pressure upon him, and because his plea was induced by representations with respect to reduction of sentence and clemency. It was also alleged that the trial judge had not fully complied with Rule 11 of the Federal Rules of Criminal Procedure. . . .

The trial judge in 1959 found the plea voluntary before accepting it; the District Court in 1968, after an evidentiary hearing, found that the plea was voluntarily made; the Court of Appeals specifically approved the finding of voluntariness. We see no reason on this record to disturb the judgment of those courts. Petitioner, advised by competent counsel, tendered his plea after his codefendant, who had already given a confession, determined to plead guilty and became available to testify against petitioner. It was this development that the District Court found to have triggered Brady's guilty plea.

The voluntariness of Brady's plea can be determined only by considering all of the relevant circumstances surrounding it. One of these circumstances was the possibility of a heavier sentence following a guilty verdict after a trial. It may be that Brady, faced with a strong case against him and recognizing that his chances for acquittal were slight, preferred to plead guilty and thus limit the penalty to life imprisonment rather than to

elect a jury trial which could result in a death penalty. But even if we assume that Brady would not have pleaded guilty except for the death penalty provision of § 1201(a), this assumption merely identifies the penalty provision as a 'but for' cause of his plea. That the statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act.

The State to some degree encourages pleas of guilty at every important step in the criminal process. For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family. All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas; the pleas are no more improperly compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction.

Of course, the agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant. But nothing of the sort is claimed in this case; nor is there evidence that Brady was so gripped by fear of the death penalty or hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty. Brady's claim is of a different sort: that it violates the Fifth Amendment to influence or encourage a guilty plea by opportunity or promise of leniency and that a guilty plea is coerced and invalid if influenced by the fear of a possibly higher penalty for the crime charged if a conviction is obtained after the State is put to its proof.

Insofar as the voluntariness of his plea is concerned, there is little to differentiate Brady from (1) the defendant, in a jurisdiction where the judge and jury have the same range of sentencing power, who pleads guilty because his lawyer advises him that the judge will very probably be more lenient than the jury; (2) the defendant, in a jurisdiction where the judge alone has sentencing power, who is advised by counsel that the judge is normally more lenient with defendants who plead guilty than with those who go to trial; (3) the defendant who is permitted by prosecutor and judge to plead guilty to a lesser offense included in the offense charged; and (4) the defendant who pleads guilty to certain counts with the understanding that other charges will be dropped. In each of these situations, as in Brady's case, the defendant might never plead guilty absent the possibility or certainty that the plea will result in a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty. We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.

The issue we deal with is inherent in the criminal law and its administration because guilty pleas are not constitutionally forbidden, because the criminal law characteristically extends to judge or jury a range of choice in setting the sentence in individual cases, and because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law. For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof. It is this mutuality of advantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty, a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury.

Of course, that the prevalence of guilty pleas is explainable does not necessarily validate those pleas or the system which produces them. But we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

A contrary holding would require the States and Federal Government to forbid guilty pleas altogether, to provide a single invariable penalty for each crime defined by the statutes, or to place the sentencing function in a separate authority having no knowledge of the manner in which the conviction in each case was obtained. In any event, it would be necessary to forbid prosecutors and judges to accept guilty pleas to selected counts, to lesser included offenses, or to reduced charges. The Fifth Amendment does not reach so far. . . .

The standard as to the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Court of Appeals for the Fifth Circuit:

(A) plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).

Under this standard, a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty.

BORDENKIRCHER v. HAYES, 434 U.S. 367 (1978)

Mr. Justice STEWART delivered the opinion of the Court.

The question in this case is whether the Due Process Clause of the Fourteenth Amendment is violated when a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged.

The respondent, Paul Lewis Hayes, was indicted by a Fayette County, Ky., grand jury on a charge of uttering a forged instrument in the amount of \$88.30, an offense then punishable by a term of 2 to 10 years in prison. Ky. Rev. Stat. § 434.130 (1973) (repealed 1975). After arraignment, Hayes, his retained counsel, and the Commonwealth's Attorney met in the presence of the Clerk of the Court to discuss a possible plea agreement. During these conferences the prosecutor offered to recommend a sentence of five years in prison if Hayes would plead guilty to the indictment. He also said that if Hayes did not plead guilty and "save[d] the court the inconvenience and necessity of a trial," he would return to the grand jury to seek an indictment under the Kentucky Habitual Criminal Act, then Ky. Rev. Stat. § 431.190 (1973) (repealed 1975), which would subject Hayes to a mandatory sentence of life imprisonment by reason of his two prior felony convictions. Hayes chose not to plead guilty, and the prosecutor did obtain an indictment charging him under the Habitual Criminal Act. It is not disputed that the recidivist charge was fully justified by the evidence, that the prosecutor was in possession of this evidence at the time of the original indictment, and that Hayes' refusal to plead guilty to the original charge was what led to his indictment under the habitual criminal statute.

A jury found Hayes guilty on the principal charge of uttering a forged instrument and, in a separate proceeding, further found that he had twice before been convicted of felonies. As required by the habitual offender statute, he was sentenced to a life term in the penitentiary. The Kentucky Court of Appeals rejected Hayes' constitutional objections to the enhanced sentence, holding in an unpublished opinion that imprisonment for life with the possibility of parole was constitutionally permissible in light of the previous felonies of which Hayes had been convicted, and that the prosecutor's decision to indict him as a habitual offender was a legitimate use of available leverage in the plea-bargaining process.

On Hayes' petition for a federal writ of habeas corpus, the United States District Court for the Eastern District of Kentucky agreed that there had been no constitutional violation in the sentence or the indictment procedure, and denied the writ. The Court of Appeals for the Sixth Circuit reversed the District Court's judgment. While recognizing "that plea bargaining now plays an important role in our criminal justice system," the appellate court thought that the prosecutor's conduct during the bargaining negotiations

had violated the principles of *Blackledge v. Perry*, which “protect[ed] defendants from the vindictive exercise of a prosecutor’s discretion.” Accordingly, the court ordered that Hayes be discharged “except for his confinement under a lawful sentence imposed solely for the crime of uttering a forged instrument.” We granted certiorari to consider a constitutional question of importance in the administration of criminal justice.

It may be helpful to clarify at the outset the nature of the issue in this case. While the prosecutor did not actually obtain the recidivist indictment until after the plea conferences had ended, his intention to do so was clearly expressed at the outset of the plea negotiations. Hayes was thus fully informed of the true terms of the offer when he made his decision to plead not guilty. This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant’s insistence on pleading not guilty. As a practical matter, in short, this case would be no different if the grand jury had indicted Hayes as a recidivist from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain.

The Court of Appeals nonetheless drew a distinction between “concessions relating to prosecution under an existing indictment,” and threats to bring more severe charges not contained in the original indictment—a line it thought necessary in order to establish a prophylactic rule to guard against the evil of prosecutorial vindictiveness. Quite apart from this chronological distinction, however, the Court of Appeals found that the prosecutor had acted vindictively in the present case since he had conceded that the indictment was influenced by his desire to induce a guilty plea. The ultimate conclusion of the Court of Appeals thus seems to have been that a prosecutor acts vindictively and in violation of due process of law whenever his charging decision is influenced by what he hopes to gain in the course of plea bargaining negotiations.

We have recently had occasion to observe: “[W]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country’s criminal justice system. Properly administered, they can benefit all concerned.” *Blackledge v. Allison*. The open acknowledgment of this previously clandestine practice has led this Court to recognize the importance of counsel during plea negotiations, *Brady v. United States*, the need for a public record indicating that a plea was knowingly and voluntarily made, *Boykin v. Alabama*, and the requirement that a prosecutor’s plea-bargaining promise must be kept, *Santobello v. New York*. The decision of the Court of Appeals in the present case, however, did not deal with considerations such as these, but held that the substance of the plea offer itself violated the limitations imposed by the Due Process Clause of the Fourteenth Amendment. For the reasons that follow, we have concluded that the Court of Appeals was mistaken in so ruling.

This Court held . . . that the Due Process Clause of the Fourteenth Amendment “requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.” The same

principle was later applied to prohibit a prosecutor from reindicting a convicted misdemeanor on a felony charge after the defendant had invoked an appellate remedy, since in this situation there was also a “realistic likelihood of ‘vindictiveness.’” *Blackledge v. Perry*.

In those cases the Court was dealing with the State’s unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction—a situation “very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power.” *Parker v. North Carolina*. The Court has emphasized that the due process violation in cases such as *Pearce* and *Perry* lay not in the possibility that a defendant might be deterred from the exercise of a legal right, but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction.

To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person’s reliance on his legal rights is “patently unconstitutional.” *Chaffin v. Stynchcombe*. But in the “give-and-take” of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution’s offer.

Plea bargaining flows from “the mutuality of advantage” to defendants and prosecutors, each with his own reasons for wanting to avoid trial. Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation. Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial.

While confronting a defendant with the risk of more severe punishment clearly may have a “discouraging effect on the defendant’s assertion of his trial rights, the imposition of these difficult choices [is] an inevitable”—and permissible—“attribute of any legitimate system which tolerates and encourages the negotiation of pleas.” *Chaffin v. Stynchcombe*. It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor’s interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

It is not disputed here that Hayes was properly chargeable under the recidivist statute, since he had in fact been convicted of two previous felonies. In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or

bring before a grand jury, generally rests entirely in his discretion. Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" so long as "the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*. To hold that the prosecutor's desire to induce a guilty plea is an "unjustifiable standard," which, like race or religion, may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself. Moreover, a rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged.

There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise. We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment. . . .

Problem 16-1

Why has the Supreme Court largely rejected the idea of constitutional regulation of the coerciveness of plea bargaining, even as public and academic concerns about the dominance of plea-bargaining mills in the criminal justice system has grown? Can you think of a different approach a future Court might be able to take to constitutional regulation of plea bargains?

D. Plea Agreements Without Cooperation

The following is an example of a "straight" plea agreement, without cooperation provisions, in an insider trading prosecution related to the investigation of Raj Rajaratnam and the Galleon hedge fund, discussed in Chapter 4. What does the defendant get under this type of agreement? What does the defendant give up? Ask the same questions with respect to the prosecutor, and tally the results. Why might a client wish to enter into this kind of "straight" plea agreement?

U.S. Department of Justice
United States Attorney
Southern District of New York

January 18, 2011

Alan Kaufman, Esq.
Kelley Drye & Warren
101 Park Avenue
New York, NY 10178

Re: United States v. Danielle Chiesi, SI 09 Cr. 1184 (RJH)

Dear Mr. Kaufman:

On the understandings specified below, the Office of the United States Attorney for the Southern District of New York (“this Office”) will accept a guilty plea from Danielle Chiesi (“the defendant”) to Counts Five, Six and Seven of the above-referenced Indictment.

Counts Five, Six and Seven charge the defendant with conspiracy to commit securities fraud, in violation of Title 18, United States Code, Section 371, and each count carries a maximum sentence of five years’ imprisonment; a maximum fine, pursuant to Title 18, United States Code, Section 3571 of the greatest of \$250,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to persons other than the defendant resulting from the offense; a mandatory \$100 special assessment; and a maximum period of supervised release of three years. The total maximum term of imprisonment for all three counts is fifteen years, in addition to the foregoing, the Court must order restitution in accordance with Sections 3663, 3663A and 3664 of Title 18, United States Code.

In consideration of the defendant’s plea to the above offenses, the defendant will not be further prosecuted criminally by this Office (except for criminal tax violations as to which this Office cannot, and does not, make any agreement) for her participation in schemes to engage in insider trading from in or about July 2008 through in or about April 2009 in the securities of Sun Microsystems Inc., Advanced Micro Devices, Inc., International Business Machines Corp., Akamai Technologies, Inc., Sybase, Inc., Lenovo Group Ltd., and Marvell Technology Group Ltd., as charged in Counts Five, Six and Seven of the Indictment and disclosed in the Bill of Particulars filed in this matter. In addition, at the time of sentencing, the Government will move to dismiss any open Count(s) against the defendant. The defendant agrees that with respect to any and all dismissed charges she is not a “prevailing party” within the meaning of the “Hyde Amendment,” Section 617, P.L. (Nov. 26, 1997), and will not file any claim under that law.

The defendant hereby admits the forfeiture allegations with respect to Counts Five, Six and Seven of the Indictment and agrees to forfeit to the United States, pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461, the proceeds she obtained as a result of the offenses charged in Counts Five, Six and Seven of the Indictment. The defendant agrees that she will not file a claim or a petition for remission or mitigation in any forfeiture proceeding and will not cause or assist anyone else in doing so. It is further understood that any forfeiture of the defendant's assets shall not be treated as satisfaction of any fine, restitution, cost of imprisonment, or any other penalty the Court may impose upon her in addition to forfeiture.

In consideration of the foregoing and pursuant to United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") Section 6B1.4, the parties hereby stipulate to the following:

A. Offense Level

1. The Guidelines provisions in effect as of November 1, 2010 apply in this case.
2. The Guidelines provision applicable to the offenses charged in Counts Five, Six and Seven of the Indictment is U.S.S.G. § 2B1.4. Pursuant to U.S.S.G. § 2B1.4(a), the base offense level is 8.
3. The base offense level is increased by 16 levels because the gain is greater than \$1,000,000 but not more than \$2,500,000. U.S.S.G. §§ 2B 1.4(b)(1), 2B1.1(b)(1)(I).
4. Assuming the defendant clearly demonstrates acceptance of responsibility, to the satisfaction of the Government, through her allocution and subsequent conduct prior to the imposition of sentence, a two-level reduction will be warranted, pursuant to U.S.S.G. § 3E1.1(a). Furthermore, assuming the defendant has accepted responsibility as described in the previous sentence, an additional one-level reduction is warranted, pursuant to U.S.S.G. § 3E1.1 (b), because the defendant gave timely notice of her intention to enter a plea of guilty, thereby permitting the Government to avoid preparing for trial and permitting the Court to allocate its resources efficiently.

In accordance with the above, the applicable Guidelines offense level is 21.

B. Criminal History Category

Based upon the information now available to this Office (including representations by the defense), the defendant has no criminal history points. Accordingly, the defendant's Criminal History Category is I.

C. Sentencing Range

Based upon the calculations set forth above, the defendant's stipulated sentencing Guidelines range is 37 to 46 months' imprisonment (the "Stipulated Guidelines Range"). In addition, after determining the defendant's ability to pay, the Court may impose a fine pursuant to §5E1.2. At Guidelines level 21, the applicable fine range is \$7,500 to \$75,000.

The parties agree that neither a downward nor an upward departure from the Stipulated Guidelines Range set forth above is warranted. Accordingly, neither party will seek any departure or adjustment pursuant to the Guidelines that is not set forth herein. Nor will either party suggest that the Probation Office consider such a departure or adjustment under the Guidelines, or suggest that the Court *sua sponte* consider any such departure or adjustment.

The parties agree that either party may seek a sentence outside of the Stipulated Guidelines Range, suggest that the Probation Office consider a sentence outside of the Stipulated Guidelines Range, and suggest that the Court *sua sponte* consider a sentence outside of the Stipulated Guidelines Range, based upon the factors to be considered in imposing a sentence pursuant to Title 18, United States Code, Section 3553(a).

Except as provided in any written Proffer Agreement(s) that may have been entered into between this Office and the defendant, nothing in this Agreement limits the right of the parties (i) to present to the Probation Office or the Court any facts relevant to sentencing; (ii) to make any arguments regarding where within the Stipulated Guidelines Range (or such other range as the Court may determine) the defendant should be sentenced and regarding the factors to be considered in imposing a sentence pursuant to Title 18, United States Code, Section 3553(a); (iii) to seek an appropriately adjusted Guidelines range if it is determined based upon new information that the defendant's criminal history category is different from that set forth above; and (iv) to seek an appropriately adjusted Guidelines range or mandatory minimum term of imprisonment if it is subsequently determined that the defendant qualifies as a career offender under U.S.S.G. § 4B1.1. Nothing in this Agreement limits the right of the Government to seek denial of the adjustment for acceptance of responsibility, *see* U.S.S.G. § 3E1.1, regardless of any stipulation set forth above, if the defendant fails clearly to demonstrate acceptance of responsibility, to the satisfaction of the Government, through her allocution and subsequent conduct prior to the imposition of sentence. Similarly, nothing in this Agreement limits the right of the Government to seek an enhancement for obstruction of justice, *see* U.S.S.G. § 3C1.1, regardless of any stipulation set forth above, should it be determined that the defendant has either (i) engaged in conduct, unknown to the Government at the time of the signing of this Agreement, that constitutes obstruction of justice or (ii) committed another crime after signing this Agreement.

It is understood that pursuant to U.S.S.G. § 6B 1.4(d), neither the Probation Office nor the Court is bound by the above Guidelines stipulation, either as to questions of fact or as to the determination of the proper Guidelines to apply to the facts. In the event that the Probation Office or the Court contemplates any Guidelines adjustments, departures, or calculations different from those stipulated to above, or contemplates any sentence outside of the Stipulated Guidelines Range, the parties reserve the right to answer any inquiries and to make all appropriate arguments concerning the same.

It is understood that the sentence to be imposed upon the defendant is determined solely by the Court. It is further understood that the Guidelines are not binding on the Court. The defendant acknowledges that her entry of a guilty plea to Counts Five, Six and Seven of the Indictment authorizes the sentencing court to impose any sentence, up to and including the statutory maximum sentence. This Office cannot, and does not, make any promise or representation as to what sentence the defendant will receive. Moreover, it is understood that the defendant will have no right to withdraw her plea of guilty should the sentence imposed by the Court be outside the Stipulated Guidelines Range set forth above.

It is agreed (i) that the defendant will not file a direct appeal; nor bring a collateral challenge, including but not limited to an application under Title 28, United States Code, Section 2255 and/or Section 2241; nor seek a sentence modification pursuant to Title 18, United States Code, Section 3582(c), of any sentence within or below the Stipulated Guidelines Range of 37 to 46 months imprisonment and (ii) that the Government will not appeal any sentence within or above the Stipulated Guidelines Range. This provision is binding on the parties even if the Court employs a Guidelines analysis different from that stipulated to herein. Furthermore, it is agreed that any appeal as to the defendant's sentence that is not foreclosed by this provision will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) the above stipulation. The parties agree that this waiver applies regardless of whether the term of imprisonment is imposed to run consecutively to or concurrently with the undischarged portion of any other sentence of imprisonment that has been imposed on the defendant at the time of sentencing in this case. The defendant further agrees not to appeal any term of supervised release that is less than or equal to the statutory maximum.

The defendant hereby acknowledges that she has accepted this Agreement and decided to plead guilty because she is in fact guilty. By entering this plea of guilty, the defendant waives any and all right to withdraw her plea or to attack her conviction, either on direct appeal or collaterally, on the ground that the Government has failed to produce any discovery material, *Jencks* Act material, exculpatory material pursuant to *Brady v. Maryland*, other than information establishing the factual innocence of the defendant, and impeachment material pursuant to *Giglio v. United States*, that has not already been produced as of the date of the signing of this Agreement.

It is further agreed that should the conviction(s) following the defendant's plea(s) of guilty pursuant to this Agreement be vacated for any reason, then any prosecution that

is not time-barred by the applicable statute of limitations on the date of the signing of this agreement (including any counts that the Government has agreed to dismiss at sentencing pursuant to this Agreement) may be commenced or reinstated against the defendant, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement or reinstatement of such prosecution. It is the intent of this Agreement to waive all defenses based on the statute of limitations with respect to any prosecution that is not time-barred on the date that this Agreement is signed.

It is further understood that this Agreement does not bind any federal, state, or local prosecuting authority other than this Office.

Apart from any written Proffer Agreement(s) that may have been entered into between this Office and defendant, this Agreement supersedes any prior understandings, promises, or conditions between this Office and the defendant. No additional understandings, promises, or conditions have been entered into other than those set forth in this Agreement, and none will be entered into unless in writing and signed by all parties.

Very truly yours,

PREET BHARARA
United States Attorney

E. Plea Agreements with Cooperation

To understand the benefits to defendants of entering into plea agreements that involve cooperation with prosecutors, including testimony, one must begin with the Sentencing Guidelines. Since the 1980s, the following provision has been the engine producing large numbers of cooperation agreements in federal criminal cases. Why is (or was) it so powerful? (The answer to this question will become clearer when the Sentencing Guidelines are taken up in full in Chapter 18.)

United States Sentencing Guidelines § 5K1.1 Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

- (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
 - (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

- (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (3) the nature and extent of the defendant's assistance;
- (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
- (5) the timeliness of the defendant's assistance.

The following is an example of a plea agreement with cooperation provisions. (This defendant was the star witness who broke open the FIFA corruption case for the government, although he died before he or anyone else could see the full results of his cooperation.) What does the defendant get in this type of agreement? What does the defendant give up? Same questions as to the prosecutor. How does the resulting tally differ from that in a plea agreement without cooperation provisions like the Chiesi agreement above?

United States v. Charles Blazer

No. 1:13-cr-00602-RJD (E.D.N.Y. June 15, 2015)

Cooperation Agreement

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the United States Attorney's Office for the Eastern District of New York (the "Office") and CHARLES BLAZER (the "defendant") agree to the following:

1. The defendant will waive indictment and, where applicable, venue and plead guilty to a 10-count information to be filed in this District charging violations of 18 U.S.C. § 1962(d) (Count One), 18 U.S.C. § 1349 (Count Two), 18 U.S.C. § 1956(h) (Count Three), 26 U.S.C. § 7201 (counts Four through Nine) and 31 U.S.C. § 5314 (Count Ten). The foregoing counts carry the following statutory penalties:

Count One (Racketeering Conspiracy)

- a. Maximum term of imprisonment: 20 years (18 U.S.C. § 1963(a)).
- b. Minimum term of imprisonment: 0 years (18 U.S.C. § 1963(a)).
- c. Maximum supervised release term: 3 years, to follow any term of imprisonment; if a condition of release is violated, the defendant may be sentenced to up to 2 years' imprisonment without credit for pre-release imprisonment or time previously served on post-release supervision (18 U.S.C. §§ 3583 (b), (e)).

- d. Maximum fine: the greater of \$250,000 or twice the gross profits of the enterprise (18 U.S.C. §§ 3571 and 1963(a)).
- e. Restitution: mandatory, in an amount to be determined by the court (18 U.S.C. §§ 3663 and 3663A).
- f. \$100 special assessment (18 U.S.C. § 3013).
- g. Criminal forfeiture: the defendant consents to criminal forfeiture, as set forth below in paragraphs 7 through 14 (18 U.S.C. §§ 1963(a) and 1963(m)).

Count Two (Wire Fraud Conspiracy)

- a. Maximum term of imprisonment: 20 years (18 U.S.C. §§ 1343, 1349).
- b. Minimum term of imprisonment: 0 years (18 U.S.C. §§ 1343, 1349).
- c. Maximum supervised release term: 3 years, to follow any term of imprisonment; if a condition of release is violated, the defendant may be sentenced to up to 2 years' imprisonment without credit for pre-release imprisonment or time previously served on post-release supervision (18 U.S.C. §§ 3583(b), (e)).
- d. Maximum fine: the greater of \$250,000 or twice the gross gain or gross loss (18 U.S.C. §§ 3571(b)(3), (d)).
- e. Restitution: mandatory, in an amount to be determined by the Court (18 U.S.C. §§ 3663 and 3663A).
- f. \$100 special assessment (18 U.S.C. § 3013).
- g. Criminal forfeiture: the defendant consents to criminal forfeiture, as set forth below in paragraphs 7 through 14 (18 U.S.C. § 981(a)(1)(C), 28 U.S.C. § 2461(c) and 21 U.S.C. § 853(p)).

Count Three (Money Laundering Conspiracy)

- a. Maximum term of imprisonment: 20 years (18 U.S.C. §§ 1956 (a), (h)).
- b. Minimum term of imprisonment: 0 years (18 U.S.C. §§ 1956 (a), (h)).
- c. Maximum supervised release term: 3 years, to follow any term of imprisonment; if a condition of release is violated, the defendant may be sentenced to up to 2 years' imprisonment without credit for pre-release imprisonment or time previously served on post-release supervision (18 U.S.C. §§ 3583 (b), (e))

- d. Maximum fine: the greater of \$500,000 or twice the value of the monetary instrument or funds involved (18 U.S.C. § 1956(a)).
- e. Restitution: mandatory, in an amount to be determined by the Court (18 U.S.C. §§ 3663 and 3663A)
- f. \$100 special assessment (18 U.S.C. § 3013).
- g. Criminal forfeiture: the defendant consents to criminal forfeiture, as set forth below in paragraphs 7 through 14 (18 U.S.C. §§ 982(a)(1) and 982(b), 28 U.S.C. § 2461(c) and 21 U.S.C. § 853(p)).

Counts Four through Nine (Tax Evasion)

- a. Maximum term of imprisonment: 5 years (26 U.S.C. § 7201).
- b. Minimum term of imprisonment: 0 years (26 U.S.C. § 7201).
- c. Maximum supervised release term: 3 years, to follow any term of imprisonment; if a condition of release is violated, the defendant may be sentenced to up to 2 years' imprisonment without credit for pre-release imprisonment or time previously served on post-release supervision (18 U.S.C. § 3583(b), (e)).
- d. Maximum fine: \$100,000 and the costs of prosecution (26 U.S.C. § 7201).
- e. Restitution: As further described below in paragraph 3(g), the defendant agrees to pay restitution to the Internal Revenue Service, and further agrees that the tax due and owing for the years 2005 through 2010 will be based on unreported total income in excess of \$11 million (18 U.S.C. § 3663).
- f. \$100 special assessment (18 U.S.C. § 3013).

Count Ten (Failure to File FBAR)

- a. Maximum term of imprisonment: 10 years (31 U.S.C. § 5322(b)).
- b. Minimum term of imprisonment: 0 years (31 U.S.C. § 5322 (b)).
- c. Maximum supervised release term: 3 years, to follow any term of imprisonment; if a condition of release is violated, the defendant may be sentenced to up to 2 years' imprisonment without credit for pre-release imprisonment or time previously served on post-release supervision (18 U.S.C. § 3583(b), (e)).
- d. Maximum fine: \$500,000 (31 U.S.C. § 5322(b)).
- e. Restitution: in an amount to be determined by the court (18 U.S.C. § 3663).
- f. \$100 special assessment. (18 U.S.C. § 3013).

g. Other penalties: A civil money penalty of \$487,875.74, as described further below in paragraph 3(g) (31 U.S.C. § 5321(a)(5)(C), (D)).

The sentence imposed on each count may run consecutively.

2. The defendant understands that although imposition of a sentence in accordance with the United States Sentencing Guidelines (the “Guidelines” and “U.S.S.G.”) is not mandatory, the Guidelines are advisory and the Court is required to consider any applicable Guidelines provisions as well as other factors enumerated in 18 U.S.C. § 3553(a) to arrive at an appropriate sentence in this case. The Office will advise the Court and the Probation Department of information relevant to sentencing, including all criminal activity engaged in by the defendant, and such information may be used by the Court in determining the defendant’s sentence. If the defendant clearly demonstrates acceptance of responsibility, through allocution and subsequent conduct prior to the imposition of sentence, a two-level reduction will be warranted, pursuant to U.S.S.G. § 3B1.1(a). Furthermore, if the defendant has accepted responsibility as described above, and if the defendant pleads guilty on or before November 25, 2013, an additional one-level reduction will be warranted, pursuant to U.S.S.G. § 3E1.1(b).

3. The defendant will provide truthful, complete and accurate information and will cooperate fully with the Office. This cooperation will include, but is not limited to, the following:

a. The defendant agrees to be fully debriefed and to attend all meetings at which his presence is requested, concerning his participation in and knowledge of all criminal activities.

b. The defendant agrees to furnish to the Office all documents and other material that may be relevant to the investigation and that are in the defendant’s possession or control and to participate in undercover activities pursuant to the specific instructions of law enforcement agents or this Office.

c. The defendant agrees not to reveal his cooperation, or any information derived therefrom, to any third party without prior consent of the Office.

d. The defendant agrees to testify at any proceeding in the Eastern District of New York or elsewhere; including in foreign jurisdictions, as requested by the Office.

e. The defendant consents to adjournments of his sentence as requested by the Office.

f. The defendant agrees to cooperate fully with the Internal Revenue Service in the ascertainment, computation and payment of his correct federal income tax liability for the years 2005 through 2013, as well as any later tax years that become due and owing prior to the imposition of sentence. To that end, the defendant will file tax returns for the years 2005 through 2013, along with all tax due and owing, exclusive of

penalties and interest, within one (1) year of the date of this agreement and consents to the disclosure to the Internal Revenue Service of information relating to his financial affairs that is in the possession of third parties. With respect to the years 2005 through 2010, which are the subject of Counts Four through Nine of the information and the agreement regarding restitution noted above, the defendant stipulates and agrees that the tax due and owing will be based on unreported total income in excess of \$11 million. The defendant further agrees to allow the contents of his Internal Revenue Service criminal file to be given to civil attorneys and support staff of the Internal Revenue Service to enable them to investigate any and all civil penalties that may be due and owing by the defendant. With respect to disclosure of the criminal file to the Internal Revenue Service, the defendant waives any rights under Title 26, United States Code, Section 7213 and Fed R. Crim. P. 6(e), and any other right to privacy with respect to the defendant's tax returns and tax information. The defendant agrees that for the purposes of 31 U.S.C. §§ 5321(a)(5)(C) and (D), the value of his unreported account at First Caribbean International Bank (Bahamas) in 2010 was \$975,751.48, and he is subject to a civil monetary penalty of 50% of that amount, or \$487,875.74.

g. The defendant agrees to comply with the forfeiture provisions set forth in paragraphs 7 through 14, below.

h. The defendant will consent to, and not oppose, any ban that may hereafter be imposed on him by the Federation Internationale de Football Association ("FIFA") or any other soccer governing body.

4. The Office agrees that:

a. Except as provided in paragraphs 1, 16 and 17, no criminal charges will be brought against the defendant for his heretofore disclosed participation in (i) criminal activity involving mail, wire and bank fraud, money laundering, interstate and foreign travel in aid of racketeering, interstate and foreign transportation of money taken by fraud and New York State commercial bribery, all in connection with the following: (A) aiding and abetting the receipt of a bribe and/or kickback payment offered in connection with the voting to host the 1998 FIFA World Cup, which conduct took place in or about 1992; (B) the sale of tickets for FIFA World Cups in or about and between 1994 and 2002; (C) the receipt of bribe and/or kickback payments made in connection with the sale of media and marketing rights associated with the Confederation of North, Central American and Caribbean Association Football ("CONCACAF") Gold Cups played between 1996 and 2003, which conduct took place in or about and between 1993 and 2003; and (D) the receipt of bribe and/or kickback payments made in connection with the voting to host the 2010 FIFA World Cup, which conduct took place in or about and between 2004 and 2011; (ii) violations of Title 26, United States Code, in connection with the willful failure to file personal income tax returns for tax years 1994 through 2010; and (iii) violations of Title 31, United States Code, in connection with the willful failure to file Reports of Foreign Bank and Financial Accounts for tax years 1994 through 2010.

b. No statements made by the defendant. during the course of this cooperation will be used against him except as provided in paragraphs 2, 16 and 17.

5. The defendant agrees that the Office may meet with and debrief him without the presence of counsel, unless the defendant specifically requests counsel's presence at such debriefings and meetings. Upon request of the defendant, the Office will endeavor to provide advance notice to counsel of the place and time of meetings and debriefings, it being understood that the Office's ability to provide such notice will vary according to time constraints and other circumstances. The Office may accommodate requests to alter the time and place of such debriefings. It is understood, however, that any cancellations or reschedulings of debriefings or meetings requested by the defendant that hinder the Office's ability to prepare adequately for trials, hearings or other proceedings may adversely affect the defendant's ability to provide substantial assistance. Matters occurring at any meeting or debriefing may be considered by the Office in determining whether the defendant has provided substantial assistance or otherwise complied with this agreement and may be considered by the Court in imposing sentence regardless of whether counsel was present at the meeting or debriefing.

6. If the Office determines that the defendant has cooperated fully, provided substantial assistance to law enforcement authorities and otherwise complied with the terms of this agreement, the Office will file a motion pursuant to U.S.S.G. § 5K1.1 with the sentencing court setting forth the nature and extent of his cooperation. Such a motion will allow the Court, in applying the advisory Guidelines, to consider a range below the Guidelines range that would otherwise apply. In this connection, it is understood that a good faith determination by the Office as to whether the defendant has cooperated fully and provided substantial assistance and has otherwise complied with the terms of this agreement, including the demonstration of acceptance of responsibility described in paragraph 2, and the Office's good faith assessment of the value, truthfulness, completeness and accuracy of the cooperation, shall be binding upon him. The defendant agrees that, in making this determination, the Office may consider facts known to it at this time. The Office will not recommend to the Court a specific sentence to be imposed. Further, the Office cannot and does not make a promise or representation as to what sentenced will be imposed by the Court.

7. The defendant acknowledges that money and property is subject to forfeiture as a result of his violations of 18 U.S.C. §§ 1962(d), 1349 and 1956(h), as alleged in the information. Pursuant to 18 U.S.C. §§ 1963(a), 981(a)(1)(C) and 982(a)(1), and 28 U.S.C. § 2461(c), the defendant consents to the forfeiture of one million nine hundred fifty-eight thousand ninety-two dollars and seventy two cents (\$1,958,092.72), which represents a portion of the monies that defendant received from bribes, kickbacks and unauthorized World Cup ticket sales . . . and to the forfeiture of a second unspecified amount of United States currency to the determined by the Court. . . . [ed: *extensive procedural provisions for facilitating the forfeiture process have been omitted*].

16. The defendant must at all times give complete, truthful and accurate information and testimony, and must not commit, or attempt to commit, any further crimes. Should it be judged by the Office that the defendant has failed to cooperate fully, has intentionally given false, misleading or incomplete information or testimony, has committed or attempted to commit any further crimes, or has otherwise violated any provision of this agreement, the defendant will not be released from his plea of guilty but this Office will be released from its obligations under this agreement, including (a) not to oppose a downward adjustment of two levels for acceptance of responsibility described in paragraph 2 above and to make the motion for an additional one-level reduction described in paragraph 2 above, and (b) to file the motion described in paragraph 6 above. Moreover, this Office may withdraw the motion described in paragraph 6 above, if such motion has been filed prior to sentencing. The defendant will also be subject to prosecution for any federal criminal violation of which the Office has knowledge, including, but not limited to, the criminal activity described in paragraph 4 above, perjury and obstruction of justice.

17. Any prosecution resulting from the defendant's failure to comply with the terms of this agreement may be premised upon, among other things: (a) any statements made by the defendant to the Office or to other law enforcement agents on or after December 29, 2011; (b) any testimony given by him before any grand jury or other tribunal, whether before or after the date this agreement is signed by the defendant; and (c) any leads derived from such statements or testimony. Prosecutions that are not time-barred by the applicable statutes of limitation on the date this agreement is signed may be commenced against the defendant in accordance with this paragraph, notwithstanding the expiration of the statutes of limitation between the signing of this agreement and the commencement of any such prosecutions. Furthermore, the defendant waives all claims under the United States constitution, Rule 11(f) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal statute or rule, that statements made by him on or after December 29, 2011, or any leads derived therefrom, should be suppressed.

18. This agreement does not bind any federal, state or local prosecuting authority other than the Office, and does not prohibit the Office from initiating or prosecuting any civil or administrative proceedings directly or indirectly involving the defendant. Apart from the written proffer agreements dated December 29, 2011, January 17, 2012, January 18, 2012, January 31, 2012, February 1, 2012, March 13, 2012, March 15, 2012, March 21, 2012, April 25, 2012, April 27, 2012, May 14, 2012, June 26, 2012, July 19, 2012, October 3, 2012, October 5, 2012, January 14, 2013, January 16, 2013, June 10, 2013 and November 13, 2013. no promises, agreements or conditions have been entered into other than those set forth in this agreement, and none will be entered into unless memorialized in writing and signed by all parties. This agreement supersedes any prior promises, agreements or conditions between the parties. To become effective, this agreement must be signed by all signatories listed below and must be approved by the Tax Division of the United States Department of Justice.

Problem 16-2

Shirley, the trader from Edgar's hedge fund, is back in your office. Now she has been charged in a federal indictment with four counts of securities fraud, based on insider trading, each of which carries a statutory maximum term of imprisonment of 10 years. It is decision time. Explain to Shirley what her options are and what the pluses, minuses, and consequences are of each of her options.

17. FIRM PLEAS AND SETTLEMENTS

Much of the discussion in this chapter will be occasion for review of concepts discussed at the outset of the materials, and returned to throughout, involving corporate liability and the purposes of imposing various kinds of sanctions on firms. (Now might be an opportune time to review the materials in Chapter 1, particularly the Justice Department's corporate prosecution guidelines.) In addition to showing the forms of corporate settlements and their common features, this chapter provides a close look at the facts involved in examples of major settlements—as a way of prompting assessment of how federal prosecutors use their powers to extract penalties and terms from corporations in criminal matters.

A. Forms of Corporate Dispositions

A corporate criminal prosecution (or investigative matter) will be disposed of under current practice in one of the following ways:

1. The government may choose to **decline prosecution** after completing an investigation.
2. The government and the company may enter into a **non-prosecution agreement (NPA)**, a contractual settlement that involves no filed criminal charges.
3. The government and the company may enter into a **deferred prosecution agreement (DPA)**, a contractual settlement that includes the filing of criminal charges, the prosecution of which is deferred for some period and then prosecutors move to dismiss them if the company complies with the agreement.
4. The government and the company may enter into a **plea agreement**, a contractual settlement in which charges are filed, the company enters a guilty plea, and a court imposes a **sentence** on the company. (Sentencing of corporations is addressed in Chapter 18.)
5. The government may file charges against a company and the company may choose to contest the charges at **trial**. A jury's acquittal will end the matter, while a conviction will be followed by a court imposing a **sentence** on the company.

To generalize, all these events—with the exception of a (1) declination or (5) an acquittal at trial—will result in some combination of sanctions imposed on a corporation by the terms of a contractual agreement or by a judge's sentence. As the Justice Department prosecution guidelines and the examples that will follow in this chapter make clear, there is a great deal of variation from case to case in how sanctions are structured. The corporate sanction menu available to prosecutors and courts includes, at least most commonly, these items:

1. Monetary fines and penalties.
2. Restitution to victims, directly or indirectly (as through funding of projects).
3. Remediation of harm (this is particularly common in environmental and consumer products cases).
4. Suspension or debarment from an industry or line of business.
5. Internal corporate reforms, particularly in the areas of management structure and compliance systems.
6. Imposition of an outside monitor to oversee the corporation's compliance with a settlement and to report to the prosecutor or court on the corporation's progress with mandated reforms.
7. Obligations to cooperate by assisting the government in investigation of individuals and further wrongdoing.
8. Admission of wrongdoing, in the form of a guilty plea or agreement to a statement of facts.
9. Waiver of legal rights, including rights to challenge admission of wrongdoing in the event that the corporation is deemed in violation of a settlement and then prosecuted for the original violations.
10. Agreement that the prosecutor retains sole power to determine whether the corporation has violated the terms of a settlement.

B. Settlement Examples

No corporate counsel can now competently advise a company regarding resolution of a criminal matter, and negotiate with federal prosecutors, without having extensive familiarity with what might be called the “common law” of Justice Department settlements, reflected in how these agreements and their terms have developed over time and across a wide variety of corporate cases. Abundant examples of corporate criminal settlements in many different forms can be found at the Corporate Prosecution Registry and the Foreign Corrupt Practices Clearinghouse.⁸

This chapter provides two examples as a basis for discussion. As you read these detailed settlement agreements, pay closest attention to three things: (1) the nature and seriousness of the underlying conduct, (2) the penalties imposed on the corporation and the prosecutors' explanation of the suitability of those penalties in the case, and (3) the terms that restrict the corporation's legal rights and freedom of action in various ways.

⁸ CORPORATE PROSECUTION REGISTRY, <https://corporate-prosecution-registry.com/>; FOREIGN CORRUPT PRACTICES CLEARINGHOUSE, <http://fcpa.stanford.edu/>.

Meanwhile, consider why the corporate managers and their lawyers in these cases decided to accept the terms of these agreements.

United States v. Volkswagen AG, No. 16-CR-20394 (E.D. Mich. 2017)

Rule 11 Plea Agreement

The United States of America, by and through the Department of Justice, Criminal Division, Fraud Section, the United States Attorney's Office for the Eastern District of Michigan, and the Department of Justice, Environment and Natural Resources Division, Environmental Crimes Section and with the approval of the Deputy Attorney General (collectively hereafter, "the Offices"), and the Defendant, Volkswagen AG (the "Defendant"), by and through its undersigned attorneys, and through its authorized representative, pursuant to authority granted by the Defendant's Management Board, with the consent of the Supervisory Board, hereby submit and enter into this plea agreement (the "Agreement"), pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. The terms and conditions of this Agreement are as follows:

1. Guilty Plea

A. Waiver of Indictment and Venue

Pursuant to Fed. R. Crim. P. 7, the Defendant agrees to knowingly waive its right to grand jury indictment and its right to challenge venue in the United States District Court for the Eastern District of Michigan, and to plead guilty to Counts One through Three of the Third Superseding Information.

B. Counts of Conviction

The Third Superseding Information charges three counts: (1) Count One—conspiracy in violation of 18 U.S.C. § 371, (2) Count Two—obstruction of justice in violation of 18 U.S.C. § 1512(c), and (3) Count Three—introducing imported merchandise into the United States by means of false statements in violation of 18 U.S.C. § 542. The Defendant further agrees to persist in that plea through sentencing and, as set forth below, to cooperate fully with the Offices in their investigation into the conduct described in this Agreement and other conduct related to the introduction into the United States of diesel vehicles with defeat devices as defined under U.S. law.

C. Elements of Offense

The elements of Count One (conspiracy) are as follows:

- (1) The elements for conspiracy to defraud the United States by obstructing the lawful function of the federal government are as follows:
 - (a) That two or more persons conspired, or agreed, to defraud the United States or one of its agencies or departments, in this case, the Environmental Protection Agency (EPA), by dishonest means;

- (b) That the defendant knowingly and voluntarily joined the conspiracy; and
 - (c) That a member of the conspiracy did one of the overt acts described in the indictment for the purpose of advancing or helping the conspiracy.
- (2) The elements for conspiracy to violate the wire fraud statute and Clean Air Act are as follows:
- (a) That two or more persons conspired, or agreed, to commit a crime, in this case, a violation of the wire fraud statute (18 U.S.C. § 1343) and the Clean Air Act (42 U.S.C. § 7413(c)(2)(A)) as described below;
 - (b) That the defendant knowingly and voluntarily joined the conspiracy; and
 - (c) That a member of the conspiracy did one of the overt acts described in the indictment for the purpose of advancing or helping the conspiracy.

Object of the Conspiracy – Wire Fraud – 18 U.S.C. § 1343

- (a) The defendant knowingly participated in, devised, or intended to devise a scheme to defraud in order to obtain money or property;
- (b) The scheme included a material misrepresentation or concealment of a material fact;
- (c) The defendant had the intent to defraud; and
- (d) The defendant used (or caused another to use) wire, radio or television communications in interstate or foreign commerce in furtherance of the scheme.

Object of the Conspiracy – Clean Air Act – 42 U.S.C. § 7413(c)(2)(A)

- (a) The defendant knowingly made (or caused to be made) a false material statement, representation, certification, or omission of material information;
- (b) The statement, representation or certification that was made (or omitted), or caused to be made or omitted was in a notice, application, record report, plan or other document required to be filed or maintained under the Clean Air Act; and
- (c) The statement representation, certification, or omission of information, was material.

The elements of Count Two (obstruction of justice) are as follows:

- (1) That the defendant altered, destroyed, mutilated, or concealed a record, document or other object;
- (2) That the defendant acted knowingly;

- (3) That the defendant acted corruptly; and
- (4) That the defendant acted with the intent to impair the record, document or object's integrity or availability for use in an official proceeding.

The elements of Count Three (entry of goods by false statement) are as follows:

- (1) That merchandise was imported;
- (2) That the defendant entered or introduced merchandise into the commerce of the United States;
- (3) That the defendant did so by means of a false statement, which it knew was false; and
- (4) That the false statement was material to the entry of the merchandise.

D. Statutory Maximum Penalties

The statutory maximum sentence that the Court can impose for a violation of Title 18, United States Code, Section 371 is a fine of \$500,000 or twice the gross pecuniary gain or gross pecuniary loss resulting from the offense, whichever is greatest, Title 18, United States Code, Section 3571(c), (d); five years' probation, Title 18, United States Code, Section 3561(c)(1); and a mandatory special assessment of \$400, Title 18, United States Code, Section 3013(a)(2)(B). The statutory maximum sentence that the Court can impose for a violation of Title 18, United States Code, Section 1512(c) (Count Two) is a fine of \$500,000; five years' probation, Title 18, United States Code, Section 3561(c)(1); and a mandatory special assessment of \$400, Title 18, United States Code, Section 3013(a)(2)(B). The statutory maximum sentence that the Court can impose for a violation of Title 18, United States Code, Section 542 (Count Three) is a fine of \$500,000 or twice the gross pecuniary gain or gross pecuniary loss resulting from the offense, whichever is greatest, Title 18, United States Code, Section 3571(c), (d); five years' probation, Title 18, United States Code, Section 3561(c)(1); and a mandatory special assessment of \$400, Title 18, United States Code, Section 3013(a)(2)(B).

E. Factual Basis for Guilty Plea

The Defendant is pleading guilty because it is guilty of the charges contained in the Third Superseding Information. The Defendant admits, agrees, and stipulates that the factual allegations set forth in Exhibit 2 (the Statement of Facts) are true and correct, that it is responsible under the laws of the United States for the acts of its employees described in Exhibit 2, and that the facts set forth in Exhibit 2 accurately reflect the Defendant's criminal conduct and provide a factual basis for the guilty plea. The Defendant agrees that it will neither contest the admissibility of, nor contradict, the Statement of Facts contained in Exhibit 2 in any proceeding.

2. Sentencing Guidelines

A. Standard of Proof

The Court will find sentencing factors by a preponderance of the evidence.

B. Guideline Range

There are no disputes with respect to the sentencing guidelines that require resolution by the court. While the Defendant does not adopt, agree or accept the United States Sentencing Guidelines (U.S.S.G.) analysis contained herein, for purposes of avoiding the need for a contested sentencing proceeding and achieving a just and fair result, and because the Defendant agrees that the overall fine proposed herein achieves such a result, the Defendant does not contest the factual or legal basis of the Office's U.S.S.G. analysis contained in this Paragraph for the purposes of this proceeding and stipulates that the proposed fine constitutes a reasonable sentence under the factors listed in Title 18, United States Code, Section 3553(a). Pursuant to *United States v. Booker*, the Court must determine an advisory sentencing guideline range pursuant to the United States Sentencing Guidelines (U.S.S.G.). The Court will then determine a reasonable sentence within the statutory range after considering the advisory sentencing guideline range and the factors listed in Title 18, United States Code, Section 3553(a). The Defendant also understands that if the Court accepts this Agreement, the Court is bound by the sentencing provisions in Paragraph 3. The Offices submit that a faithful application of the U.S.S.G. to determine the applicable fine range yields the following analysis:

- a. The 2016 U.S.S.G. are applicable to this matter.
- b. Offense Level. Based upon U.S.S.G. § 2B1.1, the total offense level is 41, calculated as follows:

(a)(1)	Base Offense Level	7
(b)(1)(P)	Amount of Loss > \$550 million	+30
(b)(2)(A)(i)	More than 10 Victims	+2
(b)(10)(B)	Substantial Part of Scheme Committed from Outside the United States	+2
TOTAL		41

- c. Base Fine. Based upon U.S.S.G. § 8C2.4(a), the base fine is \$8,543,169,187 (the pecuniary loss from the offense caused by the Defendant).
- d. Culpability Score. Based upon U.S.S.G. § 8C2.5, the culpability score is 11, calculated as follows:

(a)	Base Culpability Score	5

(b)(1)	The unit of the organization within which the offense was committed had 5,000 or more employees and an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense	+5
(e)	Obstruction of justice	+3
(g)(3)	The organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct	-2
TOTAL		11

Calculation of Fine Range

Base Fine	\$8,543,169,187 ⁹
Multipliers	2 (min) / 4 (max)
Fine Range	\$17,086,338,374(min)/\$34,172,676,746(max)

3. Sentence

Pursuant to Fed. R. Crim. P. 11(c)(1)(C), the United States and the Defendant agree that the appropriate disposition of this case is as set forth in this Section and agree to recommend jointly that the Court at a hearing to be scheduled at an agreed upon time impose it.

A. Relevant Considerations

The Offices enter into this Agreement based on the individual facts and circumstances presented by this case and the Defendant. Among the factors considered were the following:

1. the Defendant did not voluntarily disclose to the Offices the conduct described in Exhibit 2 (the Statement of Facts);
2. the Defendant cooperated with the Offices' investigation by, among other things, (i) gathering substantial amounts of evidence and performing forensic data collections in multiple jurisdictions; (ii) producing documents, including

⁹ The base fine consists of the loss amount as calculated under USSG § 2B1.1 and accompanying Application Notes, discounted to reflect a 50% reduction for the litigation risk that both parties would bear were there a contested sentencing proceeding. *See, e.g., United States v. Giovenco*, 773 F.3d 866 (7th Cir. 2014); *United States v. Prosperi*, 686 F.3d 32 (1st Cir. 2012).

- translations, to the Offices in ways that did not implicate foreign data privacy laws; (iii) collecting, analyzing, organizing, and producing voluminous evidence and information; (iv) interviewing hundreds of witnesses in the United States and overseas; (v) providing non-privileged facts relating to individuals and companies involved in the criminal conduct; and (vi) facilitating and encouraging cooperation and voluntary disclosure of information and documents by current and former company personnel;
3. the Defendant has already agreed to compensate members of the class in *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, which consists of victims of the underlying criminal conduct that is the subject of this Agreement, and to pay into a NOx remediation trust, in an aggregate amount of approximately \$11 billion (based on net present value);
 4. despite obstruction of justice committed by certain of the Defendant's employees, principally in the form of document destruction, the Defendant, including through its outside counsel, self-disclosed this conduct to the Offices, remediated the conduct by recovering large portions of the deleted documents through a variety of forensic means, and conducted a thorough investigation of the conduct, the findings of which it reported to the Offices;
 5. the Defendant engaged in remedial measures, including creation of a management board position to supervise the Defendant's legal and compliance functions, reorganization of the whistleblower system, improvements to its risk assessment systems, specific reforms to its engine-related practices, including a program to audit these reforms, termination [sic] the employment of six individuals who participated in, or failed to supervise employees who participated in, the misconduct described in the Statement of Facts, suspending an additional eight individuals who participated in the misconduct described in the Statement of Facts for varying periods, and disciplining an additional three employees who participated in the misconduct described in the Statement of Facts; however, the Defendant's remediation remains incomplete;
 6. the Defendant has committed to continue to enhance its compliance program and internal controls;
 7. the Defendant has agreed, as part of its continuing cooperation obligations, and to ensure that the Defendant and its wholly-owned subsidiary Volkswagen Group of America ("VW GOA") implements an effective compliance program, to the appointment of an independent monitor (the "Monitor") for a period of up to three years, who will have authority with respect to the Defendant and VW GOA;
 8. the nature and seriousness of the offenses;
 9. the Defendant has no prior criminal history;

10. the Defendant has agreed to continue to cooperate with the Offices in any ongoing investigation of the conduct of the Defendant and its officers, directors, employees, agents, business partners, and consultants relating to the violations to which the Defendant is pleading guilty; and
11. the Defendant has agreed to pay an additional \$1,500,000,000 to the United States to resolve claims for civil penalties arising from the underlying conduct that is the subject of this Agreement;
12. accordingly, after considering (1) through (11) above, (a) the Defendant received an aggregate discount of approximately 20% off of the bottom of the otherwise applicable U.S. Sentencing Guidelines fine range, reflecting its cooperation in the investigation, and (b) after application of the foregoing discount, the Defendant in addition received a credit of \$11 billion, representing the net present value of the Defendant's settlements with consumers and payments to the NOx remediation trust in settlement of civil litigation.

B. Fine

The Defendant shall pay to the United States a criminal fine of \$2,800,000,000, payable in full within ten days of the entry of judgment following the sentencing hearing in this matter. The Defendant shall not seek or accept directly or indirectly reimbursement or indemnification from any source with regard to the penalty amount that the Defendant pays pursuant to this Agreement. The Defendant further agrees that it shall not claim assert, or apply for, either directly or indirectly, any tax deduction, tax credit, or any other offset with regard to any U.S. federal, state, or local tax or taxable income for any fine or forfeiture paid pursuant to this Agreement.

C. Probation

The parties agree that a term of organizational probation for a period of three years should be imposed on the Defendant pursuant to 18 U.S.C. §§ 3551(c)(1) and 3561(c)(1). The parties further agree, pursuant to U.S.S.G. 8D1.4, that the term of probation shall include as conditions the obligations set forth in Paragraphs 5 and 6 below as well as the payment of the fine set forth in this Paragraph, but shall not include the obligations set forth in Paragraph 7 below.

D. Special Assessment

The Defendant shall pay to the Clerk of the Court for the United States District Court for the Eastern District of Michigan within ten days of the time of sentencing the mandatory special assessment of \$1,200 (\$400 per count).

E. Restitution

No order of restitution is appropriate in this case pursuant to 18 U.S.C. § 3663A(c)(3) as the number of identifiable victims is so large as to make restitution impracticable and/or determining complex issues of fact related to the cause or amount of victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process. Moreover, as noted in Paragraph 2(A) above the Defendant has already agreed to compensate members of the class in *In re Volkswagen "Clean Diesel" Marketing, Sales Practice, and Products Liability Litigation*, which consists of individuals who purchased affected vehicles described in Exhibit 2.

4. Other Charges

In exchange for the guilty plea of the Defendant and the complete fulfillment of all of its obligations under this Agreement, the Offices agree that they will not file additional criminal charges against the Defendant or any of its direct or indirect affiliates or subsidiaries related to: (1) any conduct described in the Third Superseding Information or Exhibit 2; (2) any conduct related to the emissions, or compliance with U.S. emissions standards, of the Subject Vehicles or the Porsche Vehicles as described and defined in the Third Superseding Information and Exhibit 2; and (3) any conduct disclosed by, or on behalf of, the Defendant or otherwise known to the Offices or the BPA as of the date of this Agreement. The Offices, however, may use any information related to the conduct described in the Statement of Facts against the Defendant: (a) in a prosecution for perjury or obstruction of justice apart from the charge in the Third Superseding Information and identified in the Statement of Facts; (b) in a prosecution for making a false statement; (c) in a prosecution or other proceeding relating to any crime of violence; or (d) in a prosecution or other proceeding relating to a violation of any provision of Title 26 of the United States Code. This Paragraph does not provide any protection against prosecution for any other conduct, including but not limited to crimes committed in the future by the Defendant or by any of its affiliates subsidiaries, officers, directors, employees, agents or consultants, whether or not disclosed by the Defendant pursuant to the terms of this Agreement. In addition, this Agreement does not provide any protection against prosecution of any joint ventures of which the Defendant is a part, or any individuals, regardless of their affiliation with the Defendant. The Defendant agrees that nothing in this Agreement is intended to release the Defendant from any and all of the Defendant's excise and income tax liabilities and reporting obligations for any and all income not properly reported and/or legally or illegally obtained or derived.

5. The Defendant's Obligations

A. Except as otherwise provided in Paragraph 6 below in connection with the Defendant's cooperation obligations, the Defendant's obligations under the Agreement shall last and be effective for a period beginning on the date on which the Third Superseding Information is filed and ending three years from the later of the date on which the Third Superseding Information is filed or the date on which

the Monitor is retained by the Defendant, as described in Paragraph 15 below (the “Term”). The Defendant agrees, however, that, in the event the Offices determine, in their sole discretion, that the Defendant has failed specifically to perform or to fulfill each of the Defendant’s obligations under this Agreement, an extension or extensions of the Term may be imposed by the Offices, in their sole discretion, for up to a total additional time period of one year, without prejudice to the Offices’ right to proceed as provided in Paragraph 9 below. Any extension of the Term extends all terms of this Agreement, including the terms of the Monitorship in Exhibit 3, for an equivalent period. Conversely, in the event the Offices find, in their sole discretion, that there exists a change in circumstances sufficient to eliminate the need for the Monitorship in Exhibit 3 and that the other provisions of this Agreement have been satisfied, the Term may be terminated early, except for the Defendant’s cooperation obligations described in Paragraph 6 below.

B. The Defendant agrees to abide by all terms and obligations of this Agreement as described herein, including, but not limited to, the following:

1. to plead guilty as set forth in this Agreement;
2. to abide by all sentencing stipulations contained in this Agreement;
3. to appear, through its duly appointed representatives, as ordered for all court appearances, and obey any other ongoing court order in this matter, consistent with all applicable U.S. and foreign laws, procedures, and regulations;
4. to commit no further crimes;
5. to be truthful at all times with the Court and the Offices;
6. to pay the applicable fine and special assessments; . . .

15. Independent Compliance Monitor

A. Promptly after the Offices’ selection pursuant to Paragraph 15(B) below, the Defendant agrees to retain the Monitor for the term specified in Paragraph 15(C). The Monitor’s duties and authority, and the obligations of the Defendant with respect to the Monitor and the Offices, are set forth in Exhibit 3, which is incorporated by reference into this Agreement. The same Monitor shall serve as the Independent Auditor appointed pursuant to Paragraph 27(b) of the Third Partial Consent Decree in *In re: Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation*. No later than the date of execution of this Agreement, and after consultation with the Offices, the Defendant will propose to the Offices a pool of three qualified candidates to serve as the Monitor. If the Offices determine, in their sole discretion, that any of the candidates are not, in fact, qualified to serve as the Monitor, or if the Offices, in their sole discretion, are not satisfied with the candidates proposed, the Offices

reserve the right to seek additional nominations from the Defendant, The parties will endeavor to complete the monitor selection process within sixty (60) days of the execution of this Agreement. The Monitor candidates or their team members shall have, at a minimum, the following qualifications:

1. demonstrated expertise with respect to federal anti-fraud and environmental laws, including experience counseling on these issues;
 2. experience designing and/or reviewing corporate ethics and compliance programs, including anti-fraud policies, procedures and internal controls;
 3. knowledge of automotive or similar industries;
 4. the ability to access and deploy resources as necessary to discharge the Monitor's duties as described in the Agreement;
 5. sufficient independence from the Defendant to ensure effective and impartial performance of the Monitor's duties as described in the Agreement; and
 6. the qualifications set out in Paragraph 27(a) of the Third Partial Consent Decree in *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*.
- B. The Offices retain the right, in their sole discretion, to choose the Monitor from among the candidates proposed by the Defendant, though the Defendant may express its preference(s) among the candidates. In the event the Offices reject all proposed Monitors, the Defendant shall propose an additional three candidates within twenty (20) business days after receiving notice of the rejection. This process shall continue until a Monitor acceptable to both parties is chosen. The Offices and the Defendant will use their best efforts to complete the selection process within sixty (60) calendar days of the execution of this Agreement. If, during the term of the monitorship, the Monitor becomes unable to perform his or her obligations as set out herein and in Exhibit 3, or if the Offices in their sole discretion determine that the Monitor cannot fulfill such obligations to the satisfaction of the Offices, the Offices shall notify the Defendant of the release of the Monitor, and the Defendant shall within thirty (30) calendar days of such notice recommend a pool of three qualified Monitor candidates from which the Offices will choose a replacement.
- C. The Monitor's term shall be three years from the date on which the Monitor is retained by the Defendant, subject to extension or early termination as described in Paragraph 5. The Monitor's powers, duties, and responsibilities, as well as additional circumstances that may support an extension of the Monitor's term, are set forth in Exhibit 3. The Defendant agrees that it will not employ or be affiliated with the Monitor or the Monitor's firm for a period of not less than two years from the date on which the Monitor's term expires. Nor will the

Defendant discuss with the Monitor or the Monitor's firm the possibility of further employment or affiliation during the Monitor's term.

16. Complete Agreement

This document states the full extent of the Agreement between the parties. There are no other promises or agreements, express or implied. Any modification of this Agreement shall be valid only if set forth in writing in a supplemental or revised plea agreement signed by all parties. . . .

EXHIBIT 2: STATEMENT OF FACTS

The following Statement of Facts is incorporated by reference as part of the Plea Agreement (the "Agreement") between the United States Department of Justice (the "Department") and Volkswagen AG ("VW AG"). VW AG hereby agrees and stipulates that the following information is true and accurate. VW AG admits, accepts, and acknowledges that under U.S. law it is responsible for the acts of its employees set forth in this Statement of Facts, which acts VW AG acknowledges were within the scope of the employees' employment and, at least in part, for the benefit of VW AG. All references to legal terms and emissions standards, to the extent contained herein, should be understood to refer exclusively to applicable U.S. laws and regulations, and such legal terms contained in this Statement of Facts are not intended to apply to, or affect, VW AG's rights or obligations under the laws or regulations of any jurisdiction outside the United States. This Statement of Facts does not contain all of the facts known to the Department or VW AG; the Department's investigation into individuals is ongoing. The following facts took place during the time frame specified in the Third Superseding Information and establish beyond a reasonable doubt the charges set forth in the criminal Information attached to this Agreement:

Relevant Entities and Individuals

1. VW AG was a motor vehicle manufacturer based in Wolfsburg, Germany. Under U.S. law, VW AG acts through its employees, and conduct undertaken by VW AG, as described herein, reflects conduct undertaken by employees. Pursuant to applicable German stock corporation law, VW AG was led by a Management Board that was supervised by a Supervisory Board. Solely for purposes of this Statement of Facts, unless otherwise indicated, references in this Statement of Facts to "supervisors" are to senior employees below the level of the VW AG Management Board.
2. Audi AG ("Audi") was a motor vehicle manufacturer based in Ingolstadt, Germany and a subsidiary approximately 99.55% owned by VW AG. Under U.S. law, Audi AG acts through its employees, and conduct undertaken by Audi AG, as described herein, reflects conduct undertaken by employees.
3. Volkswagen Group of America, Inc. ("VW GOA") was a wholly owned subsidiary of VW AG based in Herndon, Virginia. Under U.S. law, VW GOA acts

through its employees, and conduct undertaken by VW GOA, as described herein, reflects conduct undertaken by employees.

4. VW AG, Audi AG, and VW GOA are collectively referred to herein as “VW.”
5. “VW Brand” was an operational unit within VW AG that developed vehicles to be sold under the “Volkswagen” brand name.
6. Company A was an automotive engineering company based in Berlin, Germany, which specialized in software, electronics, and technology support for vehicle manufacturers. VW AG owned fifty percent of Company A’s shares and was Company A’s largest customer.
7. “Supervisor A,” an individual whose identity is known to the United States and VW AG, was the supervisor in charge of Engine Development for all of VW AG from in or about October 2012 to in or about September 2015. From July 2013 to September 2015, Supervisor A also served as the supervisor in charge of Development for VW Brand, where he supervised a group of approximately 10,000 VW AG employees. From in or about October 2011, when he joined VW, until in or about July 2013, Supervisor A served as the supervisor in charge of the VW Brand Engine Development department.
8. “Supervisor B,” an individual whose identity is known to the United States and VW AG, was a supervisor in charge of the VW Brand Engine Development department from in or about May 2005 to in or about April 2007.
9. “Supervisor C,” an individual whose identity is known to the United States and VW AG, was a supervisor in charge of the VW Brand Engine Development department from in or about May 2007 to in or about March 2011.
10. “Supervisor D,” an individual whose identity is known to the United States and VW AG, was a supervisor in charge of the VW Brand Engine Development department from in or about October 2013 to the present.
11. “Supervisor E,” an individual whose identity is known to the United States and VW AG, was a supervisor with responsibility for VW AG’s Quality Management and Product Safety department who reported to the supervisor in charge of Quality Management from in or about 2007 to in or about October 2014.
12. “Supervisor F,” an individual whose identity is known to the United States and VW AG, was a supervisor within the VW Brand Engine Development department from in or about 2003 until in or about December 2012.
13. “Attorney A,” an individual whose identity is known to the United States and VW AG, was a German-qualified in-house attorney for VW AG who was the in-house attorney principally responsible for providing legal advice in connection with VW AG’s response to U.S. emissions issues from in or about May 2015 to in or about September 2015.

U.S. NO_x Emissions Standards

14. The purpose of the Clean Air Act and its implementing regulations was to protect human health and the environment by, among other things, reducing emissions of pollutants from new motor vehicles, including nitrogen oxides (“NO_x”).

15. The Clean Air Act required the U.S. Environmental Protection Agency (“EPA”) to promulgate emissions standards for new motor vehicles. The EPA established standards and test procedures for light-duty motor vehicles sold in the United States, including emission standards for NO_x.

16. The Clean Air Act prohibited manufacturers of new motor vehicles from selling, offering for sale, introducing or delivering for introduction into U.S. commerce, or importing (or causing the foregoing with respect to) any new motor vehicle unless the vehicle complied with U.S. emissions standards, including NO_x emissions standards, and was issued an EPA certificate of conformity.

17. To obtain a certificate of conformity, a manufacturer was required to submit an application to the EPA for each model year and for each test group of vehicles that it intended to sell in the United States. The application was required to be in writing, to be signed by an authorized representative of the manufacturer, and to include, among other things, the results of testing done pursuant to the published Federal Test Procedures that measure NO_x emissions, and a description of the engine, emissions control system, and fuel system components, including a detailed description of each Auxiliary Emission Control Device (“AECD”) to be installed on the vehicle.

18. An AECD was defined under U.S. law as any element of design which senses temperature, vehicle speed, engine RPM, transmission gear, manifold vacuum, or any other parameter for the purpose of activating, modulating, delaying, or deactivating the operation of any part of the emission control system. The manufacturer was also required to include a justification for each AECD. If the EPA, in reviewing the application for a certificate of conformity, determined that the AECD “reduced the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use,” and that (1) it was not substantially included in the Federal Test Procedure, (2) the need for the AECD was not justified for protection of the vehicle against damage or accident, or (3) it went beyond the requirements of engine starting, the AECD was considered a “defeat device.” Whenever the term “defeat device” is used in this Statement of Facts, it refers to a defeat device as defined by U.S. law.

19. The EPA would not certify motor vehicles equipped with defeat devices. Manufacturers could not sell motor vehicles in the United States without a certificate of conformity from the EPA.

20. The California Air Resources Board (“CARB”) (together with the EPA, “U.S. regulators”) issued its own certificates, called executive orders, for the sale of motor

vehicles in the State of California. To obtain such a certificate, the manufacturer was required to satisfy the standards set forth by the State of California, which were equal to or more stringent than those of the EPA.

21. As part of the application for a certification process, manufacturers often worked in parallel with the EPA and CARB. To obtain a certificate of conformity from the EPA, manufacturers were required to demonstrate that the light-duty vehicles were equipped with an on-board diagnostic (“OBD”) system capable of monitoring all emissions-related systems or components. Manufacturers could demonstrate compliance with California OBD standards in order to meet federal requirements. CARB reviewed applications from manufacturers, including VW, to determine whether their OBD systems were in compliance with California OBD standards, and CARB’s conclusion would be included in the application the manufacturer submitted to the EPA.

22. In 1998, the United States established new federal emissions standards that would be implemented in separate steps, or Tiers. Tier II emissions standards including for NOx emissions, were significantly stricter than Tier I. For light-duty vehicles, the regulations required manufacturers to begin to phase in compliance with the new, stricter Tier II NOx emissions standards in 2004 and required manufacturers to fully comply with the stricter standards for model year 2007. These strict U.S. NOx emissions standards were applicable specifically to vehicles in the United States.

VW Diesel Vehicles Sold in the United States

23. In the United States, VW sold, offered for sale, introduced into commerce, delivered for introduction into commerce, imported, or caused the foregoing actions (collectively “sold in the United States”) the following vehicles containing 2.0 liter diesel engines (“2.0 Liter Subject Vehicles”):

- a. Model Year (“MY”) 2009–2015 VW Jetta;
- b. MY 2009–2014 VW Jetta Sportwagen;
- c. MY 2010–2015 VW Golf;
- d. MY 2015 VW Golf Sportwagen;
- e. MY 2010–2013, 2015 Audi A3;
- f. MY 2013–2015 VW Beetle and VW Beetle Convertible; and
- g. MY2012–2015 VW Passat.

24. VW sold in the United States the following vehicles containing 3.0 liter diesel engines (“3.0 Liter Subject Vehicles”):

- a. MY 2009–2016 VW Touareg;
- b. MY 2009–2015 Audi Q7;
- c. MY 2014–2016 Audi A6 Quattro;
- d. MY 2014–2016 Audi A7 Quattro;
- e. MY 2014–2016 Audi A8L; and
- f. MY 2014 2016 Audi Q5.

25. VW GOA's Engineering and Environmental Office ("EEO") was located in Auburn Hills, Michigan, in the Eastern District of Michigan. Among other things, EEO prepared and submitted applications (the "Applications") for a certificate of conformity and an executive order (collectively, "Certificates") to the EPA and CARB to obtain authorization to sell each of the 2.0 Liter Subject Vehicles and 3.0 Liter Subject Vehicles in the United States (collectively, the "Subject Vehicles"). VW GOA's Test Center California performed testing related to the Subject Vehicles.

26. VW AG developed the engines for the 2.0 Liter Subject Vehicles. Audi AG developed the engines for the 3.0 Liter Subject Vehicles and the MY 2013–2016 Porsche Cayenne diesel vehicles sold in the United States (the "Porsche Vehicles").

27. The Applications to the EPA were accompanied by the following signed statement by a VW representative:

The Volkswagen Group states that any element of design, system, or emission control device installed on or incorporated in the Volkswagen Group's new motor vehicles or new motor vehicle engines for the purpose of complying with standards prescribed under section 202 of the Clean Air Act, will not, to the best of the Volkswagen Group's information and belief, cause the emission into the ambient air of pollutants in the operation of its motor vehicles or motor vehicle engines which cause or contribute to an unreasonable risk to public health or welfare except as specifically permitted by the standards prescribed under section 202 of the Clean Air Act. The Volkswagen Group further states that any element of design, system, or emission control device installed or incorporated in the Volkswagen Group's new motor vehicles or new motor vehicle engines, for the purpose of complying with standards prescribed under section 202 of the Clean Air Act, will not, to the best of the Volkswagen Group's information and belief, cause or contribute to an unreasonable risk to public safety. All vehicles have been tested in accordance with good engineering practice to ascertain that such test vehicles meet the requirement of this section for the useful life of the vehicle.

28. Based on the representations made by VW employees in the Applications for the Subject Vehicles, EPA and CARE issued Certificates for these vehicles, allowing the Subject Vehicles to be sold in the United States.

29. Upon importing the Subject Vehicles into the United States, VW disclosed to U.S. Customs and Border Protection ("CBP") that the vehicles were covered by valid Certificates by affixing an emissions label to the vehicles' engines. These labels stated that the vehicles conformed to EPA and CARB emissions regulations. VW affixed these labels to each of the Subject Vehicles that it imported into the United States.

30. VW represented to its U.S. customers, U.S. dealers, U.S. regulators and others in the United States that the Subject Vehicles met the new and stricter U.S. emissions standards identified in paragraph 22 above. Further, VW designed a specific marketing campaign to market these vehicles to U.S. customers as “clean diesel” vehicles.

VW AG’s Criminal Conduct

31. From approximately May 2006 to approximately November 2015, VW AG, through Supervisors A–F and other VW employees, agreed to deceive U.S. regulators and U.S. customers about whether the Subject Vehicles and the Porsche Vehicles complied with U.S. emissions standards. During their involvement with design, marketing and/or sale of the Subject Vehicles and the Porsche Vehicles in the United States, Supervisors A–F and other VW employees: (a) knew that the Subject Vehicles and the Porsche Vehicles did not meet U.S. emissions standards; (b) knew that VW was using software to cheat the U.S. testing process by making it appear as if the Subject Vehicles and the Porsche Vehicles met U.S. emissions standards when, in fact, they did not; and (c) attempted to and did conceal these facts from U.S. regulators and U.S. customers.

32. In at least in or about 2006, VW AG employees working under the supervision of Supervisors B, C, and F were designing the new EA 189 2.0 liter diesel engine (later known as the Generation 1 or “Gen 1”) for use in the United States that would be the cornerstone of a new project to sell passenger diesel vehicles in the United States. Selling diesel vehicles in the U.S. market was an important strategic goal of VW AG. This project became known within VW as the “US ’07” project.

33. Supervisors B, C, and F, and others, however, realized that VW could not design a diesel engine that would both meet the stricter U.S. NOx emissions standards that would become effective in 2007 and attract sufficient customer demand in the U.S. market. Instead of bringing to market a diesel vehicle that could legitimately meet the new, more restrictive U.S. NOx emissions standards, VW AG employees acting at the direction of Supervisors B, C, and F and others, including Company A employees, designed, created, and implemented a software function to detect, evade and defeat U.S. emissions standards.

34. While, employees acting at their direction designed and implemented the defeat device software, Supervisors B, C, and F, and others knew that U.S. regulators would measure VW’s diesel vehicles’ emissions through standard U.S. tests with specific, published drive cycles. VW AG employees acting at the direction of Supervisors B, C, and F, and others designed the VW defeat device to recognize whether the vehicle was undergoing standard U.S. emissions testing on a dynamometer (or “dyno”) or whether the vehicle was being driven on the road under normal driving conditions. The defeat device accomplished this by recognizing the standard drive cycles used by U.S. regulators. If the vehicle’s software detected that it was being tested, the vehicle performed in one mode, which satisfied U.S. NOx emissions standards. If the defeat device detected that the vehicle was not being tested, it operated in a different mode, in

which the effectiveness of the vehicle's emissions control systems was reduced substantially, causing the vehicle to emit substantially higher NO_x, sometimes 35 times higher than U.S. standards.

35. In designing the defeat device, VW engineers, borrowed the original concept of the dual-mode, emissions cycle-beating software from Audi. On or about May 17 2006, a VW engineer, in describing the Audi software, sent an email to employees in the VW Brand Engine Development department that described aspects of the software and cautioned against using it in its current form because it was "pure" cycle-beating, i.e., as a mechanism to detect, evade and defeat U.S. emissions cycles or tests. The VW AG engineer wrote (in German), "within the clearance structure of the pre-fuel injection the acoustic function is nearly always activated within our current US '07-data set. This function is pure [cycle-beating] and can like this absolutely not be used for US '07."

36. Throughout in or around 2006, Supervisor F authorized VW AG engineers to use the defeat device in the development of the US '07 project, despite concerns expressed by certain VW AG employees about the propriety of designing and activating the defeat device software. In or about the fall of 2006, lower level VW AG engineers, with the support of their supervisors raised objections to the propriety of the defeat device, and elevated the issue to Supervisor B. During a meeting that occurred in or about November 2006, VW AG employees briefed Supervisor B on the purpose and design of the defeat device. During the meeting, Supervisor B decided that VW should continue with production of the US '07 project with the defeat device, and instructed those in attendance, in sum and substance not to get caught.

37. Throughout 2007, various technical problems arose with the US '07 project that led to internal discussions and disagreements among members of the VW AG team that was primarily responsible for ensuring vehicles met U.S. emissions standards. Those disagreements over the direction of the project were expressly articulated during a contentious meeting on or about October 5, 2007, over which Supervisor C presided. As a result of the meeting, Supervisor C authorized Supervisor F and his team to proceed with the US '07 project despite knowing that only the use of the defeat device software would enable VW diesel vehicles to pass U.S. emissions tests.

38. Starting with the first model year 2009 of VW's new engine for the 2.0 Liter Subject Vehicles through model year 2016, Supervisors A–D and F, and others, then caused the defeat device software to be installed in the 2.0 Liter Subject Vehicles marketed and sold in the United States.

39. Starting in or around 2006, Audi AG engineers designed a 3.0 liter diesel for the U.S. market. The 3.0 liter engine was more powerful than the 2.0 liter engine, and was included in larger and higher-end model vehicles. The 3.0 liter engine was ultimately placed in various Volkswagen, Audi and Porsche diesel vehicles sold in the United States for model years 2009 through 2016. In order to pass U.S. emissions tests, Audi engineers designed and installed software designed to detect, evade and defeat U.S. emissions standards, which constituted a defeat device under U.S. law.

40. Specifically, Audi AG engineers calibrated a defeat device for the 3.0 Liter Subject Vehicles and the Porsche Vehicles that varied injection levels of a solution consisting of urea and water (“AdBlue”) into the exhaust gas system based on whether the vehicle was being tested or not, with less NOx reduction occurring during regular driving conditions. In this way, the vehicle consumed less AdBlue, and avoided a corresponding increase in the vehicle’s AdBlue tank size, which would have decreased the vehicle’s trunk size, and made the vehicle less marketable in the United States. In addition, the vehicle could drive further between service intervals, which was also perceived as important to the vehicle’s marketability in the United States.

41. VW employees met with the EPA and CARB to seek the certifications required to sell the Subject Vehicles to U.S. customers. During these meetings, some of which Supervisor F attended personally, VW employees misrepresented, and caused to be misrepresented, to the EPA and CARB staff that the Subject Vehicles complied with U.S. NOx emissions standards, when they knew the vehicles did not. During these meetings, VW employees described, and caused to be described, VW’s diesel technology and emissions control systems to the EPA and CARB staff in detail but omitted the fact that the engine could not meet U.S. emissions standards without using the defeat device software.

42. Also as part of the certification process for each new model year, Supervisors A-F and others certified, and/or caused to be certified, to the EPA and CARB that the Subject Vehicles met U.S. emissions standards and complied with standards prescribed by the Clean Air Act. Supervisors A–F, and others, knew that if they had told the truth and disclosed the existence of the defeat device, VW would not have obtained the requisite certificates for the Subject Vehicles and could not have sold any of them in the United States.

43. In order to import the Subject Vehicles into the United States, VW was required to disclose to CBP whether the vehicles were covered by valid certificates for the United States. VW did so by affixing a label to the vehicles’ engines. VW employees caused to be stated on the labels that the vehicles complied with applicable EPA and CARB emissions regulations and limitations, knowing that if they had disclosed that the Subject Vehicles did not meet U.S. emissions regulations and limitations, VW would not have been able to import the vehicles into the United States. Certain VW employees knew that the labels for the Porsche Vehicles stated that those vehicles complied with EPA and CARB emissions regulations and limitations, when in fact, the VW employees knew they did not.

44. Supervisors A and C and others marketed, and caused to be marketed the Subject Vehicles to the U.S. public as “clean diesel” and environmentally friendly, when they knew the Subject Vehicles were intentionally designed to detect, evade and defeat U.S. emissions standards.

45. For example, on or about November 18, 2007, Supervisor C sent an email to Supervisor F and others attaching three photos of himself with California’s then-

Governor, which were taken during an event at which Supervisor C promoted the 2.0 Liter Subject Vehicles in the United States as “green diesel.”

46. Following the launch of the Gen 1 2.0 Liter Subject Vehicles in the United States, Supervisors C and F, and others, worked on a second generation of the vehicle (the “Gen 2”), which also contained software designed to detect, evade and defeat U.S. emissions tests. The Gen 2 2.0 Liter Subject Vehicles were launched in the United States in or around 2011.

47. In or around 2012, hardware failures developed in certain of the 2.0 Liter Subject Vehicles that were being used by customers on the road in the United States. VW AG engineers hypothesized that vehicles equipped with the defeat device stayed in “dyno” mode (i.e., testing mode) even when driven on the road outside of test conditions. Since the 2.0 Liter Subject Vehicles were not designed to be driven for longer periods of time in “Dyno” mode, VW AG engineers suspected that the increased stress on the exhaust system from being driven too long in “Dyno” mode could be the root cause of the hardware failures.

48. In or around July 2012, engineers from the VW Brand Engine Development department met, in separate meetings, with Supervisors A and E to explain that they suspected that the root cause of the hardware failures in the 2.0 Liter Subject Vehicles was the increased stress on the exhaust system from being driven too long in “Dyno” mode as a result of the use of software designed to detect, evade and defeat U.S. emissions tests. To illustrate the software’s function the engineers used a document. Although they understood the purpose and significance of the software, Supervisors A and E each encouraged the further concealment of the software. Specifically, Supervisors A and E each instructed the engineers who presented the issue to them to destroy the document they had used to illustrate the operation of the defeat device software.

49. VW AG engineers, having informed the supervisor in charge of the VW AG Engine Development department and within the VW AG Quality Management and Product Safety department of the existence and purpose of the defeat device in the 2.0 Liter Subject Vehicles, then sought ways to improve its operation in existing 2.0 Liter Subject Vehicles to avoid the hardware failures. To solve the hardware failures, VW AG engineers decided to start the 2.0 Liter Subject Vehicles in the “street mode” and, when the defeat device recognized that the vehicle was being tested for compliance with U.S. emissions standards, switch to the “Dyno mode.” To increase the likelihood that the vehicle in fact realized that it was being tested on the dynamometer for compliance with U.S. emissions standards, the VW AG engineers activated a “steering wheel angle recognition” feature. The steering wheel angle recognition interacted with the software by enabling the vehicle to detect whether it was being tested on a dynamometer (where the steering wheel is not turned), or being driven on the road.

50. Certain VW AG employees again expressed concern, specifically about the expansion of the defeat device through the steering wheel angle detection, and sought

approval for the function from more senior supervisors within the VW AG Engine Development department. In particular, VW AG engineers asked Supervisor A for a decision on whether or not to use the proposed function in the 2.0 Liter Subject Vehicles. In or about April 2013, Supervisor A authorized activation of the software underlying the steering wheel angle recognition function, VW employees then installed the new software function in new 2.0 Liter Subject Vehicles being sold in the United States, and later installed it in existing 2.0 Liter Subject Vehicles through software updates during maintenance.

51. VW employees falsely told, and caused others to tell, U.S. regulators, U.S. customers and others in the United States that the software update in or around 2014 was intended to improve the 2.0 Liter Subject Vehicles when, in fact, VW employees knew that the update also used the steering wheel angle of the vehicle as a basis to more easily detect when the vehicle was undergoing emissions tests, thereby improving the defeat device's precision in order to reduce the stress on the emissions control systems.

52. In or around March 2014, certain VW employees learned of the results of a study undertaken by West Virginia University's Center for Alternative Fuels, Engines and Emissions and commissioned by the International Council on Clean Transportation (the "ICCT study"). The ICCT study identified substantial discrepancies in the NOx emissions from certain 2.0 Liter Subject Vehicles when tested on the road compared to when these vehicles were undergoing EPA and CARB standard drive cycle tests on a dynamometer. The results of the study showed that two of the three vehicles tested on the road, both 2.0 Liter Subject Vehicles, emitted NOx at values of up to approximately 40 times the permissible limit applicable during testing in the United States.

53. Following the ICCT study, CARB, in coordination with the EPA, attempted to work with VW to determine the cause for the higher NOx emissions in the 2.0 Liter Subject Vehicles when being driven on the road as opposed to on the dynamometer undergoing standard emissions test cycles. To do this, CARB, in coordination with the EPA, repeatedly asked VW questions that became increasingly more specific and detailed, as well as conducted additional testing themselves.

54. In response to learning about the results of the ICCT study, engineers in the VW Brand Engine Development department formed an ad hoc task force to formulate responses to questions that arose from the U.S. regulators. VW AG supervisors, including Supervisors A, D, and E, and others, determined not to disclose to U.S. regulators that the tested vehicle models operated with a defeat device. Instead, Supervisors A, D, and E, and others decided to pursue a strategy of concealing the defeat device in responding to questions from U.S. regulators, while appearing to cooperate.

55. Throughout 2014 and the first half of 2015, Supervisors A, D, and E, and others, continued to offer, and/or cause to be offered, software and hardware "fixes" and explanations to U.S. regulators for the 2.0 Liter Subject Vehicles' higher NOx measurements on the road without revealing the underlying reason—the existence of software designed to detect, evade and defeat U.S. emissions tests.

56. On or about April 28, 2014, members of the VW task force presented the findings of the ICCT study to Supervisor E, whose supervisory responsibility included addressing safety and quality problems in vehicles in production. Included in the presentation was an explanation of the potential financial consequences VW could face if the defeat device was discovered by U.S. regulators, including but not limited to applicable fines per vehicle, which were substantial.

57. On or about May 21, 2014, a VW AG employee sent an email to his supervisor, Supervisor D, and others, describing an “early round meeting” with Supervisor A at which emissions issues in North America for the Gen 2 2.0 Liter Subject Vehicles were discussed, and questions were raised about the risk of what could happen and the available options for VW. Supervisor D responded by email that he was in “direct touch” with the supervisor in charge of Quality Management at VW AG and instructed the VW AG employee to “please treat confidentially” the issue.

58. On or about October 1, 2014, VW AG employees presented to CARB regarding the ICCT study results and discrepancies identified in NOx emissions between dynamo meter testing and road driving. In response to questions, the VW AG employees did not reveal that the existence of the defeat device was the explanation for the discrepancies in NOx emissions, and, in fact gave CARB various false reasons for the discrepancies in NOx emissions including driving patterns and technical issues.

59. When U.S. regulators threatened not to certify VW model year 2016 vehicles for sale in the United States, VW AG supervisors requested a briefing on the situation in the United States. On or about July 27, 2015, VW AG employees presented to VW AG supervisors. Supervisors A and D were present, among others.

60. On or about August 5, 2015, in a meeting in Traverse City, Michigan, two VW employees met with a CARB official to discuss again the discrepancies in emissions of the 2.0 Liter Subject Vehicles. The VW employees did not reveal the existence of the defeat device.

61. On or about August 18, 2015, Supervisors A and D, and others, approved a script to be followed by VW AG employees during an upcoming meeting with CARB in California on or about August 19, 2015. The script provided for continued concealment of the defeat device from CARB in the 2.0 Liter Subject Vehicles, with the goal of obtaining approval to sell the Gen 3 model year 2016 2.0 Liter Subject Vehicles in the United States.

62. On or about August 19, 2015, in a meeting with CARB in El Monte, California, a VW employee explained, for the first time to U.S. regulators and in direct contravention of instructions from supervisors at VW AG, that certain of the 2.0 Liter Subject Vehicles used different emissions treatment depending on whether the vehicles were on the dynamometer or the road, thereby signaling that VW had evaded U.S. emissions tests.

63. On or about September 3, 2015, in a meeting in El Monte, California with CARB and EPA, Supervisor D, while creating the false impression that he had been unaware of the defeat device previously, admitted that VW had installed a defeat device in the 2.0 Liter Subject Vehicles.

64. On or about September 18, 2015, the EPA issued a public Notice of Violation to VW stating that the EPA had determined that VW had violated the Clean Air Act by manufacturing and installing defeat devices in the 2.0 Liter Subject Vehicles.

65. On or about January 27, 2015, CARB informed VW AG that CARB would not approve certification of the Model Year 2016 3.0 Liter Subject Vehicles until Audi AG confirmed that the 3.0 Liter Subject Vehicles did not possess the same emissions issues as had been identified by the ICCT study and as were being addressed by VW with the 2.0 Liter Subject Vehicles.

66. On or about March 24, 2015, in response to CARB's questions, Audi AG employees made a presentation to CARB, during which Audi AG employees did not disclose that the Audi 2.0 and 3.0 Liter Subject Vehicles and the Porsche Vehicles in fact contained a defeat device, which caused emissions discrepancies in those vehicles. The Audi AG employees informed CARB that the 3.0 Liter Subject Vehicles did not possess the same emissions issues as the 2.0 Liter Subject Vehicles when, in fact; the 3.0 Liter Subject Vehicles possessed at least one defeat device that interfered with the emissions systems to reduce NOx emissions on the dyno but not on the road. On or about March 25, 2015, CARB, based on the misstatements and omissions made by the Audi AG representatives, issued an executive order approving the sale of Model Year 2016 3.0 Liter Subject Vehicles.

67. On or about November 2, 2015, EPA issued a Notice of Violation to VW AG, Audi AG and Porsche AG, citing violations of the Clean Air Act related to EPA's discovery that the 3.0 Liter Subject Vehicles and the Porsche Vehicles contained a defeat device that resulted in excess NOx emissions when the vehicles were driven on the road.

68. On or about November 2, 2015, VW AG issued a statement that "no software has been installed in the 3-liter V6 diesel power units to alter emissions characteristics in a forbidden manner."

69. On or about November 19, 2015, Audi AG representatives met with EPA and admitted that the 3.0 Liter Subject Vehicles contained at least three undisclosed AECDs. Upon questioning from EPA, Audi AG representatives conceded that one of these three undisclosed AECDs met the criteria of a defeat device under U.S. law.

70. On or about May 16, 2016, Audi AG representatives met with CARB and admitted that there were additional elements within two of its undisclosed AECDs, which impacted the dosing strategy in the 3.0 Liter Subject Vehicles and the Porsche Vehicles.

71. On or about July 19, 2016, in a presentation to CARB, Audi AG representatives conceded that elements of two of its undisclosed AECs met the definition of a defeat device.

72. Supervisors A–F and others caused defeat device software to be installed on all of the approximately 585,000 Subject Vehicles and the Porsche Vehicles sold in the United States from 2009 through 2015.

73. As VW employees prepared to admit to U.S. regulators that VW used a “defeat device” in the 2.0 Liter Subject Vehicles, counsel for VW GOA prepared a litigation hold notice to ensure that VW GOA preserved documents relevant to diesel emissions issues. At the same time, VW GOA was in contact with VW AG to discuss VW AG preserving documents relevant to diesel emissions issues, Attorney A made statements that several employees understood as suggesting the destruction of these materials. In anticipation of this hold taking effect at VW AG certain VW AG employees destroyed documents and files related to U.S. emissions issues that they believed would be covered by the hold. Certain VW AG employees also requested that their counterparts at Company A destroy sensitive documents relating to U.S. emissions issues. Certain Audi AG employees also destroyed documents related to U.S. emissions issues. The VW AG and Audi AG employees who participated in this deletion activity did so to protect both VW and themselves from the legal consequences of their actions.

74. Between the August 19, 2015 and September 3, 2015 meetings with U.S. regulators, certain VW AG employees discussed issues with Attorney A and others.

75. On or about August 26, 2015 VW GOA’s legal team sent the text of a litigation hold notice to Attorney A in VW AG’s Wolfsburg office that would require recipients to preserve and retain records in their control. The subject of the e-mail was “Legal Hold Notice—Emissions Certification of MY2009-2016 2.0L TDI Volkswagen and Audi vehicles.” The VW GOA legal team stated that VW GOA would be issuing the litigation hold notice to certain VW GOA employees the following day. On or about August 28, 2015 Attorney A received notice that VW GOA was issuing that litigation hold notice that day. Attorney A indicated to his staff on August 31 that the hold would be sent out at VW AG on September 1. Among those at VW AG being asked to retain and preserve documents were Supervisors A and D and a number of other VW AG employees.

76. On or about August 27, 2015, Attorney A met with several VW AG engineers to discuss the technology behind the defeat device. Attorney A indicated that a hold was imminent, and that these engineers should check their documents, which multiple participants understood to mean that they should delete documents prior to the hold being issued.

77. On or about August 31, 2015, a meeting was held to prepare for the September 3 presentation to CARE and EPA where VW’s use of the defeat device in the United States was to be formally revealed. During the meeting, within hearing of several participants, Attorney A discussed the forthcoming hold and again told the engineers

that the hold was imminent and recommended that they check what documents they had. This comment led multiple individuals, including supervisors in the VW Brand Engine Development department at VW AG, to delete documents related to U.S. emissions issues.

78. On or about September 1, 2015, the hold at VW AG was issued. On or about September 1, 2015, several employees in the VW Brand Engine Development department at VW AG discussed the fact that their counterparts at Company A would also possess documents related to U.S. emissions issues. At least two VW AG employees contacted Company A employees and asked them to delete documents relating to U.S. emissions issues.

79. On or about September 3, 2015, Supervisor A approached Supervisor D's assistant, and requested that Supervisor D's assistant search in Supervisor D's office for a hard drive on which documents were stored containing emails of VW AG supervisors, including Supervisor A. Supervisor D's assistant recovered the hard drive and gave it to Supervisor A. Supervisor A later asked his assistant to throw away the hard drive.

80. On or about September 15, 2015, a supervisor within the VW Brand Engine Development department convened a meeting with approximately 30–40 employees, during which Attorney A informed the VW AG employees present about the current situation regarding disclosure of the defeat device in the United States. During this meeting, a VW AG employee asked Attorney A what the employees should do with new documents that were created, because they could be harmful to VW AG. Attorney A indicated that new data should be kept on USB drives and only the final versions saved on VW AG's system, and then, only if "necessary."

81. Even employees who did not attend these meetings, or meet with Attorney A personally, became aware that there had been a recommendation from a VW AG attorney to delete documents related to U.S. emissions issues. Within VW AG and Audi AG thousands of documents were deleted by approximately 40 VW AG and Audi AG employees.

82. After it began an internal investigation, VW AG was subsequently able to recover many of the deleted documents.

Problem 17-1

- (a) Was VW fined an appropriate amount in its plea agreement? How would you develop an answer to that question?
- (b) Most recent corporate resolutions take the form of NPAs and DPAs. Why did the VW case end with a guilty plea? Does the form of the VW resolution matter, assuming all penalties and requirements remain the same?
- (c) What might explain the conduct at VW that led to this prosecution? Does the plea agreement promise to reduce future instances of that conduct, at VW and/or other companies in the industry?

The most senior VW officials involved in the emissions cheating affair have been prosecuted in Germany. On May 26, 2025, after a four year (!) trial, a German court convicted four former VW managers and sentenced them to terms ranging from 1 to 4.5 years in prison. Prosecution of former VW CEO Martin Winterkorn remains underway and has been delayed due to Winterkorn's health.

Perhaps the most widely discussed and controversial corporate investigation and prosecution in recent years is the one involving the Boeing Company. In 2021, following two fatal crashes of its new 737MAX aircraft, Boeing entered into a deferred prosecution agreement with the government. The following documents set out the details with regard to Boeing's original conduct, the original DPA, Boeing's subsequent alleged violations of that DPA, and a new nonprosecution agreement between the government and Boeing that imposes additional penalties to those under the original DPA. Critics, not surprisingly, have not been satisfied with this second resolution.

U.S. Department of Justice

May 29, 2025

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Benjamin L. Hatch
Brandon M. Santos
McGuireWoods LLP
888 16th Street NW, Suite 500
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Re: United States v. The Boeing Company, Non-Prosecution Agreement

Dear counsel:

1. The United States Department of Justice, Criminal Division, Fraud Section and the United States Attorney's Office for the Northern District of Texas (collectively, the "Offices") and The Boeing Company (the "Company"), a corporation organized under the laws of Delaware and headquartered in Virginia, pursuant to the authority granted by its Board of Directors, enter into this Non-Prosecution Agreement ("Agreement"). On the understandings specified below, and with the Company's consent, as reflected in Attachment B to this Agreement, the Offices will move under Federal Rule of Criminal Procedure 48(a) to dismiss without prejudice the one-count Criminal Information pending against the Company in the United States District Court for the Northern District of Texas, 4:21-cr-00005-O, ECF No. 1 ("Information"), and not further criminally prosecute the Company for any crimes relating to any of the conduct described in the Statement of Facts attached hereto as Attachment A-2 (except for criminal tax violations, as to which the Offices do not make any agreement). The Company is subject to prosecution for this conduct following the determination by the Offices that the Company breached the Deferred Prosecution Agreement, which the Company entered into with the Offices on January 7, 2021. Specifically, as described in the Offices' Factual Basis for Breach attached to this Agreement as Attachment A-1, the Offices determined that the Company breached the terms of the DPA by failing to sufficiently design, implement, and enforce a compliance and ethics program to prevent and detect violations of the U.S. fraud laws throughout its operations. To the extent there is conduct disclosed by the Company that is not set forth in the attached Statement of Facts, such conduct will not be exempt from prosecution and is not within the scope of or relevant to this Agreement.

2. The Offices enter into this Non-Prosecution Agreement based on the individual facts and circumstances presented by this case and the Company, including:

- (a) the Offices' determination that the Company breached the terms of the DPA by failing to design, implement, and enforce a compliance and ethics program, including failing to sufficiently integrate its ethics and compliance program with its safety and quality programs, as necessary to prevent and detect violations of the U.S. fraud laws throughout its operations, as described in the Offices' Factual Basis for Breach attached to this Agreement as Attachment A-1;
- (b) the nature and seriousness of the offense conduct, as described in the Statement of Facts attached to this Agreement as Attachment A-2, which involved the Company, through its employees, deceiving the Federal Aviation Administration's Aircraft Evaluation Group ("FAA AEG") about the Boeing 737 MAX's Maneuvering Characteristics Augmentation System ("MCAS") that impacted its flight control

system. Through this deception, the Company interfered with the FAA AEG's lawful function to evaluate MCAS and determine whether to include information about MCAS in the 737 MAX FSB Report, and fraudulently obtained from the FAA AEG a differences-training determination for the 737 MAX that was based on incomplete and inaccurate information about MCAS;

- (c) although the Company had inadequate anti-fraud controls and an inadequate anti- fraud compliance program during the period of conduct charged in the Information, the Company took considerable steps during the DPA period and continuing through the present to enhance its compliance program through structural and leadership changes, including but not limited to steps to enhance the independence, capability, and effectiveness of its compliance program; steps to enhance its annual Compliance Risk Management process; and steps to integrate compliance efforts across its business, and has committed to continuing to implement and test further enhancements to ensure that its compliance program satisfies the minimum elements set forth in Attachment C to this Agreement;
- (d) the Offices have continued to review the Company's ongoing compliance program enhancements since the Offices' determination that the Company breached the DPA, and to engage with the FAA about the same, including enhancements made under the increased and sustained oversight of the FAA since January 2024 that pertain to the Company's anti-fraud compliance program; based on the state of the Company's compliance program and the meaningful improvements made, and the FAA's commitment to continued enhanced oversight of the Company, where necessary and appropriate, the Company agrees to modify its existing compliance program to ensure that it maintains a rigorous compliance program that incorporates relevant internal controls, as well as policies and procedures, designed to effectively detect and deter violations of U.S. federal fraud laws, including the integration of its ethics and compliance program with its safety and quality programs as necessary to reasonably prevent violations of U.S. fraud laws or policies. The compliance program will include, but not be limited to, the minimum elements set forth in Attachment C. In addition, the Company agrees that it will engage an Independent Compliance Consultant to assess the Company's progress regarding remediation and implementation of the compliance measures described in Attachment C ("Independent Compliance Consultant"). The Company and the Independent Compliance Consultant will report to the Offices during the Term (as defined in Paragraph 5 below), in accordance with Attachment D to this Agreement;

- (e) the Company has agreed to continue to cooperate with the Offices as described in Paragraphs 6 and 7, below;
- (f) the Company has agreed to pay victim compensation to the heirs, relatives, and/or legal beneficiaries of the crash victims of Lion Air Flight 610 and Ethiopian Airlines Flight 302 (collectively, “Crash Victim Families”) in the amount of \$444.5 million, in accordance with Paragraph 11, below; and
- (g) the Company has agreed to ensure that its Board of Directors holds a meeting with the Crash Victim Families, should they wish to attend, and their legal representatives, in accordance with Paragraph 14, below.

3. Accordingly, after considering sub-parts (a) through (g) in Paragraph 2 above, and pursuant to Paragraph 26 of the DPA, the Offices have determined that the appropriate resolution of this case is for the Offices to dismiss the Information, with the consent of the Company in accordance with Attachment B, and enter into a non-prosecution agreement with the Company with a two-year term; payment by the Company of an overall criminal monetary penalty amount of \$487,200,000, which reflects a fine at the top of the applicable Sentencing Guidelines fine range and the maximum fine allowable under Title 18, United States Code, Sections 371 and 3571(c), including credit for the \$243,600,000 previously paid by the Company pursuant to the DPA, resulting in a remaining criminal penalty owed by the Company of \$243,600,000; the retention by the Company of an Independent Compliance Consultant in accordance with Attachment D to this Agreement; and a sustained monetary investment by the Company in its compliance and safety programs of at least \$455,000,000.

4. The Company admits, accepts, and acknowledges that it is responsible under United States law for the acts of its officers, directors, employees, and agents as set forth in the Statement of Facts attached hereto as Attachment A-2 and incorporated by reference into this Agreement, and that the facts described in the Statement of Facts are true and accurate. As set forth in Attachment A-2, the Company also admits, accepts, and acknowledges that the facts described in the Statement of Facts constitute a violation of law, specifically Title 18, United States Code, Section 371. The Company expressly agrees that it shall not, through present or future attorneys, officers, directors, employees, agents or any other person authorized to speak for the Company make any public statement, in litigation or otherwise, contradicting the acceptance of responsibility by the Company set forth above or the facts described in the Statement of Facts attached hereto as Attachment A-2. The Company shall be permitted to raise defenses and to assert affirmative claims in other proceedings relating to matters set forth in the Statement of Facts, provided that such defenses and claims do not contradict, in whole or in part, a statement contained in the Statement of Facts. The Company agrees that if it, or any of its direct or indirect subsidiaries or affiliates, issues a press release or holds any press

conference in connection with this Agreement, the Company shall first consult the Offices to determine (a) whether the text of the release or proposed statements at the press conference are true and accurate with respect to matters between the Offices and the Company; and (b) whether the Offices have any objection to the release.

5. The Company's obligations under this Agreement shall have a term of two years from the later of the date on which the Agreement is executed or the date on which the Independent Compliance Consultant is retained by the Company, in accordance with Attachment D to this Agreement, as described below (the "Term"). The Company agrees, however, that, in the event the Department determines, in its sole discretion, that the Company has knowingly violated any provision of this Agreement or has failed to completely perform or fulfill each of the Company's obligations under this Agreement an extension or extensions of the Term may be imposed by the Offices, in their sole discretion, for up to a total additional time period of one year, without prejudice to the Offices' right to proceed as provided in the breach provisions of this Agreement below. Any extension of the Agreement extends all terms of this Agreement, including the terms of the reporting requirement in Attachment D, for an equivalent period. Conversely, in the event the Offices find, in their sole discretion, that there exists a change in circumstances sufficient to eliminate the need for the reporting requirement in Attachment D and that the other provisions of this Agreement have been satisfied, the Agreement may be terminated early.

6. The Company shall cooperate fully with the Offices in any and all matters relating to the conduct described in this Agreement and the Statement of Facts attached hereto as Attachment A-2 and other conduct under investigation by the Offices or any other component of the Department of Justice at any time during the Term of this Agreement, subject to applicable law and regulations, until the later of the date upon which all investigations and prosecutions arising out of such conduct are concluded, or the Term. At the request of the Offices, the Company shall also cooperate fully with other domestic or foreign law enforcement and regulatory authorities and agencies in any investigation of the Company, or its affiliates, or any of its present or former officers, directors, employees, agents, and consultants, or any other party, in any and all matters relating to the conduct described in this Agreement and the Statement of Facts attached hereto as Attachment A-2 and other conduct under investigation by the Offices or any other component of the Department of Justice at any time during the Term. The Company agrees that its cooperation shall include, but not be limited to, the following:

- (a) The Company represents that it has timely and truthfully disclosed all factual information with respect to its activities, those of its affiliates, and those of its present and former directors, officers, employees, agents, and consultants relating to the conduct described in this Agreement and the attached Statement of Facts and other conduct under investigation by the Offices at any time about which the Company has any knowledge and that it shall promptly and truthfully disclose all

factual information with respect to its activities, those of its affiliates, and those of its present and former directors, officers, employees, agents, and consultants about which the Company shall gain any knowledge or about which the Offices may inquire. This obligation of truthful disclosure includes, but is not limited to, the obligation of the Company to provide to the Offices, upon request, any document, record or other tangible evidence about which the Offices may inquire of the Company including evidence that is responsive to any requests made prior to the execution of this Agreement.

- (b) Upon request of the Offices, the Company shall designate knowledgeable employees, agents or attorneys to provide to the Offices the information and materials described above on behalf of the Company. It is further understood that the Company must at all times provide complete, truthful, and accurate information.
- (c) The Company shall use its best efforts to make available for interviews or testimony, as requested by the Offices, present or former officers, directors, employees, agents and consultants of the Company. This obligation includes, but is not limited to, sworn testimony before a federal grand jury or in federal trials, as well as interviews with domestic or foreign law enforcement and regulatory authorities. Cooperation shall include identification of witnesses who, to the knowledge of the Company, may have material information regarding the matters under investigation.
- (d) With respect to any information, testimony, documents, records or other tangible evidence provided to the Offices pursuant to this Agreement, the Company consents to any and all disclosures, subject to applicable law and regulations, to other governmental authorities, including United States authorities and those of a foreign government of such materials as the Offices, in their sole discretion, shall deem appropriate.

7. In addition, during the Term of the Agreement, should the Company learn of any evidence or allegation of a violation of U.S. fraud laws committed by the Company's employees or agents upon any domestic or foreign government agency (including the FAA), regulator, or any of the Company's airline customers, the Company shall promptly report such evidence or allegation to the Offices. No later than thirty (30) calendar days after the Term expires, the Company, by the Chief Executive Officer of the Company and the Chief Financial Officer of the Company, will certify to the Offices, in the form of executing the document attached as Attachment E to this Agreement, that the Company has met its disclosure obligations pursuant to this Agreement. Such certification will be deemed a material statement and representation by the Company to the executive branch of the United States for purposes of 18 U.S.C. § 1001.

8. The Company represents that it has endeavored to implement and will continue to implement a compliance and ethics program reasonably designed, implemented, and enforced to prevent and detect violations of U.S. fraud laws throughout its operations, including those of its affiliates, agents, and joint ventures, and those of its contractors and subcontractors whose responsibilities relate to the Company's interactions with any domestic or foreign government agency (including the FAA), regulator, or any of its airline customers, including, but not limited to, the minimum elements set forth in Attachment C, which is incorporated by reference into this Agreement. No later than thirty (30) calendar days after the Term expires, the Company, by its Chief Executive Officer and Chief Compliance Officer, will certify to the Offices, in the form of executing the document attached as Attachment F to this Agreement, that the Company has met its compliance obligations pursuant to this Agreement. Such certification will be deemed a material statement and representation by the Company to the executive branch of the United States for purposes of 18 U.S.C. § 1001.

9. In order to address any deficiencies in its internal controls, policies, and procedures, the Company represents that it has undertaken, and will continue to undertake in the future, in a manner consistent with all of its obligations under this Agreement, a review of its existing internal controls, policies, and procedures regarding compliance with U.S. federal fraud laws, including the adequacy of the controls, compliance policies, and procedures to address safety related fraud risks. Where necessary and appropriate, the Company agrees to modify its existing compliance program to ensure that it maintains a rigorous compliance program that incorporates relevant internal controls, as well as policies and procedures, designed to effectively detect and deter violations of U.S. fraud laws or policies, including the integration of its ethics and compliance program with its safety and quality programs as necessary to reasonably prevent violations of U.S. fraud laws or policies. The compliance program will include, but not be limited to, the minimum elements set forth in Attachment C.

10. In addition, the Company agrees that it will engage an Independent Compliance Consultant to assess the Company's progress regarding remediation and implementation of the compliance measures described in Attachment C. The Company and the Independent Compliance Consultant will report to the Offices during the Term, in accordance with Attachment D to this Agreement. The Independent Compliance Consultant's duties and authority, and the obligations of the Company with respect to the Independent Compliance Consultant and the Offices, are set forth in Attachment D.

11. The Company agrees to pay additional victim compensation in the amount of \$444.5 million to the heirs, relatives, and/or legal beneficiaries of the crash victims of Lion Air Flight 610 and Ethiopian Airlines Flight 302 (the "Crash-Victim Beneficiaries Compensation Amount"). No later than five (5) business days after the Agreement is executed, the Company shall deposit the full Crash-Victim Beneficiaries Compensation Amount into an escrow account ("Crash-Victim Beneficiaries Escrow Account") that it

shall establish for that purpose. No monies will be paid out of the Crash-Victim Beneficiaries Escrow Account until after the entry of a final Order of the Court dismissing the Information, and only then with the prior approval of the Offices.

(a) The Estate of each Crash-Victim will be entitled to an equal pro rata share of the \$444.5 million fund. The parties agree that the appointment of a Crash-Victim Beneficiaries Compensation Claims Administrator (the “Administrator”) is appropriate and necessary to determine the proper administration and disbursement of the Crash-Victim Beneficiaries Compensation Amount.

(b) The Administrator shall make recommendations to the Offices regarding the individuals who should receive payments from the Crash-Victim Beneficiaries Compensation Amount. Only the Offices shall be empowered to make final decisions regarding the individuals who should receive the victim payments from the Crash-Victim Beneficiaries Compensation Amount.

(c) The parties agree that the Administrator should be the Crash-Victim Beneficiaries Compensation Claims Administrator selected and engaged under the DPA. The Company agrees to pay for all costs, fees, and expenses incurred by the Administrator. The Company shall execute an engagement letter with the Administrator that must be approved, in advance of execution, by the Offices. The Offices and the Company will use their best efforts to complete the engagement within thirty (30) calendar days of the execution of this Agreement.

(d) The Company agrees that it will not employ or be affiliated with the Administrator for a period of not less than two years from the date on which the Administrator’s term expires. Nor will the Company discuss with the Administrator the possibility of further employment or affiliation during the Administrator’s term. Upon agreement by the parties, this prohibition will not apply to other claims administration responsibilities that the Administrator may undertake in connection with resolutions with foreign or other domestic authorities.

(e) The Company agrees that it will not use the fact that any beneficiary of the crash victims of Lion Air Flight 610 and Ethiopian Airlines Flight 302 seeks or receives any compensation from the Crash-Victim Beneficiaries Compensation Amount to seek to preclude such beneficiary from pursuing any other lawful claim that such beneficiary might have against the Company.

12. As provided in Paragraph 3, the Company agrees to pay an additional criminal

monetary penalty in the amount of \$243,600,000. The Company shall pay the additional criminal monetary penalty of \$243,600,000 into an escrow account (separate from the Crash-Victim Beneficiaries Escrow Account) within five (5) business days of the execution of this Agreement, which \$243,600,000 shall be paid to the United States Treasury no later than five (5) business days after the entry of a final Order of the Court dismissing the Information. The Company acknowledges that no tax deduction may be sought in connection with the payment of any part of this \$243,600,000 penalty. The Company shall not seek or accept directly or indirectly reimbursement or indemnification from any source with regard to the penalty amount that the Company pays pursuant to this Agreement or any other agreement entered into with an enforcement authority or regulator concerning the facts set forth in the Statement of Facts attached hereto as Attachment A-2.

13. The Company shall invest in its compliance, quality, and safety programs a total of at least \$455,000,000, measured from July 24, 2024 (the date the parties proposed a plea agreement with the same investment requirement) through the end of the Term. The Company shall at the start of the Term, and thereafter no less than semi-annually, provide proof of the accumulated investment amounts to the Offices. Expenditures the Company makes to implement internal support to, or the recommendations of, the Independent Compliance Consultant are qualifying investments, but not the fees and costs the Company pays for the services of the Independent Compliance Consultant and the Independent Compliance Consultant's team.

14. The Company will ensure that its Board of Directors holds a meeting with the Crash Victim Families, should they wish to attend, and their legal representatives within six (6) months after the entry of a final Order of the Court dismissing the Information. The purpose of the meeting is for the Board of Directors and the Crash Victim Families to discuss, among other things, the Company's conduct and the impact on the Crash Victim Families as well as the Company's compliance, safety, and quality programs. The Company shall meet and confer with the representatives of the Crash Victim Families in a good faith effort to select a mutually agreeable date and location for the meeting. To facilitate the in-person attendance of the greatest number of attendees practicable, the meeting will be scheduled to occur near in time with a regularly scheduled meeting of the Board of Directors. The meeting will be held in person with an option for Crash Victim Families and their legal representatives located outside the United States to join virtually if they choose not to attend in person, though at least 80 percent of Boeing Board members must attend in person. The Company shall arrange and pay for interpreters to provide translation services during the meeting if needed. The Boeing Board members shall be present for the entirety of the meeting. Within three (3) business days after the meeting, the Company shall confirm to the Offices that the meeting took place.

15. The Offices agree, except as provided herein, that, with the Company's consent and agreement that the Company is not a "prevailing party" for purposes of the Hyde

Amendment according to Attachment B, they will move under Federal Rule of Criminal Procedure 48(a) to dismiss the Information without prejudice and to not further criminally prosecute the Company for any crimes relating to any of the conduct described in the attached Statement of Facts. The Offices agree, except as provided herein, that they will not bring any criminal or civil case against the Company or any of its present or former subsidiaries relating to any of the conduct described in the Statement of Facts, attached hereto as Attachment A-2. The Offices, however, may use any information related to the conduct described in the attached Statement of Facts against the Company: (a) in a prosecution for perjury or obstruction of justice; (b) in a prosecution for making a false statement; (c) in a prosecution or other proceeding relating to any crime of violence; or (d) in a prosecution or other proceeding relating to a violation of any provision of Title 26 of the United States Code. This Agreement does not provide any protection against prosecution for any future conduct by the Company. In addition, this Agreement does not provide any protection against prosecution of any individuals, regardless of their affiliation with the Company.

16. If, during the Term of this Agreement, the Company (a) commits any felony under U.S. federal law; (b) provides in connection with this Agreement deliberately false, incomplete, or misleading information, including in connection with its disclosure of information about individual culpability; (c) fails to cooperate as set forth in this Agreement; (d) fails to implement a compliance program as set forth in this Agreement and Attachment C; or (e) otherwise fails specifically to perform or to fulfill completely each of the Company's obligations under the Agreement, regardless of whether the Offices become aware of such a breach after the Term of the Agreement is complete, the Company shall thereafter be subject to prosecution for any federal criminal violation of which the Offices have knowledge, including, but not limited to, the conduct described in the attached Statement of Facts, which may be pursued by the Offices in the U.S. District Court for the Northern District of Texas or any other appropriate venue. Determination of whether the Company has breached the Agreement and whether to pursue prosecution of the Company shall be in the Offices' sole discretion. Any such prosecution may be premised on information provided by the Company or its personnel. Any such prosecution relating to the conduct described in the attached Statement of Facts or relating to conduct known to the Offices prior to the date on which this Agreement was signed that is not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against the Company, notwithstanding the expiration of the statute of limitations, between the signing of this Agreement and the expiration of the Term plus one year. Thus, by signing this Agreement, the Company agrees that the statute of limitations with respect to any such prosecution that is not time-barred on the date of the signing of this Agreement shall be tolled for the Term plus one year. In addition, the Company agrees that the statute of limitations as to any violation of federal law that occurs during the Term will be tolled from the date upon which the violation occurs until the earlier of the date upon which the Offices are made aware of the violation or the duration of the Term plus five years, and that this period shall be excluded from any calculation of time for purposes of the

application of the statute of limitations.

17. In the event the Offices determine that the Company has breached this Agreement, the Offices agree to provide the Company with written notice prior to instituting any prosecution resulting from such breach. Within thirty days of receipt of such notice, the Company shall have the opportunity to respond to the Offices in writing to explain the nature and circumstances of the breach, as well as the actions the Company has taken to address and remediate the situation, which the Offices shall consider in determining whether to pursue prosecution of the Company.

18. In the event that the Offices determine that the Company has breached this Agreement: (a) all statements made by or on behalf of the Company to the Offices or to the Court, including the attached Statement of Facts, and any testimony given by the Company before a grand jury, a court, or any tribunal, or at any legislative hearings, whether prior or subsequent to this Agreement, and any leads derived from such statements or testimony, shall be admissible in evidence in any and all criminal proceedings brought by the Offices against the Company; and (b) the Company shall not assert any claim under the United States Constitution, Rule 11(f) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal rule that any such statements or testimony made by or on behalf of the Company prior or subsequent to this Agreement, or any leads derived therefrom, should be suppressed or are otherwise inadmissible. The decision whether conduct or statements of any current director, officer or employee, or any person acting on behalf of, or at the direction of, the Company, will be imputed to the Company for the purpose of determining whether the Company has violated any provision of this Agreement shall be in the sole discretion of the Offices. . . .

ATTACHMENT A-1, FACTUAL BASIS FOR BREACH

1. The United States' Factual Basis for the Breach of the January 7, 2021 Deferred Prosecution Agreement (the "DPA"), which DPA was between the United States Department of Justice, Criminal Division, Fraud Section (the "Fraud Section") and the United States Attorney's Office for the Northern District of Texas (the "USAO-NDTX") (collectively, the "Offices"), and the Defendant, The Boeing Company ("Defendant," "Boeing," or the "Company") is incorporated by reference as part of the non-prosecution agreement, dated May 29, 2025, between the Offices and Boeing. The parties stipulate that the representations and views herein belong to the Offices.

2. On January 7, 2021, the United States filed a one-count criminal Information (the "Information") in the United States District Court for the Northern District of Texas, charging Boeing with one count of conspiracy to defraud the United States, in violation of Title 18, United States Code, Section 371, that is, knowingly and willfully, and with the intent to defraud, conspired and agreed together with others to defraud the United States

by impairing, obstructing, defeating, and interfering with, by dishonest means, the lawful function of a United States government agency, to wit, the Federal Aviation Administration Aircraft Evaluation Group (“FAA AEG”) within the United States Department of Transportation, in connection with the FAA AEG’s evaluation of the Boeing 737 MAX airplane’s Maneuvering Characteristics Augmentation System, including for purposes of the 737 MAX Flight Standardization Board Report and the 737 MAX differences-training determination.

3. The same day, the United States also filed the DPA between the United States and Boeing. In exchange for Boeing agreeing, among other things, “to implement a compliance and ethics program designed, implemented, and enforced to prevent and detect violations of the U.S. fraud laws throughout its operations,” the United States agreed to defer prosecution of Boeing for the conduct set forth in the Statement of Facts attached to the DPA, including the conspiracy charged in the Information, for the three-year term of the DPA. The United States further agreed that, if Boeing complied fully with the terms of the DPA, the United States would move to dismiss the Information described in Paragraph 1 of the DPA six months after the term of the DPA expired. The DPA provided, however, that if the United States determined during the six-month period following the end of the term of the DPA that Boeing had breached the DPA during the DPA term, the United States could pursue remedies for the breach, including by prosecuting the Company for any federal criminal violation of which the Offices have knowledge, including, but not limited to, the charges in the Information. As part of the DPA, the Company also agreed, among other things, to pay a criminal monetary penalty of \$243,600,000, an Airline Compensation Amount of \$1,770,000,000, and a Crash-Victim Beneficiaries Compensation Amount of \$500,000,000 to the heirs, relatives, and/or legal beneficiaries of the crash victims of Lion Air Flight 610 and Ethiopian Airlines Flight 302.

4. Relevant to the United States’ breach determination, Paragraphs 21 and 22 of the DPA state:

21. The Company represents that it has implemented and will continue to implement a compliance and ethics program designed, implemented, and enforced to prevent and detect violations of the U.S. fraud laws throughout its operations, including those of its subsidiaries, affiliates, agents, and joint ventures, and those of its contractors and subcontractors whose responsibilities relate to the Company’s interactions with any domestic or foreign government agency (including the FAA), regulator, or any of its airline customers, including, but not limited to, the minimum elements set forth in Attachment C.

22. In order to address any deficiencies in its internal controls, policies, and procedures, the Company represents that it has undertaken, and will continue to undertake in the future, in a manner consistent with all of its obligations under

this Agreement, a review of its existing internal controls, policies, and procedures regarding compliance with U.S. fraud laws, focusing on the Company's interactions with domestic or foreign government agencies (including the FAA), regulators, and any of its airline customers. Where necessary and appropriate, the Company agrees to adopt a new compliance program, or to modify its existing one, including internal controls, compliance policies, and procedures in order to ensure that it maintains an effective compliance program, including a system of internal controls, designed to effectively detect and deter violations of U.S. fraud laws. The compliance program, including the internal controls system, will include, but not be limited to, the minimum elements set forth in Attachment C [which outlined the requirements for the Company's compliance program].

5. At the time of the conduct described in Attachment A-2, Boeing did not have a centralized compliance function. Boeing appointed its first Global Chief Compliance Officer ("CCO") and established its Global Compliance function ("Global Compliance" or "Compliance") in May of 2020. During the term of the DPA, Boeing took considerable steps to enhance the independence, capability, and effectiveness of its compliance program. Among other things, Boeing enhanced its annual Compliance Risk Management process, including in ways that strengthened compliance controls with respect to potential safety and quality risks, and took steps to integrate compliance efforts across its business. As direct remediation of the charged misconduct, Boeing implemented policies and procedures to manage and coordinate the formal communication of information between Boeing and its regulators and customers and mandatory training regarding transparency in interactions with regulators and customers. Despite enhancements, in the Offices' view, Boeing failed to sufficiently extend its anti-fraud ethics and compliance program over its quality and manufacturing process before the end of the DPA term. As a result, the Department determined that Boeing's anti-fraud compliance program still has significant gaps.

6. The United States, in an exercise of the discretion conferred upon it by the agreed upon terms of the DPA (namely, Paragraph 26 of the DPA), has determined that Boeing violated Paragraphs 21 and 22 and Attachment C of the DPA and declared a breach of the DPA on May 14, 2024. Relevant considerations in arriving at that determination and making that declaration include the following:

- Boeing failed to fully satisfy the requirement to "create and foster a culture of ethics and compliance with the law in its day-to-day operations," by failing to mitigate known manufacturing and quality risks;
- Boeing failed to fully satisfy the requirement to implement "compliance policies and procedures designed to reduce the prospect of violations of U.S. fraud laws and the Company's compliance code," by failing to design a compliance and ethics program that included sufficient anti-fraud oversight of Boeing's quality and safety processes;

- Boeing failed to fully satisfy the requirement to implement “compliance policies and procedures designed to reduce the prospect of violations of U.S. fraud laws and the Company’s compliance code,” by failing to implement sufficient controls concerning the risk that Boeing’s airworthiness certifications to the FAA could be incomplete, inaccurate, false and/or fraudulent;
- Boeing failed to fully satisfy the requirement to implement “compliance policies and procedures designed to reduce the prospect of violations of U.S. fraud laws and the Company’s compliance code,” by failing to implement sufficient controls concerning the risk of incomplete, inaccurate, false and/or fraudulent statements in Boeing’s manufacturing records; and
- Boeing failed to fully satisfy the requirement to appropriately develop and adjust “compliance policies and procedures on the basis of a periodic risk assessment addressing the individual circumstances of the Company,” and to review and update such policies “as appropriate to ensure their continued effectiveness,” in light of known manufacturing and quality risks, and the attendant risks of incomplete, inaccurate, false, and/or fraudulent statements to the FAA.

7. Before delivering a 737 MAX aircraft to a U.S. customer, Boeing must apply to the FAA for a U.S. Airworthiness Certificate for each aircraft. In so doing, Boeing certifies to the FAA “that the aircraft has been inspected and is airworthy,” meaning, “the aircraft conforms to its type design and is in a condition for safe operation.” FAA Form 8130-6; 14 C.F.R. § 3.5. A Boeing employee makes this certification in reliance on the completeness, accuracy, and truthfulness of the Company’s build records and the effectiveness of related manufacturing and quality processes. Although Boeing knew about manufacturing, quality, safety, and anti-fraud risks capable of undermining the completeness, accuracy, and truthfulness of those records, Boeing did not implement additional or sufficient controls concerning the risk that its certifications of airworthiness to the FAA could be incomplete, inaccurate, false and/or fraudulent and that aircraft delivered to its customers “conforms to its type design and is in a condition for safe operation.” The Department has determined that these failures breached the DPA, as set forth above and below.

8. Boeing’s instructions for aircraft assembly require assembly to occur in a particular sequence. When a sequenced step is performed inadequately or not completed, it may be discovered and corrected at a later stage. Correction of the inadequate or incomplete work must then be done “out-of-sequence.” Out-of-sequence work is more difficult to perform, increases the risk that defects in manufacturing will occur, and may require installed parts to be removed and later re-installed.

9. Between 2021 and 2023, Boeing conducted several Safety Risk Management assessments that identified out-of-sequence work as a risk factor that could cause the

delivery of an “unairworthy” or non-conforming aircraft to Boeing’s customers. Despite the acknowledgement of this risk, the Safety Risk Management assessments did not sufficiently consider measures to reduce out-of-sequence work. Boeing senior executives prioritized the movement of aircraft through Boeing’s factories over reducing out-of-sequence work to ensure production quality. Boeing did not implement sufficient policies or procedures to mitigate the risk posed by out-of-sequence work.

10. Moreover, although fraud is an inherent risk in production and quality compliance activities, Boeing’s Safety Risk Management assessments also failed to identify out-of-sequence risk as a fraud risk or consider enhanced production procedures, or preventive or detective controls, to mitigate the risk. Boeing’s Global Compliance function, which is responsible for Boeing’s anti-fraud ethics and compliance program, was not involved in the Safety Risk Assessments. Compliance therefore did not evaluate fraud risks associated with out-of-sequence work, including the risk of incomplete, inaccurate, false, and/or fraudulent statements to the FAA.

11. The United States has determined that Boeing’s failure to identify and adjust its ethics and compliance program to address the anti-fraud risks attendant to out-of-sequence work violated its obligation to meet the compliance program standards required by DPA Attachment C, including Paragraphs 1, 4, and 5.

12. Boeing’s airworthiness certifications to the FAA rely on the completeness and accuracy of Boeing’s build records and the effectiveness of related manufacturing and quality processes. If installed parts are later removed during manufacturing, Boeing policy requires Boeing employees to document the removal in certain written records. The creation of a removal record initiates a process to ensure proper reinstallation of the part and record the individuals involved in removal, reinstallation, and reinspection. If a removal record was not completely resolved in Boeing’s computer systems, including reinstallation and reinspection, a Boeing employee would not certify an aircraft as airworthy to the FAA.

13. A failure to create a removal record prevents Boeing from verifying that parts are correctly or completely re-installed and that its certification stating that the plane is “airworthy” is accurate. This recordkeeping failure could also undermine Boeing’s processes for effectively responding to, investigating, and remediating potential allegations of violations of the U.S. fraud laws or the Company’s compliance code, policies, and procedures, in part because Boeing could lack records of who was involved in removing, reinstalling, and reinspecting disturbed installations and what they did.

14. Boeing received numerous reports of incidents of non-compliance with its policy governing removals throughout the DPA term. In addition, since 2019, the FAA has issued numerous formal or informal actions to Boeing related to Boeing’s policy governing removals. Compliance was not sufficiently involved in root cause analysis, remediation, or risk mitigation related to this process, notwithstanding the (1) impact

non-compliance with Boeing's policy governing removals could have on Boeing's representations regarding its aircraft, and (2) recordkeeping consequences. Boeing failed to meet the compliance program standards required by DPA Attachment C, including Paragraphs 3, 4, and 5.

15. Throughout the build process, Boeing mechanics and inspectors affirm (or "stamp") that they have completed work in conformance with requirements. Stamped manufacturing and quality records are important for Boeing's certification to the FAA that an aircraft is airworthy. All build plans and required inspections must be stamped by Boeing employees as complete to requirements before a Boeing employee certifies an aircraft as airworthy to the FAA. Boeing relies on those build and quality stamping records to certify to the FAA that an aircraft is airworthy. False statements in Boeing's build records pose a fraud risk because they could undermine the completeness, accuracy, and truthfulness of Boeing's representations and certifications to the FAA regarding its aircraft, among other issues. Boeing received hundreds of reports of stamping non-compliance through its internal reporting channels. Boeing Compliance identified this anti-fraud risk during the DPA term and issued training and communications throughout the Company in response to the risk. Despite awareness of stamping non-compliance reports, Boeing did not conduct sufficient testing to evaluate whether its stamping integrity communications and training efforts were effective in practice and stamping issues persisted.

16. In or around April 2024, Boeing disclosed to the Fraud Section false stamping during the DPA term at the Boeing 787 manufacturing facility in Charleston, South Carolina. The false stamps caused Boeing's quality management systems to reflect that all required steps were complete, when they were not. Employees involved in the false stamping did not understand Boeing's stamping policy, were not familiar with its requirements, and were not effectively trained on it. Because the build and quality records are the cornerstone of Boeing's certification that aircraft conform to their approved type design, the lack of understanding by Boeing employees of the importance of and requirements for stamping integrity calls into question the effectiveness of Boeing's anti-fraud compliance program with respect to the certifications.

17. These reported stamping issues highlighted several shortcomings in Boeing's anti-fraud compliance program with respect to stamping integrity, including the following weaknesses:

- Boeing did not effectively evaluate its stamping policy to ensure it was effective. Specifically, Boeing failed to measure employee understanding of the policy, including whether employees understood that stamping, build, and quality records were the basis for Boeing's certification to the FAA of airworthiness.
- Boeing did not effectively ensure compliance with its stamping policy.

- Boeing did not implement enhanced or remedial controls to prevent or detect stamping policy violations. Rather, Boeing continued to rely on its existing build and inspection record process to support its certification to the FAA of aircraft airworthiness.

18. Complete, accurate, and truthful build records are the basis for Boeing's certification of airworthiness to the FAA. In the face of known manufacturing, quality, safety, and anti-fraud risks which undermine the completeness, accuracy, and truthfulness of those records, Boeing failed to implement additional or sufficient controls concerning the risk that certifications of airworthiness to the FAA could be incomplete, inaccurate, false and/or fraudulent and that aircraft delivered to its customers "conform[] to its type design and is in a condition for safe operation," in violation of the compliance program standards required by DPA Attachment C, including Paragraphs 3, 4, and 5.

ATTACHMENT A-2, STATEMENT OF FACTS

1. The following Statement of Facts is incorporated by reference as part of the Non-Prosecution Agreement between the United States Department of Justice, Criminal Division, Fraud Section (the "Fraud Section"), the United States Attorney's Office for the Northern District of Texas (the "USAO-NDTX") and The Boeing Company ("Boeing" or the "Company"). The Company hereby agrees and stipulates that the following information is true and accurate. The Company admits, accepts, and acknowledges that it is responsible for the acts of its officers, directors, employees, and agents as set forth below. The following facts establish beyond a reasonable doubt the offense with which Boeing is charged in the criminal Information, Conspiracy to Defraud the United States, in violation of Title 18, United States Code, Section 371, as well as the pecuniary gross gain the Company derived from committing the offense. At all times relevant to this Statement of Facts, with all dates being approximate and inclusive:

Boeing's New Airplane: The 737 MAX

2. Boeing was a U.S.-based multinational corporation that designed, manufactured, and sold commercial airplanes to airlines worldwide. Boeing operated from various locations, including in and around Seattle, Washington.

3. Boeing's airline customers included major U.S.-based airlines headquartered in the Northern District of Texas and elsewhere.

4. The Boeing 737 was a commercial airplane that could seat approximately 200 passengers and was one of Boeing's best-selling airplane models. Boeing began designing, manufacturing, and selling the Boeing 737 in the 1960s. Over time, Boeing designed, manufactured, and sold new versions of the Boeing 737 to its airline customers, including major U.S.-based airlines.

5. In or around June 2011, Boeing began developing and marketing a new version of its Boeing 737 called the 737 MAX. The 737 MAX was designed by Boeing as a competitive answer to a new version of an airplane developed by one of Boeing's top rivals in commercial airplanes, Company-1. Like the new version of Company-1's airplane, the 737 MAX promised increased fuel efficiency over its prior version, the 737 Next Generation ("737 NG"). With this increased efficiency, the 737 MAX offered fuel-cost savings for airlines.

The FAA AEG's Role in Determining Pilot "Differences Training" for New Airplanes

6. Before any U.S.-based airline could operate a new commercial airplane, U.S. regulations required the Federal Aviation Administration ("FAA"), an organization within the United States Department of Transportation, to evaluate and approve the airplane for commercial use. Without this approval, a U.S.-based airline would not be permitted to operate the airplane.

7. As part of this evaluation and approval process, the FAA had to make two distinct determinations: (i) whether the airplane met U.S. federal airworthiness standards; and (ii) what minimum level of pilot training would be required for a pilot to fly the airplane for a U.S.-based airline. These two determinations were made by entirely different groups within the FAA that were composed of different personnel with different organizational structures and different reporting lines.

8. The FAA Aircraft Evaluation Group ("AEG") was principally responsible for determining the minimum level of pilot training required for a pilot to fly the airplane for a U.S.-based airline. To make that determination, the FAA AEG compared the new version of the airplane (such as the 737 MAX) to a similar, prior version of the airplane (such as the 737 NG). After evaluating the differences between the new and prior versions of the airplane, the FAA AEG mandated the minimum level of pilot training, known as "differences training," for the new version.

9. Based on the nature and extent of the differences between the new and prior version of the airplane, the FAA AEG assigned a level of differences training ranging from "Level A" through "Level E." These levels of differences training ranged in rigor, with "Level A" being the least intensive and "Level E" being the most intensive. As relevant here, "Level B" differences training generally included computer-based training ("CBT") training, and "Level D" differences training generally included full-flight simulator training.

10. At the conclusion of the FAA's evaluation of the new version of the airplane, the FAA AEG published a Flight Standardization Board Report ("FSB Report"). Among other things, the FSB Report contained relevant information about certain airplane systems and parts that the airplane manufacturer was required to incorporate into airplane manuals and pilot-training materials for all U.S.-based airlines that would fly

the airplane. The FSB Report also contained the FAA AEG's differences-training determination.

11. Boeing's 737 MAX Flight Technical Team was principally responsible for identifying and providing to the FAA AEG all information that was relevant to the FAA AEG in connection with the FAA AEG's publication of the 737 MAX FSB Report. The 737 MAX Flight Technical Team was separate and distinct from another group within Boeing that was responsible for providing information to the FAA for certification of whether the airplane met U.S. federal airworthiness standards.

12. From in or around early 2012 until in or around early 2014, Boeing Employee-1 was a Technical Pilot for Boeing's 737 MAX Flight Technical Team. In or around early 2014, Boeing Employee-1 became Boeing's 737 MAX Chief Technical Pilot. In that role, Boeing Employee-1 led the 737 MAX Flight Technical Team. In or around July 2018, Boeing Employee-1 left Boeing to work for a major U.S.-based airline.

13. From in or around mid-2014 until in or around July 2018, Boeing Employee-2 was a Technical Pilot for Boeing's 737 MAX Flight Technical Team. In or around July 2018, after Boeing Employee-1 left Boeing, Boeing Employee-2 became Boeing's 737 MAX Chief Technical Pilot. In that role, Boeing Employee-2 led the 737 MAX Flight Technical Team.

14. Boeing Employee-1 and Boeing Employee-2 understood that the FAA AEG relied on them, as members of Boeing's 737 MAX Flight Technical Team, to identify and provide to the FAA AEG all information that was relevant to the FAA AEG in connection with the FAA AEG's publication of the 737 MAX FSB Report, including information that could impact the FAA AEG's differences-training determination.

15. Boeing Employee-1 and Boeing Employee-2 also understood that, because flight controls were vital to flying modern commercial airplanes, differences between the flight controls of the 737 NG and the 737 MAX were especially important to the FAA AEG for purposes of its publication of the 737 MAX FSB Report and the FAA AEG's differences-training determination.

16. From at least in and around November 2016 through at least in and around December 2018, in the Northern District of Texas and elsewhere, Boeing, through Boeing Employee-1 and Boeing Employee-2, knowingly, and with intent to defraud, conspired to defraud the FAA AEG.

17. At all times during the conspiracy, Boeing Employee-1 and Boeing Employee-2 were acting within the scope of their employment and with the intention, at least in part, to benefit Boeing. The purpose of the conspiracy was to defraud the FAA AEG by impairing, obstructing, defeating, and interfering with the lawful function of the FAA AEG by dishonest means in connection with its publication of the 737 MAX FSB Report

and its differences-training determination for the Boeing 737 MAX, in order to bring about a financial gain to Boeing and to benefit Boeing Employee-1 and Boeing Employee-2 in connection with the Boeing 737 MAX.

Boeing's Financial Incentive to Secure No Greater than "Level B" Differences Training in the 737 MAX FSB Report

18. As Boeing knew, "Level B" differences training was significantly less expensive for airlines to complete than "Level D." For example, a pilot could complete "Level B" differences training from anywhere in the world in a matter of hours using a computer or tablet. In contrast, a pilot could complete "Level D" differences training only by appearing in person wherever the pilot's airline operated a full-flight simulator. Apart from the cost of acquiring one or more multimillion-dollar simulators and other related expenses, airlines that were required by the FAA AEG to train pilots on a full-flight simulator could also lose revenue that the pilot might otherwise have generated from flying airline passengers during that time. Accordingly, if the FAA AEG required a less rigorous level—such as "Level B"—of differences training for the 737 MAX in the 737 MAX FSB Report, the 737 MAX would be a more attractive option for Boeing's airline customers already flying the 737 NG than switching to an entirely new airplane, such as the new version of Company-1's airplane, as such customers would save significant money in pilot-training costs by transitioning to the 737 MAX.

19. Principally for this reason, Boeing's stated objectives in designing the 737 MAX included securing the FAA AEG's determination to require no greater than "Level B" differences training in the 737 MAX FSB Report. Boeing Employee-1 and Boeing Employee-2 understood as much. For example, in or around November 2014, Boeing Employee-2 wrote in an internal Boeing electronic chat communication to Boeing Employee-1 that "nothing can jeopardize [sic] level b[.]" In or around December 2014, Boeing Employee-1 wrote in an email to another Boeing employee that "if we lose Level B [it] will be thrown squarely on my shoulders. It was [Boeing Employee-1], yes [Boeing Employee-1]! Who cost Boeing tens of millions of dollars!"

The Maneuvering Characteristics Augmentation System ("MCAS")

20. To achieve its promised fuel efficiency, the 737 MAX used larger engines than the 737 NG. These larger engines, and their placement under the airplane's wings, meant that the aerodynamics of the 737 MAX differed from those of the 737 NG.

21. These different aerodynamics created a new handling characteristic for the 737 MAX that caused the 737 MAX's nose to pitch up during a certain flight maneuver called a high-speed, wind-up turn. A high-speed, wind-up turn generally involved sharply turning the airplane at high speed (approximately Mach 0.6-0.8) in a corkscrew-like pattern.

22. A high-speed, wind-up turn was a "certification" maneuver, that is, a maneuver

outside the limits of what the 737 MAX would be expected to encounter during a normal commercial passenger flight. Nevertheless, if Boeing did not fix the 737 MAX's pitch-up characteristic in high-speed, wind-up turns, the FAA could determine that the 737 MAX did not meet U.S. federal airworthiness standards.

23. To fix this pitch-up characteristic, Boeing created MCAS and incorporated it as a part of the 737 MAX's flight controls. In operation, MCAS would automatically cause the airplane's nose to pitch down by adjusting the 737 MAX's horizontal stabilizer (a horizontal tail located near the rear of the airplane). As originally designed, MCAS could only activate during a high-speed, wind-up turn.

Boeing Employee-1 and Other Boeing Employees Told the FAA AEG that MCAS was Limited to High-Speed, Wind-Up Turns

24. In or around June 2015, Boeing Employee-1 and other Boeing employees briefed the FAA AEG on MCAS. During this briefing, Boeing described MCAS as a system that could only activate during a high-speed, wind-up turn. After the briefing, Boeing Employee-1 and another Boeing employee further discussed MCAS with an FAA AEG employee ("FAA AEG Employee-1") and reiterated to FAA AEG Employee-1 the limited operational scope of MCAS.

Boeing Subsequently Expanded MCAS's Operational Scope Beyond High-Speed, Wind-Up Turns

25. Subsequently, Boeing expanded MCAS's operational scope, including the speed range within which MCAS could activate, significantly altering its original design. Among other things, when the airplane registered a high angle of attack, the change expanded the speed range within which MCAS could activate from approximately Mach 0.6-0.8 to approximately Mach 0.2-0.8—that is, from only high-speed flight to nearly the entire speed range for the 737 MAX, including low-speed flight, which generally occurs at a lower altitude and in and around takeoff and landing. Boeing disclosed this expansion to FAA personnel, but only to those personnel who were responsible for determining whether the 737 MAX met U.S. federal airworthiness standards. Boeing did not disclose the expansion to the FAA AEG personnel responsible for publishing the 737 MAX FSB Report and making the training-related determination.

Boeing Advocated for the FAA AEG to Publish the 737 MAX FSB Report with No Greater Than "Level B" Differences Training

26. On or about August 16, 2016, before the FAA AEG published the 737 MAX FSB Report, the FAA AEG issued a provisional "Level B" differences-training determination for the 737 MAX. At the time of this provisional determination, the FAA AEG was unaware that Boeing had expanded MCAS's operational scope.

27. On or about the same day, Boeing Employee-1 recognized Boeing's

achievement in an email to Boeing employees, including Boeing Employee-2, and wrote that the FAA AEG's provisional determination "culminates more than 3 years of tireless and collaborative efforts across many business units" and that the 737 MAX program management "is VERY happy."

28. As Boeing Employee-1 and Boeing Employee-2 knew, the FAA AEG based its provisional "Level B" differences training for the 737 MAX in part on its understanding that MCAS could only activate during the limited operational scope of a high-speed, wind up turn.

29. Boeing Employee-1 and Boeing Employee-2 also understood, as Boeing Employee-1 acknowledged in his email on or about August 16, 2016, that the FAA AEG's "Level B" differences determination for the 737 MAX was only a "provisional approval [. . .] assuming no significant systems changes to the airplane."

30. For example, in an email to Boeing employees including Boeing Employee-2 discussing a potential change to another part of the 737 MAX's flight controls on or about November 10, 2016, Boeing Employee-1 emphasized that "[o]ne of the Program Directives we were given was to not create any differences [. . .]. This is what we sold to the regulators who have already granted us the Level B differences determination. To go back to them now, and tell them there is in fact a difference [. . .] would be a huge threat to that differences training determination.

"Shocker Alert": Boeing Employee-1 and Boeing Employee-2 Discovered MCAS's Expanded Operational Scope

31. On or about November 15, 2016, during a test flight of the 737 MAX in a simulator, Boeing Employee-1 experienced what Boeing Employee-1 recognized as MCAS operating at lower speed. Boeing Employee-1 further recognized that this lower-speed operation was different from what Boeing had briefed and described to the FAA AEG.

32. On or about that same day, Boeing Employee-1 and Boeing Employee-2 discussed MCAS in an internal Boeing electronic chat communication, writing in part:

Boeing Employee-1: Oh shocker alert! [sic] / MCAS is now active down to [Mach] .2 / It's running rampant in the sim on me / at least that's what [a Boeing simulator engineer] thinks is happening

Boeing Employee-2: Oh great, that means we have to update the speed trim description in vol 2

Boeing Employee-1: so I basically lied to the regulators (unknowingly)

Boeing Employee-2: it wasn't a lie, no one told us that was the case

33. At this point, Boeing Employee-1 and Boeing Employee-2 recognized that the FAA AEG was under the misimpression that MCAS operated only during a high-speed, wind up turn and could not operate at lower Mach speeds, such as at Mach 0.2. Boeing Employee-1 and Boeing Employee-2 therefore knew, at least as of the time of this chat communication, that the FAA AEG's provisional "Level B" differences-training determination had been based in part on outdated and inaccurate information about MCAS.

34. Boeing Employee-1 and Boeing Employee-2 also knew that MCAS's expanded operational scope was relevant to the FAA AEG's decisions about the content of the 737 MAX FSB Report, including whether to include information about MCAS. Boeing Employee-1 and Boeing Employee-2 similarly understood that it was their responsibility to update the FAA AEG about any relevant changes to the 737 MAX's flight controls—such as MCAS's expanded operational scope.

35. Despite knowing that the FAA AEG had issued its provisional "Level B" determination without any awareness that MCAS's operational scope had been expanded to include high angle of attack conditions in nearly the entire speed range of ordinary commercial flight, Boeing Employee-1 and Boeing Employee-2 did not correct the FAA AEG's understanding of MCAS's operational scope or otherwise ensure that the FAA AEG's "Level B" determination was based on an accurate understanding of MCAS's operation. Instead, Boeing—through Boeing Employee-1 and Boeing Employee-2—intentionally withheld and concealed from the FAA AEG their knowledge of MCAS's expanded operational scope.

Boeing, Through Boeing Employee-1 and Boeing Employee-2, Deceived the FAA AEG About MCAS's Operational Scope and Told the FAA AEG to Delete MCAS from the 737 MAX FSB Report

36. For example, shortly after the simulated test flight described in paragraph 30, Boeing Employee-1 talked with FAA AEG Employee-1, who asked Boeing Employee-1 about the simulated test flight. Boeing Employee-1 intentionally withheld and concealed from FAA AEG Employee-1 the fact that MCAS's operational scope had been expanded beyond what the FAA AEG relied upon when it issued its provisional "Level B" differences-training determination for the 737 MAX.

37. Around the time that Boeing Employee-1 and Boeing Employee-2 discussed MCAS's expanded operational scope, Boeing Employee-1 asked a Boeing senior engineer assigned to the 737 MAX program about MCAS's operational scope. The senior engineer confirmed to Boeing Employee-1 that MCAS could activate beyond the limited operational scope of a high-speed, wind-up turn. The senior engineer suggested that Boeing Employee-1 contact certain subject-matter experts at Boeing for more specific information about MCAS's operational scope.

38. On or about November 17, 2016, the FAA AEG emailed three Boeing employees, including Boeing Employee-1, Boeing Employee-2, and another Boeing employee, a draft of the forthcoming 737 MAX FSB Report. That same day, Boeing Employee-1 asked Boeing Employee-2 and the other Boeing employee to review the draft 737 MAX FSB Report “for any glaring issues.”

39. On or about November 22, 2016, the other Boeing employee emailed the draft 737 MAX FSB Report back to the FAA AEG with proposed edits. Boeing Employee-1 and Boeing Employee-2 were included on this email. Boeing Employee-1 included a proposed edit to delete a reference to MCAS, and wrote, “We agreed not to reference MCAS since it’s outside normal operating envelope.” Neither Boeing Employee-1 nor Boeing Employee-2 shared the fact of MCAS’s expanded operational scope with the FAA AEG or otherwise corrected the FAA AEG’s misimpression that MCAS’s operational scope was limited to high-speed, wind-up turns.

40. In doing so, Boeing Employee-1 and Boeing Employee-2 deceived the FAA AEG into believing that the basis upon which the FAA AEG had initially “agreed” to remove any information about MCAS from the 737 MAX FSB Report—that MCAS could only activate during the limited operational scope of a high-speed, wind-up turn—remained the same. Boeing Employee-1 and Boeing Employee-2 withheld their knowledge of MCAS from the FAA AEG to avoid risking the FAA AEG taking any action that could threaten the differences-training determination for the 737 MAX.

41. On or about January 17, 2017, Boeing Employee-1 again reminded the FAA AEG in an email to delete any reference to MCAS from the forthcoming 737 MAX FSB Report, and wrote, “Flight Controls: Delete MCAS, recall we decided we weren’t going to cover it [. . .] since it’s way outside the normal operating envelope.” Again, Boeing Employee-1 deceived the FAA AEG into believing that the basis upon which the FAA AEG had initially “decided” to remove any information about MCAS from the 737 MAX FSB Report—that MCAS could only activate during the limited operational scope of a high-speed, wind-up turn—remained the same.

42. By concealing MCAS’s expanded operational scope from the FAA AEG, Boeing, through Boeing Employee-1 and Boeing Employee-2, defrauded, impaired, obstructed, defeated, and interfered with the FAA AEG’s lawful function to evaluate MCAS and to include information about MCAS in the 737 MAX FSB Report.

43. Based on Boeing’s misleading statements, half-truths, and omissions to the FAA AEG about MCAS, and in reliance on those statements and omissions, the FAA AEG agreed to delete all information about MCAS from the 737 MAX FSB Report.

44. From in or around January 2017 through in or around July 2017 (when the 737 MAX FSB Report was published), Boeing Employee-1 and Boeing Employee-2 sent and

caused to be sent emails to representatives of various Boeing airline customers that had agreed to purchase the 737 MAX, including major U.S.-based airlines. In these emails, Boeing Employee-1 and Boeing Employee-2 or members of their 737 MAX Flight Technical Team referenced and included drafts of the forthcoming 737 MAX FSB Report and airplane manuals and pilot-training materials for Boeing's 737 MAX airline customers. None of these items contained any information about MCAS, consistent with Boeing Employee-1's and Boeing Employee-2's efforts to deceive the FAA AEG into deleting information about MCAS.

The FAA AEG Published the 737 MAX FSB Report Without Any Information about MCAS and Required No Greater than "Level B" Differences Training

45. On or about July 5, 2017, the FAA AEG published the first 737 MAX FSB Report, which included the FAA AEG's "Level B" differences-training determination for the 737 MAX.

46. Because of Boeing's intentional withholding of information from the FAA AEG, the final version of the 737 MAX FSB Report lacked information about MCAS, and relevant portions of this 737 MAX FSB Report were materially false, inaccurate, and incomplete. In turn, airplane manuals and pilot-training materials for U.S.-based airlines lacked information about MCAS, and relevant portions of these manuals and materials were similarly materially false, inaccurate, and incomplete as a result.

47. After the FAA AEG published the final version of the 737 MAX FSB Report, Boeing continued to sell, and Boeing's U.S.-based airline customers were permitted to fly, the 737 MAX. Pilots flying the 737 MAX for Boeing's airline customers were not provided any information about MCAS in their airplane manuals and pilot-training materials.

Lion Air Flight 610: The First 737 MAX Crash Exposed MCAS's Operational Scope

48. On October 29, 2018, Lion Air Flight 610, a Boeing 737 MAX, crashed shortly after takeoff into the Java Sea near Indonesia. All 189 passengers and crew on board died.

49. Following the Lion Air crash, the FAA AEG learned that MCAS activated during the flight and may have played a role in the crash. The FAA AEG also learned for the first time about MCAS's expanded operational scope.

50. In and around the same time, Boeing employees, including Boeing Employee-2, met with personnel from the FAA AEG to discuss, among other things, MCAS's operational scope. After that meeting, Boeing Employee-2 told FAA AEG Employee-1 that he was previously unaware of MCAS's expanded operational scope and otherwise misled FAA AEG Employee-1 about Boeing Employee-2's prior knowledge of MCAS.

51. Also, in and around the same time, Boeing Employee-2 caused Boeing to present a false and misleading presentation to the FAA AEG about MCAS. Boeing investigated, among other things, what information Boeing Employee-1 and Boeing Employee-2 provided to the FAA AEG about MCAS. In connection with this investigation, Boeing Employee-2 caused Boeing to represent in a presentation to the FAA AEG that, during the training-evaluation process, Boeing and the FAA AEG had “discussed and agreed on [the] removal of MCAS” from the 737 MAX FSB Report and associated materials. This representation was misleading because Boeing Employee-2 had failed to disclose the “shocker alert” chat communication and the fact that the FAA AEG was deprived of relevant information about MCAS.

52. Following the Lion Air crash, Boeing proposed changes to the operational scope of MCAS, and the FAA AEG worked with Boeing to evaluate these changes to MCAS for purposes of pilot training.

Ethiopian Airlines Flight 302: The Second 737 MAX Crash and the Grounding of the Fleet

53. On March 10, 2019, Ethiopian Airlines Flight 302, a Boeing 737 MAX, crashed shortly after takeoff near Ejere, Ethiopia. All 157 passengers and crew on board died. Following the Ethiopian Airlines crash, the FAA AEG learned that MCAS activated during the flight and may have played a role in the crash.

54. On March 13, 2019, the 737 MAX was officially grounded in the United States, indefinitely halting further flights of this airplane by any U.S.-based airline.

Boeing's Pecuniary Gross Gain

55. Boeing derived a pecuniary gross gain of \$243,600,000 by committing the offense with which it is charged in the criminal Information. This amount represents Boeing's cost- savings from its above-described conduct associated with the implementation of full-flight simulator training for the 737 MAX. . . .

ATTACHMENT C, CORPORATE COMPLIANCE PROGRAM

In order to address any deficiencies in its internal controls, compliance code, policies, and procedures regarding compliance with U.S. fraud laws in connection with interactions with any domestic or foreign government agency, including the integration of its ethics and compliance program with its safety and quality programs as designed to deter violations of anti-fraud laws or policies, The Boeing Company (the “Company”) agrees to continue to conduct, in a manner consistent with all of its obligations under this Agreement, appropriate reviews of its existing internal controls, policies, and procedures.

Where necessary and appropriate, the Company agrees to modify its compliance program, including internal controls, compliance policies, and procedures in order to maintain: (a) an effective system of internal controls designed to ensure the completeness and accuracy of records pertaining to interactions with any domestic or foreign government agency; and (b) a rigorous anti-fraud compliance program that incorporates relevant internal controls, compliance policies, and procedures in order to maintain an effective compliance program that is designed, implemented, and enforced to effectively deter and detect violations of U.S. fraud laws. The contemplated improvements to the Company's ethics and compliance program discussed herein include a commitment by the Company to the integration of its ethics and compliance program with its safety and quality programs for the purpose of deterring violations of anti-fraud laws or policies. At a minimum, this should include, but not be limited to, the following elements, to the extent they are not already part of the Company's existing internal controls, compliance code, policies, and procedures:

1. The Company will ensure that its directors and senior management provide strong, explicit, and visible support and commitment to compliance with its corporate policy against violations of U.S. fraud laws, its compliance policies, and its Code of Conduct, and demonstrate rigorous support for compliance principles via their actions and words.
2. The Company will ensure that mid-level management throughout its organization reinforce leadership's commitment to compliance policies and principles and encourage employees to abide by them. The Company will create and foster a culture of ethics and compliance with the law in their day-to-day operations at all levels of the Company.
3. The Company will implement a risk management process to identify, analyze, and address the individual circumstances of the Company, in particular the fraud risks facing the Company.
4. On the basis of its periodic risk assessment, the Company shall take appropriate steps to design, implement, or modify each element of its compliance program to reduce the risk of violations of U.S. fraud laws, its compliance policies, and its Code of Conduct.
5. The Company will develop and promulgate a clearly articulated and visible corporate policy against violations of U.S. fraud laws, which shall be memorialized in a written compliance policy or policies.
6. The Company will develop and promulgate compliance policies and procedures designed to reduce the prospect of violations of U.S. fraud laws and the Company's compliance policies and Code of Conduct, and the Company will take appropriate measures to encourage and support the observance of ethics and compliance policies and procedures against violations of U.S. fraud laws by personnel at all levels of the

Company. These anti-fraud policies and procedures shall apply to all directors, officers, and employees and, where necessary and appropriate, outside parties acting on behalf of the Company, including all agents and business partners. The Company shall notify all employees that compliance with the policies and procedures is the duty of individuals at all levels of the Company.

7. The Company will ensure that it has a system of internal controls reasonably designed to ensure the completeness and accuracy of records pertaining to interactions with any domestic or foreign government agency.

8. The Company shall review its anti-fraud compliance policies and procedures as necessary to address changing and emerging risks and update them as appropriate to ensure their continued effectiveness, taking into account relevant developments in the field and evolving international and industry standards.

9. The Company will assign responsibility to one or more senior corporate executives of the Company for the implementation and oversight of the Company's anti-fraud compliance policies and procedures. Such corporate official(s) shall have the authority to report directly to independent monitoring bodies, including internal audit, the Company's Board of Directors, or any appropriate committee of the Company's Board of Directors, and shall have an adequate level of autonomy from management as well as sufficient resources, authority, and support from senior leadership to maintain such autonomy.

10. The Company will implement mechanisms designed to ensure that its Code of Conduct and anti-fraud compliance policies and procedures are effectively communicated to all directors, officers, employees, and, where necessary and appropriate, agents and business partners. These mechanisms shall include: (a) periodic training for all directors and officers, all employees in positions of leadership or trust, positions that require such training (e.g., internal audit, sales, legal, compliance, finance), or positions that otherwise pose a fraud risk to the Company, and, where necessary and appropriate, agents and business partners; and (b) metrics for measuring knowledge retention and effectiveness of the training. The Company will conduct training in a manner tailored to the audience's size, sophistication, or subject matter expertise and, where appropriate, will discuss prior compliance incidents.

11. The Company will maintain, or where necessary establish, an effective system for providing guidance and advice to directors, officers, employees, and, where necessary and appropriate, agents and business partners, on complying with the Company's anti-fraud compliance policies and procedures, including when they need advice on an urgent basis.

12. The Company will maintain, or where necessary establish, an effective system for internal and, where possible, confidential reporting concerning violations of the

Company's Code of Conduct or anti-fraud compliance policies and procedures and protection of directors, officers, employees, and, where appropriate, agents and business partners, who make such reports. To ensure effectiveness, the Company commits to following applicable anti-retaliation and whistleblower protection laws, and to appropriately training employees on such laws.

13. The Company will maintain, or where necessary establish, an effective and reliable process with sufficient resources for responding to, investigating, and documenting allegations of violations of U.S. fraud laws or the Company's anti-fraud compliance policies and procedures.

14. The Company will implement clear mechanisms to incentivize behavior amongst all directors, officers, employees, and, where necessary and appropriate, parties acting on behalf of the Company that comply with its corporate policy against violations of the anti-fraud laws, its compliance policies, and its Code of Conduct. These incentives shall include, but shall not be limited to, the implementation of criteria related to compliance in the Company's compensation and bonus system.

15. The Company will institute appropriate disciplinary procedures to address, among other things, violations of the anti-fraud laws and the Company's Code of Conduct and anti-fraud compliance policies and procedures by the Company's directors, officers, and employees. Such procedures should be applied consistently and fairly, regardless of the position held by, or perceived importance of, the director, officer, or employee. The Company shall implement procedures designed to ensure that where misconduct is discovered, reasonable steps are taken to remedy the harm resulting from such misconduct, and designed to ensure that appropriate steps are taken to prevent further similar misconduct, including assessing the internal controls, Code of Conduct, and compliance policies and procedures and making modifications necessary to ensure the overall anti-fraud compliance program is effective.

16. The Company will institute appropriate risk-based due diligence and compliance requirements pertaining to the retention and oversight of all agents and business partners, including:

- a. properly documented due diligence pertaining to the hiring and appropriate and regular oversight of agents and business partners;
- b. informing agents and business partners of the Company's commitment to abiding by U.S. fraud laws, and of the Company's Code of Conduct and anti-fraud compliance policies and procedures; and
- c. seeking a reciprocal commitment from agents and business partners.

17. Where necessary and appropriate, the Company will include standard provisions

in agreements, contracts, and renewals thereof with all agents and business partners that are reasonably calculated to prevent violations of U.S. fraud laws, which may, depending upon the circumstances, include: (a) representations and undertakings relating to compliance with U.S. fraud laws; (b) rights to conduct audits of the records of the agent or business partner to promote compliance with the foregoing; and (c) rights to terminate an agent or business partner as a result of any breach of U.S. fraud laws, the Company's Code of Conduct or compliance policies or procedures, or the representations and undertakings related to such matters.

18. The Company will develop and implement policies and procedures for mergers and acquisitions requiring that the Company conduct appropriate risk-based due diligence on potential new business entities, including appropriate U.S. fraud law due diligence by legal, accounting, and compliance personnel.

19. The Company will apply its Code of Conduct and compliance policies and procedures regarding U.S. fraud laws as quickly as is practicable to newly acquired businesses or entities merged with the Company and will promptly:

- a. train the directors, officers, employees, agents, and business partners consistent with Paragraph 10 above on U.S. fraud laws and the Company's compliance policies and procedures regarding U.S. fraud laws;
- b. where warranted, conduct a fraud-specific audit of all newly acquired or merged businesses as quickly as practicable; and
- c. where warranted, establish a plan to integrate the acquired businesses or entities into the Company's enterprise resource planning systems as quickly as practicable.

20. The Company will conduct periodic reviews and testing of all elements of its compliance program to evaluate and improve their effectiveness in preventing and detecting violations of U.S. fraud laws and the Company's Code of Conduct and anti-fraud compliance policies and procedures, taking into account relevant developments in the field and evolving international and industry standards.

21. The Company will ensure that compliance and control personnel have sufficient direct or indirect access to relevant sources of data to allow for timely and effective monitoring and/or testing of transactions.

22. The Company will conduct a root cause analysis of misconduct, including prior misconduct, to identify any systemic issues and/or any control failures. The Company will timely and appropriately remediate the root causes of misconduct. The Company will ensure that root causes, including systemic issues and control failures, and relevant remediations are shared with management as appropriate.

Problem 17-2

Only one individual was charged criminally in the Boeing matter, Mark Forkner (“Employee-1” in the statement of facts above). Following a trial, on March 23, 2022, a jury in Dallas federal court acquitted Forkner. Assume that Congress had passed a new statute requiring the government to obtain court approval for a DPA or NPA, after a hearing, under a standard directing the court to determine whether the agreement is “in the interests of justice” and “fair, reasonable, and proportionate.” If you were the federal judge to whom the Boeing NPA had been assigned under such a law, would you have approved or rejected the NPA, and with what reasoning?

Compare these recent examples to the VW and Boeing cases:

1. Recall from Chapter 5 the facts of the FCPA matter involving **Goldman Sachs and the Malaysian investment fund 1MDB**. The matter was resolved with a plea agreement (in the form of a “C” plea) with Goldman’s Malaysia subsidiary and a deferred prosecution agreement (DPA) with Goldman itself. The Goldman subsidiary pled guilty to violating the anti-bribery provisions of the FCPA and the punishment was folded into the overall agreed penalties in the DPA with Goldman.

In the DPA, Goldman agreed, among other things, (1) that a criminal information would be filed in the Eastern District of New York charging Goldman with a violation of the anti-bribery provisions of the FCPA; (2) to admit the statement of facts reproduced in Chapter 5; (3) to pay a \$2.3 billion penalty; (4) to disgorge \$600 million in profits; (4) to implement and report on a new corporate compliance program (without an outside monitor); and (5) to continue full cooperation in the investigation.

The government agreed to dismiss the FCPA charge after three years if Goldman complies with its obligations under the DPA. In the DPA, the government described Goldman’s cooperation as receiving “partial credit,” because Goldman delayed in producing some useful information, and stated that Goldman received no voluntary self-reporting credit. See Press Release, U.S. Dep’t of Justice, Goldman Sachs Resolves Foreign Bribery Case and Agrees to Pay Over \$2.9 Billion (Oct. 22, 2020), <https://www.justice.gov/usao-edny/pr/goldman-sachs-resolves-foreign-bribery-case-and-agrees-pay-over-29-billion>.

2. Recall the **Purdue Pharma opioids matter** described in Chapter 6. Purdue and the DOJ entered into a plea agreement (in the form of a “C” plea), under which Purdue agreed (1) to plead guilty in the District of New Jersey to conspiring to defraud the U.S. government and conspiring to violate the FDCA, as well as two distinct conspiracies to violate the anti-kickback statute; (2) to admit to the statement of facts reproduced in Chapter 6; (3) to pay a \$3.5 billion fine and forfeit an additional \$2 billion (provided such payments are approved by the judge overseeing Purdue’s ongoing reorganization proceeding in bankruptcy court); and (4) to continue full cooperation with investigations, including by creating and maintaining an open document repository for all non-

privileged evidence relating to the opioid scandal. The government agreed not to prosecute Purdue as a corporation further in opioid-related matters, except for an investigation of potential FCPA violations that is ongoing. *See* Press Release, U.S. Dep’t of Justice, Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family (Oct. 21, 2020), <https://www.justice.gov/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-opioid>.

C. The Role of the Judiciary

Finally, return to the question of the judiciary’s role. Recall the court opinions from Chapter 1 discussing limits on the ability of judges to review the substantive merits of settlements in the form of DPAs. In the following case, you can see the approach of a UK judge to a major settlement under the UK’s regime governing DPAs, which statutorily requires judicial approval of such settlements.

SERIOUS FRAUD OFFICE v. ROLLS ROYCE ENERGY SYSTEMS INC., 2017 WL 00219524 (UK Crown Court at Southwark, Jan. 17, 2017)

Sir Brian Leveson P:

This is the third (and, by far, the largest) application for approval by the court of a deferred prosecution agreement (“DPA”) reached between the Serious Fraud Office (“SFO”) and two entities now ultimately owned by Rolls-Royce Holdings plc namely Rolls-Royce plc (“Rolls-Royce”) and its Delaware incorporated subsidiary, Rolls-Royce Energy Systems Inc (“RRESI”). It covers the conduct of Rolls-Royce and RRESI in Nigeria, Indonesia and Russia along with the conduct of Rolls-Royce alone in Thailand, India, China and Malaysia.

Rolls-Royce Holdings plc (listed on the London Stock Exchange and forming part of the FTSE 100 index) is properly considered to be a company of central importance to the United Kingdom, with a reputation in the field of engineering second to none. . . .

Rolls-Royce and its subsidiaries employ some 50,000 people, in more than 50 countries. This case concerns the conduct of its civil aerospace business which manufactures engines for the commercial large aircraft and corporate jet markets and generates approximately 50% of its revenue, defence aerospace business which manufactures engines for the military transport market and is the second largest provider of defence aero engine products and services in the world (generating approximately 20% of its revenue), and its former energy business concerned with the manufacture of gas turbines and compressors to power off-shore platforms, the transport of oil and gas through pipelines, and the generation of electricity which generates less than 10% of its revenue, part of which was conducted by RRESI.

Against that background, it can properly be described as devastating and of the very greatest gravity that the conduct of this institution should fall to be examined within the

context of a criminal investigation and that the investigation (in very large part conducted and voluntarily revealed to the SFO by Rolls-Royce itself) should reveal the most serious breaches of the criminal law in the areas of bribery and corruption (some of which implicated senior management and, on the face of it, controlling minds of the company). It involves:

- i) agreements to make corrupt payments to agents in connection with the sale of Trent aero engines for civil aircraft in Indonesia and Thailand between 1989 and 2006;
- ii) concealment or obfuscation of the use of intermediaries involved in its defence business in India between 2005 and 2009 when the use of intermediaries was restricted;
- iii) an agreement to make a corrupt payment in 2006/7 to recover a list of intermediaries that had been taken by a tax inspector from Rolls-Royce in India;
- iv) an agreement to make corrupt payments to agents in connection with the supply of gas compression equipment in Russia between January 2008 and December 2009;
- v) failing to prevent bribery by employees or intermediaries in conducting its energy business in Nigeria and Indonesia between the commencement of the Bribery Act 2010 and May 2013 and July 2013 respectively, with similar failures in relation to its civil business in Indonesia;
- vi) failure to prevent the provision by Rolls-Royce employees of inducements which constitutes bribery in its civil business in China and Malaysia between the commencement of the Bribery Act 2010 and December 2013.

Further, in relation to the conduct of Rolls-Royce, there have been discussions between the SFO and the Department of Justice in the United States and discussions between the Department of Justice and the Brazilian Ministério Público Federal, to ensure a coordinated global resolution of the relevant conduct. Parallel to this DPA, it is intended that a similar type of agreement reached with the Department of Justice (which has been fully disclosed in these proceedings) and a settlement with the Brazilian authorities will be announced. The American agreement covers the conduct of Rolls-Royce's energy business (in Brazil, Kazakhstan and Thailand) and also addresses conduct relating to Rolls-Royce and RRESI arising from an investigation into its use of an intermediary called Unaoil.

Deferred Prosecution Agreements

Although the concept of a DPA has been fully explained in both judgments which follow the first two agreements (*SFO v Standard Bank plc* and *SFO v XYZ Ltd*), it is worth summarising the structure as prescribed by s. 45 and Schedule 17 of the Crime and

Courts Act 2013 (“the 2013 Act”). In short, a DPA is potentially available for certain economic or financial offences to a body corporate, a partnership or an unincorporated association in respect of whom the only criminal sanction is financial: it does not cover (nor does it protect from prosecution) any individual. It provides a mechanism whereby, subject to the approval of the court, prosecution can be avoided by entering into an agreement on negotiated terms with a prosecutor designated by the 2013 Act.

The court’s role is as follows. Following the commencement of negotiations and what might become an agreement, the scheme mandates that a hearing must be held in private for the purposes of ascertaining whether the court will declare that the proposed DPA is “likely” to be in the interests of justice and its proposed terms are fair, reasonable and proportionate: see paras. 7(1) and (4) of Schedule 17 of the 2013 Act. Reasons must be given and, if a declaration is declined, a further application is permitted (paras. 7(2) and (3)). In that way, the court retains control of the ultimate outcome and, if the agreement is not approved, the possibility of prosecution is not jeopardised as a consequence of any publicity that would follow if these proceedings had not been held in private.

If a declaration has been granted pursuant to para. 7(1) of Schedule 17 and the DPA is finalised on the terms previously identified, para. 8 of Schedule 17 comes into play. This provides:

- (1) Where a prosecutor and P have agreed the terms of a DPA, the prosecutor must apply to the Crown Court for a declaration that
 - (a) the DPA is in the interests of justice, and
 - (b) the terms of the DPA are fair, reasonable and proportionate.
- (2) But the prosecutor may not make an application under sub-paragraph 1 unless the court has made a declaration under paragraph 7(1) (declaration on preliminary hearing).
- (3) A DPA only comes into force when it is approved by the Crown Court making a declaration under sub-paragraph (1).
- (4) The court must give reasons for its decision on whether or not to make a declaration under sub-paragraph (1).
- (5) A hearing at which an application under this paragraph is determined may be held in private.
- (6) But if the court decides to approve the DPA and make a declaration under sub-paragraph (1) it must do so, and give its reasons, in open court.
- (7) Upon approval of the DPA by the court, the prosecutor must publish—

- (a) the DPA
- (b) the declaration of the court under paragraph 7 and the reasons for its decision to make the declaration,
- (c) in a case where the court initially declined to make a declaration under paragraph 7, the court's reason for that decision, and
- (d) the court's declaration under this paragraph and the reasons for its decision to make the declaration,

unless the prosecutor is prevented from doing so by an enactment or by an order of the court under paragraph 12 (postponement of publication to avoid prejudicing proceedings).”

Thus, even having agreed that a DPA is likely to be in the interests of justice and that its proposed terms are fair, reasonable and proportionate, the court continues to retain control and can decline to conclude that it is, in fact, in the interests of justice or that its terms are fair, reasonable and proportionate. To that end, it remains open to continue the argument in private, again on the basis that, if a declaration under para. 8(1) is not forthcoming, a prosecution is not jeopardised although it has to be recognised that, absent a material change of circumstances between the para. 7 hearing and the para. 8 hearing, it is difficult to see how the court could conclude that a DPA which it considered likely to be in the interests of justice with terms fair, reasonable and proportionate was not, in fact, in the interests of justice with terms which are fair, reasonable and proportionate. . . .

In addition to examining the internal investigations (including the interviews, Rolls-Royce having waived any claim for legal professional privilege on a limited basis), the SFO, with what Sir Edward, for the SFO, recognised was “the extraordinary cooperation of Rolls-Royce”, has conducted its own extensive investigation. This investigation has included:

- i) obtaining from Rolls-Royce the key documents identified by the internal investigations including memoranda of interviews, along with access generally to Rolls-Royce hard copy documents;
- ii) obtaining from Rolls-Royce complete digital repositories or email containers where available of in excess of 100 key employees or former employees, without filtering the material for potential privilege, but, instead, permitting issues of privilege to be resolved by independent counsel;
- iii) obtaining documentary evidence through requests for mutual legal assistance;

- iv) arresting domestic and overseas intermediaries and former Rolls-Royce employees (including searches of their premises) and conducting numerous interviews of suspects and others whether voluntarily or under compulsion;
- v) making other targeted requests and review of material (all of which have been voluntarily provided), such as compliance material, including historic internal reviews; personnel files; employee notebooks; telephones; marketing services agent files; and accountancy records.

The full and extensive nature of this co-operation has led to the acquisition, and application of digital review methods to over 30 million documents. All this has been in the context of an investigation concerning conduct in multiple jurisdictions, across four business lines and spanning a long period of time. Sir Edward has made clear (and the Statement of Facts confirms) that the proactive approach to co-operation adopted by Rolls-Royce has led to the SFO receiving pertinent information which may not otherwise have come to its attention. Rolls-Royce's approach has included:

- i) genuine cooperation with the SFO in the conduct of Rolls-Royce's own internal investigation, including deferring interviews until the SFO had first completed its interview, and the audio recording of interviews where requested;
- ii) disclosure of all interview memoranda was made (on a limited waiver basis), despite Rolls-Royce's belief that the material was capable of resisting an order for disclosure, on the basis that it was privileged;
- iii) providing all material requested by the SFO voluntarily, that is to say without requiring recourse to compulsory powers (in one case at least effectively relinquishing control to the SFO); and
- iv) consulting the SFO in respect of developments in media coverage, and seeking the SFO's permission before winding up companies that may have been implicated in the SFO's investigation.

I have recited the extent of the assistance provided by Rolls-Royce because it is highly material both to the interests of justice and the assessment of the balance between prosecution and DPA and also to the appropriate discount to allow from the financial penalty imposed. In both *SFO v Standard Bank* and *SFO v XYZ Ltd*, the DPA followed what was a self-report at a time that the SFO neither had knowledge of, nor known means of likelihood of learning about, the conduct which led to the DPA (see [27]–[28] of the decision dated 30 November 2015 and [24]–[25] of the redacted decision dated 8 July 2016 respectively). In this case, the SFO had been alerted because of the public internet posting and had initiated an inquiry.

The fact that an investigation was not triggered by a self-report would usually be highly relevant in the balance but the nature and extent of the co-operation provided by Rolls-Royce in this case has persuaded the SFO not only to use the word “extraordinary” to

describe it but also to advance the argument that, in the particular circumstances of this case, I should not distinguish between its assistance and that of those who have self-reported from the outset. Given that what has been reported has clearly been far more extensive (and of a different order) than is may have been exposed without the co-operation provided, I am prepared to accede to that submission. . . .

I must consider the conduct covered by the proposed DPA in this case which [involves] . . . the following aggravating features:

- i) The conduct involved offences relating to the bribery of foreign public officials, commercial bribery and the false accounting of payments to intermediaries.
- ii) The offences were multi-jurisdictional, numerous and spread across Rolls-Royce's defence aerospace, civil aerospace and energy businesses.
- iii) The offences have caused and/or will cause substantial harm to the integrity/confidence of markets.
- iv) The offending was persistent and spanned from 1989 until 2013.
- v) The offending involved substantial funds being made available to fund bribe payments.
- vi) The conduct displayed elements of careful planning.
- vii) The conduct related to the award of large value contracts which, taken together, ultimately earned over £250 million of gross profit (although care must be used in relation to this term which is based on calculations reached by accountants instructed by the SFO and Rolls-Royce and agreed by the parties and does not necessarily reflect the way in which the accounting profession would approach gross profit for reporting standards).
- viii) The conduct involved senior (on the face of it, very senior) Rolls-Royce employees. . . .

Although entirely a consequence of its own conduct, for the sake of completeness, I record that the costs of the work done by Rolls-Royce in connection with its investigation and work with prosecutors in multiple jurisdictions, together with the cost of the intermediary review and the appropriate professional financial advice, as at December 2016, amounted to £123,115,643 and will doubtless continue to increase. . . .

Rolls-Royce has taken the following steps to enhance its ethics and compliance procedures such that organisation and governance has been improved by the recruitment of experienced compliance personnel in key positions (including Head of Risk and Head of Compliance) as well as additional Compliance Officers and the appointment of designated Local Ethics Advisers. There has been a significant re-organisation of

reporting lines which ensures that compliance officers are independent of business divisions. In addition, there are:

- i) Enhanced policies and procedures covering high risk areas of Rolls-Royce's business divisions.
- ii) Top level commitment to ethics and compliance through improved communication and annual manager led ethics training.
- iii) Development of a risk assessment framework and implementation of risk assessment procedures into business divisions.
- iv) Improved due diligence in respect of intermediaries comprising business justification, external due diligence, approval by an Adviser Panel (consisting of Lord Gold and both the Head of Risk at Rolls-Royce and one of its senior external legal advisers) together with ongoing monitoring.
- v) Regular compulsory training on compliance issues for all staff with extensive monitoring of anti-bribery and corruption procedures including regular audit by Rolls-Royce's Audit Committee of anti-bribery and corruption procedures and investigations of issues.
- vi) Implementation of compliance procedures and training in respect of concessions provided in the Civil Aerospace industry.

Rolls-Royce has also specifically addressed the potential risks arising from its intermediaries by reviewing 250 intermediary relationships across the company. This has led to the suspension of 88 intermediaries and led to a material reduction in the number of intermediaries used across the Rolls-Royce Group.

Further, as a consequence of the internal investigation, Rolls-Royce has conducted disciplinary proceedings in respect of 38 employees in its Civil Aerospace, Energy and Marine divisions leading to 11 employees leaving RR during stages of the disciplinary process and decisions to dismiss six employees; others have suffered sanction short of dismissal.

I am told that, up to December 2016, these steps (excluding the intermediary review and disciplinary proceedings) have cost Rolls-Royce £15,175,331.46 and that the review is ongoing. In that regard, a term of the DPA deals with issues of compliance and the SFO has identified issues to be addressed which would be included within the conditions of the DPA. Suffice to say that I entirely accept that Rolls-Royce could not have done more to address the issues that have now been exposed. I comment only that it is a real tragedy that it did not do so following the well-known observations of Kofi Annan, in the foreword to the 2004 UN Convention against Corruption which spoke about it as "an insidious plague".

The cultural change is evidenced by the steps which I have just described but I have pressed Rolls-Royce to disclose its present constitution and, in particular, the membership of its Board. Had any member of the today's senior management who was implicated or been in a position where they should have been aware of the culture and practices which I have described and were clearly endemic at Rolls-Royce remained in his or her position, this, itself, would have been of real significance and could have affected my approach.

I am informed (and accept) that no current member of the Board was involved in any of the conduct described in the Statement of Facts and that conduct occurring after 1 July 2011 did not involve any of the (then) directors. The Group President (appointed in January 2016) was previously on the Board and now has responsibility for operational functions (e.g. IT, Group Property, Quality etc.); his focus as a director (since 2005) has been on engineering, technology and research. The Chief Executive, the Chief Financial Officer and the Company Secretary have all been appointed since January 2014.

As for the non-executive directors, none are or have been involved in the day to day running of the business. The Chairman (who was a non-executive director from 1 March 2013) was appointed in May 2013 and is not a member of the executive leadership team. Four non-executive directors were in post from 2008, 2011 (two) and 2012 and four have been appointed since January 2014. The Senior Independent Director was appointed in 2015.

This is the Board that has clearly authorised all that Rolls-Royce has done since 2012 and is to be highly commended for that. In the circumstances, I am satisfied that both the senior management and those responsible for the strategic direction of Rolls-Royce are different to those responsible for the running of the company (and its culture) during the period when the events which I have described occurred.

The final consideration identified in *SFO v XYZ Ltd* is the impact of prosecution on employees and others innocent of any misconduct or what might otherwise be described as the consequences of a conviction. To understand the extent of that impact, it is first necessary to consider the impact on Rolls-Royce.

First, a conviction would undeniably affect the ability of Rolls-Royce to trade in the world where, as I started this judgment by observing, it is a world leader and has a reputation for excellence. It is well known that many countries operate public sector procurement rules which would debar participation following conviction. Thus, I have no difficulty in accepting that which I am informed to the effect that, as at the end of 2014, a minimum in the order of 15% of the Rolls-Royce order book was from entities subject to public sector procurement rules in countries with mandatory debarment and, approximately, a further 15% was from entities subject to public sector procurement rules in countries with discretionary debarment pursuant to express legislation.

Furthermore, it is not difficult to visualize that the direct losses to revenue which would be caused by debarment would have a long term financial effect consequent upon losing

contracts which, for commercial aircraft, can extend for 25 to 30 years. There would also be incumbency effects of a short term debarment, leading to longer term exclusion from other contracts and reduced research & development caused by the loss of a key revenue stream.

Debarment and exclusion would clearly have significant, and potentially business critical, effects on the financial position of Rolls-Royce. This could lead to the worst case scenario of a very negative share price impact, and, potentially, more serious impacts on shareholder confidence, future strategy, and therefore viability.

These repercussions for Rolls-Royce risk additional repercussions to third party interests, including:

- i) adverse effect to the UK defence industry, where Rolls-Royce has a critical role in supplying engines for UK military and naval vessels, nuclear propulsion technology for nuclear submarines, and aftermarket services;
- ii) consequential financial effects on the supply chain;
- iii) impairment of competition in highly concentrated markets, where there are limited alternative sources of supply and significant barriers to entry;
- iv) a potentially significant fall in share price, which is likely to be made more dramatic by the debarment consequences of a conviction;
- v) possible group-wide redundancies and/or restructuring; and potential weakening of Rolls-Royce's financial covenant for pensions.

I have no difficulty in accepting that these features demonstrate that a criminal conviction against Rolls-Royce would have a very substantial impact on the company, which, in turn, would have wider effects for the UK defence industry and persons who were not connected to the criminal conduct, including Rolls-Royce employees, and pensioners, and those in its supply chain. None of these factors is determinative of my decision in relation to this DPA; indeed, the national economic interest is irrelevant. Neither is my decision founded on the proposition that a company in the position of Rolls-Royce is immune from prosecution: it is not. It is not because of who or what Rolls-Royce is that is relevant but, rather, the countervailing factors that I have to weigh in the balance when considering the public interest and the interests of justice. As I have made clear before, and repeat, a company that commits serious crimes must expect to be prosecuted and if convicted dealt with severely and, absent sufficient countervailing factors, cannot expect to have an application for approval of a DPA accepted. . . .

My reaction when first considering these papers was that if Rolls-Royce were not to be prosecuted in the context of such egregious criminality over decades, involving countries around the world, making truly vast corrupt payments and, consequentially, even greater profits, then it was difficult to see when any company would be prosecuted. A possible exception could be the corporate vehicle for fraud, set up for that purpose and, in the

public interest, requiring dissolution (although that also might be achieved in different ways). As for the non-penal consequences of conviction, the purpose of the procurement rules is specifically to discourage corruption and they should not be circumvented.

On the other hand, I accept that Rolls-Royce is no longer the company that once it was; its new Board and executive team has embraced the need to make essential change and has deliberately sought to clear out all the disreputable practices that have gone before, creating new policies, practices and cultures. Its full co-operation and willingness to expose every potential criminal act that it uncovers and the work being done on compliance and creating that culture goes a long way to address the obvious concerns as to the past.

So the question becomes whether it is necessary to inflict the undeniably adverse consequences on Rolls-Royce that would flow from prosecution because of the gravity of its offending even though it may now be considered a dramatically changed organisation. In any event, it will have to suffer the undeniably adverse publicity that will flow from the facts of its business practices which will be exposed by the DPA so that the way in which it has done business will be obvious. Any public procurement exercise will be conducted in the light of its history and it will doubtless only win contracts on the merits of its products. That, of course, is as it should be. Neither will the conduct of Rolls-Royce escape sanction: it could only ever be fined and the DPA has to be approached on the basis that it must be broadly comparable to the fine that a court would have imposed on conviction following a guilty plea (see para. 5(4) of Schedule 17 of the 2013 Act).

In the circumstances, subject to the terms being fair, reasonable and proportionate, I have come to the conclusion that it is in the interests of justice that the conduct of Rolls-Royce be resolved through the mechanism of a DPA. It is to those terms that I now turn.

The essential basis of this DPA is that effective from the date of the declaration under paras. 8(1) and (3) of Schedule 17 to the 2013 Act for a period of five years (or four years if the SFO confirm in writing that the agreement has concluded by payment of the disgorgement and financial penalty and taking account of any remaining obligations), the SFO will agree, having preferred the indictment, to suspend it and, subject to compliance with the terms of the DPA, after its conclusion, will discontinue the proceedings.

Other conditions include the absence of any protection against prosecution of any present or former officer, employee or agent or against Rolls-Royce or RRESI for conduct not disclosed by them prior to the date of the agreement (or any future criminal conduct). There is also a condition that fresh proceedings may follow if Rolls-Royce provided inaccurate, misleading or incomplete information to the SFO and knew or ought to have known that it was inaccurate, misleading or incomplete.

Taken together, the requirements falling upon Rolls-Royce and RRESI which the court declared were likely to be in the interests of justice and were fair, reasonable and proportionate can be summarised as follows:

- i) Past and future co-operation with the relevant authorities (as further described) in all matters relating to the conduct arising out of the circumstances of the draft Indictment;
- ii) Disgorgement of profit on the transactions of £258,170,000;
- iii) Payment of a financial penalty of £239,082,645;
- iv) Payment of the costs incurred by the SFO (put at £12,960,754);
- v) At its own expense, completing a compliance programme following the recommendations of the reviews commissioned by Rolls-Royce from Lord Gold (formerly of Herbert Smith Freehills LLP now of Gold Associates) of the approach to anti- bribery and corruption compliance (as further described).

It is also acknowledged that no tax reduction shall be sought in relation to any part of the payments (ii), (iii) and (iv) above in the UK or elsewhere, with time to pay the disgorgement and financial penalty in four instalments subject to simple interest at an annual rate of 80 basis points over GBP 6m LIBOR on any sum unpaid calculated from 30 June 2017. . . .

Putting entirely to one side the £15 million cost of the compliance programme (which Rolls-Royce and RRESI—to say nothing of the other Rolls-Royce entities—required in any event), the risk of potential liability in jurisdictions not covered by this DPA and the agreements reached with the United States and Brazil and the legal and other costs incurred by Rolls-Royce in the investigation of its conduct in multiple jurisdictions, the intermediary review, expert advice and negotiation of these agreements (which as I have noted above amounted, in December 2016, to £123 million), the total financial penalty (including costs to the SFO) arising out of the DPA with which I am concerned exceeds £½ billion.

In addition, included for the sake of completeness, the deferred prosecution agreement reached with the Department of Justice requires a financial payment of \$169,917,710 and the leniency agreement with the Brazilian authorities a payment of US \$25,579,645. . . .

Putting to one side the reputational damage that will flow from the conduct of Rolls-Royce and their employees and agents, leading to the DPA, the total financial impact of the penalties and costs imposed exceeds £500 million and I am satisfied that it achieves the objectives of punishment and deterrence. The financial advisors to the SFO and DOJ have confirmed that, taking into account Roll-Royce's financial circumstances, the penalty is substantial enough to have a real economic impact: when added to the costs

incurred by Rolls-Royce it amounts to a sum in the region of £650 million. Mr. Whittam, for the SFO agrees with this view and submits that the penalty will bring home to both management and shareholders the need to operate within the law without putting it out of business which outcome would be inappropriate in these circumstances. Mr. Perry, for Rolls-Royce, accepts the accuracy of that submission. . . .

Thus, as I have observed in relation to previous DPAs, there is no question of the parties having reached a private compromise without appropriate independent judicial consideration of the public interest: furthermore, publication of the relevant material now serves to permit public scrutiny of the circumstances and the agreement. Suffice to say that I am satisfied that the DPA fully reflects the interests of the public in the prevention and deterrence of this type of crime. . . .

A cynic (or irresponsible company) might look at the costs which Rolls-Royce have incurred in their own investigation and wonder whether it be more sensible to keep quiet and hope that its conduct does not fall under the eye of the authorities. Quite apart from the total failure to acknowledge the difference between right and wrong, that is to fail to understand that such an approach carries with it cataclysmic risks. Whatever the costs Rolls-Royce have incurred, they are modest compared to the cost of seeking to brazen out an investigation which commences; absent self-disclosure and full co-operation, prosecution would require the attention of the company to be entirely focused on litigation at the expense of whatever business it is trying to conduct and conviction would almost inevitably spell a far greater disaster than has befallen Rolls-Royce. . . .

Problem 17-3

Does the UK system requiring judicial approval of DPAs appear superior to the current system for negotiated settlements in the U.S. under DOJ written policies and typical practices? Why or why not.

18. SENTENCING

Now we come to the end of the criminal process, at which point someone often goes to prison—except that corporations cannot be imprisoned.

Over the past three decades in the white collar crime area, more people have gone to prison for more time than ever before in the U.S. This has been intentional. Legislators, prosecutors, the public, and many judges coalesced during the 1980s, and continuing through the 1990s and early 2000s, around the view that white collar sentences had been too lenient for too long, and that harsher sentences would promote deterrence and equity in punishment.

Most of this happened during a time when the United States Sentencing Guidelines were virtually mandatory—binding on federal judges as a matter of statute. In 2005, however, the Supreme Court held in *United States v. Booker*, 543 U.S. 220 (2005), that the Sixth Amendment right to jury trial is violated if Congress requires judges to follow any guidelines provision that increases a sentence based on a factual finding made by a judge in connection with a post-trial sentencing hearing (such as the amount of dollar loss in a fraud case, or the weight of the substance in a drug case). Unless sentencing-relevant facts (like dollar loss or drug weight) were proved to a jury beyond a reasonable doubt, the Guidelines would need to be non-binding—advisory only. As a result of the odd split opinion in *Booker* and subsequent inaction by Congress, the latter is what we now have—non-binding Guidelines that federal judges must consult and consider but can deviate from on any reasonable ground.

This state of doctrine has increased pressure on all actors in the system to think about and explain what kinds of sentences are appropriate for white collar offenders and for what reasons—a matter on which Americans as a whole are at least unsure if not downright ambivalent. This chapter will explore this problem, and also discuss how to sentence a corporation in the relatively rare event of a guilty plea or conviction after trial (as opposed to an NPA or DPA settlement).

A. Individual Sentencing

This is the federal sentencing statute. It describes the factors relevant to sentencing. Procedurally, the sentencing judge has to walk through this statute or it is reversible error. Substantively, are these factors simply a statement of what anyone would consider important to a criminal punishment? Are there any factors that the statute left out or should have left out?

18 U.S.C. § 3553

(a) **Factors To Be Considered in Imposing a Sentence.**— The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
 - (i) issued by the Sentencing Commission pursuant to section 994 (a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28); and
 - (ii) that, except as provided in section 3742 (g), are in effect on the date the defendant is sentenced; or
 - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994 (a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28);
- (5) any pertinent policy statement—
 - (A) issued by the Sentencing Commission pursuant to section 994 (a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28); and
 - (B) that, except as provided in section 3742 (g), is in effect on the date the defendant is sentenced.

- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense. . . .

On the following pages are the most important provisions in the Sentencing Guidelines for individual white collar cases: the fraud guideline and the insider trading guideline. The former controls in virtually all fraud and theft cases of any sort, regardless of the statute charged. The object of the Guidelines is to create a series of metrics and factors that ensure that like cases are treated alike, and different cases are treated differently. Have the drafters chosen the right factors?

§ 2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

- (a) Base Offense Level:
 - (1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or
 - (2) 6, otherwise.

- (b) Specific Offense Characteristics
 - (1) If the loss exceeded \$6,500, increase the offense level as follows:

<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A) \$6,500 or less	no increase
(B) More than \$6,500	add 2
(C) More than \$15,000	add 4
(D) More than \$40,000	add 6
(E) More than \$95,000	add 8
(F) More than \$150,000	add 10
(G) More than \$250,000	add 12

(H)	More than \$550,000	add 14
(I)	More than \$1,500,000	add 16
(J)	More than \$3,500,000	add 18
(K)	More than \$9,500,000	add 20
(L)	More than \$25,000,000	add 22
(M)	More than \$65,000,000	add 24
(N)	More than \$150,000,000	add 26
(O)	More than \$250,000,000	add 28
(P)	More than \$550,000,000	add 30 .

*Notes to Table:

(A) Loss.—Loss is the greater of actual loss or intended loss.

(B) Gain.—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.

(C) For purposes of this guideline—

(i) “Actual loss” means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) “Intended loss” (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) “Pecuniary harm” means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) “Reasonably foreseeable pecuniary harm” means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.

- (2) (Apply the greatest) If the offense—
- (A) (i) involved 10 or more victims; (ii) was committed through mass-marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by **2** levels;
 - (B) resulted in substantial financial hardship to five or more victims, increase by **4** levels; or
 - (C) resulted in substantial financial hardship to 25 or more victims, increase by **6** levels.
- (3) If the offense involved a theft from the person of another, increase by **2** levels.
- (4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by **2** levels.
- (5) If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by **2** levels.
- (6) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by **2** levels.
- (7) If (A) the defendant was convicted of a federal health care offense involving a government health care program; and (B) the loss under subsection (b)(1) to the government health care program was (i) more than \$1,000,000, increase by **2** levels; (ii) more than \$7,000,000, increase by **3** levels; or (iii) more than \$20,000,000, increase by **4** levels.
- (8) (Apply the greater) If—
- (A) the offense involved conduct described in 18 U.S.C. § 670, increase by **2** levels; or
 - (B) the offense involved conduct described in 18 U.S.C. § 670, and the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product, increase by **4** levels.
- (9) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not

addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.

(10) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(11) If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(12) If the offense involved conduct described in 18 U.S.C. § 1040, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(13) If the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years' imprisonment applies, increase by **4** levels. If the resulting offense level is less than **12**, increase to level **12**.

(14) (Apply the greater) If the offense involved misappropriation of a trade secret and the defendant knew or intended—

(A) that the trade secret would be transported or transmitted out of the United States, increase by **2** levels; or

(B) that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by **4** levels.

If subparagraph (B) applies and the resulting offense level is less than level **14**, increase to level **14**.

(15) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo

shipment, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(16) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(17) (Apply the greater) If—

(A) the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by **2** levels; or

(B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; or (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees, increase by **4** levels.

(C) The cumulative adjustments from application of both subsections (b)(2) and (b)(17)(B) shall not exceed **8** levels, except as provided in subparagraph (D).

(D) If the resulting offense level determined under subparagraph (A) or (B) is less than level **24**, increase to level **24**.

(18) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by **2** levels.

(19) (A) (Apply the greatest) If the defendant was convicted of an offense under:

(i) 18 U.S.C. § 1030, and the offense involved a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by **2** levels.

(ii) 18 U.S.C. § 1030(a)(5)(A), increase by **4** levels.

(iii) 18 U.S.C. § 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by **6** levels.

(B) If subparagraph (A)(iii) applies, and the offense level is less than level **24**, increase to level **24**.

(20) If the offense involved—

(A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or

(B) a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator,

increase by **4** levels.

(c) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.

(2) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

(3) If (A) neither paragraph (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.

(4) If the offense involved a cultural heritage resource or a paleontological resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural

Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources), if the resulting offense level is greater than that determined above.

Application Notes: . . .

3. Loss Under Subsection (b)(1).—This application note applies to the determination of loss under subsection (b)(1).

(A) Rules of Construction in Certain Cases.—In the cases described in clauses (i) through (iii), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:

(i) Product Substitution Cases.—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.

(ii) Procurement Fraud Cases.—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.

(iii) Offenses Under 18 U.S.C. § 1030.—In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.

(B) Estimation of Loss.—The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss

determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).

The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:

- (i) The fair market value of the property unlawfully taken, copied, or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.
- (ii) In the case of proprietary information (e.g., trade secrets), the cost of developing that information or the reduction in the value of that information that resulted from the offense.
- (iii) The cost of repairs to damaged property.
- (iv) The approximate number of victims multiplied by the average loss to each victim.
- (v) The reduction that resulted from the offense in the value of equity securities or other corporate assets.
- (vi) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.

(C) Exclusions from Loss.—Loss shall not include the following:

- (i) Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.
- (ii) Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.

(D) Credits Against Loss.—Loss shall be reduced by the following:

- (i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the

offense was detected or about to be detected by a victim or government agency.

(ii) In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.

(iii) Notwithstanding clause (ii), in the case of a fraud involving a mortgage loan, if the collateral has not been disposed of by the time of sentencing, use the fair market value of the collateral as of the date on which the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

In such a case, there shall be a rebuttable presumption that the most recent tax assessment value of the collateral is a reasonable estimate of the fair market value. In determining whether the most recent tax assessment value is a reasonable estimate of the fair market value, the court may consider, among other factors, the recency of the tax assessment and the extent to which the jurisdiction's tax assessment practices reflect factors not relevant to fair market value.

(E) Special Rules.—Notwithstanding subparagraph (A), the following special rules shall be used to assist in determining loss in the cases indicated:

(iv) Ponzi and Other Fraudulent Investment Schemes.—In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in excess of that investor's principal investment (i.e., the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme). . . .

(viii) Federal Health Care Offenses Involving Government Health Care Programs.—In a case in which the defendant is convicted of a federal health care offense involving a government health care program, the aggregate dollar amount of fraudulent bills submitted to the government health care program shall constitute prima facie evidence of the amount of the intended loss, i.e., is evidence sufficient to establish the amount of the intended loss, if not rebutted.

(ix) Fraudulent Inflation or Deflation in Value of Securities or Commodities.—In a case involving the fraudulent inflation or deflation

in the value of a publicly traded security or commodity, the court in determining loss may use any method that is appropriate and practicable under the circumstances. One such method the court may consider is a method under which the actual loss attributable to the change in value of the security or commodity is the amount determined by—

- (I) calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed to the market, and
- (II) multiplying the difference in average price by the number of shares outstanding.

In determining whether the amount so determined is a reasonable estimate of the actual loss attributable to the change in value of the security or commodity, the court may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense (e.g., changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events). . . .

(F) Substantial Financial Hardship.—In determining whether the offense resulted in substantial financial hardship to a victim, the court shall consider, among other factors, whether the offense resulted in the victim—

- (i) becoming insolvent;
- (ii) filing for bankruptcy under the Bankruptcy Code (title 11, United States Code);
- (iii) suffering substantial loss of a retirement, education, or other savings or investment fund;
- (iv) making substantial changes to his or her employment, such as postponing his or her retirement plans;
- (v) making substantial changes to his or her living arrangements, such as relocating to a less expensive home; and
- (vi) suffering substantial harm to his or her ability to obtain credit. . . .

(B) Sophisticated Means Enhancement under Subsection (b)(10)(C).—For purposes of subsection (b)(10)(C), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means. . . .

14. Application of Subsection (b)(17)(B).—

(A) Application of Subsection (b)(17)(B)(i).—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution was substantially jeopardized:

- (i) The financial institution became insolvent.
- (ii) The financial institution substantially reduced benefits to pensioners or insureds.
- (iii) The financial institution was unable on demand to refund fully any deposit, payment, or investment.
- (iv) The financial institution was so depleted of its assets as to be forced to merge with another institution in order to continue active operations.
- (v) One or more of the criteria in clauses (i) through (iv) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a "bailout".

(B) Application of Subsection (b)(17)(B)(ii).—

- (i) Definition.—For purposes of this subsection, "organization" has the meaning given that term in Application Note 1 of §8A1.1 (Applicability of Chapter Eight).
- (ii) In General.—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the solvency or financial security of an organization that was a publicly traded company or that had more than 1,000 employees was substantially endangered:

- (I) The organization became insolvent or suffered a substantial reduction in the value of its assets.
- (II) The organization filed for bankruptcy under Chapters 7, 11, or 13 of the Bankruptcy Code (title 11, United States Code).
- (III) The organization suffered a substantial reduction in the value of its equity securities or the value of its employee retirement accounts.
- (IV) The organization substantially reduced its workforce.
- (V) The organization substantially reduced its employee pension benefits.
- (VI) The liquidity of the equity securities of a publicly traded company was substantially endangered. For example, the company was delisted from its primary listing exchange, or trading of the company's securities was halted for more than one full trading day.
- (VII) One or more of the criteria in subclauses (I) through (VI) was likely to result from the offense but did not result from the offense because of federal government intervention, such as a "bailout". . . .

20. Multiple-Count Indictments.—Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. See Chapter Three, Part D (Multiple Counts). . . .

§ 2B1.4. Insider Trading

- (a) Base Offense Level: 8
- (b) Specific Offense Characteristics
 - (1) If the gain resulting from the offense exceeded \$6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
 - (2) If the offense involved an organized scheme to engage in insider trading and the offense level determined above is less than level **14**, increase to level **14**. . . .

Application Notes:

1. Application of Subsection (b)(2).—For purposes of subsection (b)(2), an “organized scheme to engage in insider trading” means a scheme to engage in insider trading that involves considered, calculated, systematic, or repeated efforts to obtain and trade on inside information, as distinguished from fortuitous or opportunistic instances of insider trading.

The following is a non-exhaustive list of factors that the court may consider in determining whether the offense involved an organized scheme to engage in insider trading:

- (A) the number of transactions;
 - (B) the dollar value of the transactions;
 - (C) the number of securities involved;
 - (D) the duration of the offense;
 - (E) the number of participants in the scheme (although such a scheme may exist even in the absence of more than one participant);
 - (F) the efforts undertaken to obtain material, nonpublic information;
 - (G) the number of instances in which material, nonpublic information was obtained; and
 - (H) the efforts undertaken to conceal the offense.
2. Application of §3B1.3.—Section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) should be applied if the defendant occupied and abused a position of special trust. Examples might include a corporate president or an attorney who misused information regarding a planned but unannounced takeover attempt. It typically would not apply to an ordinary “tippee”.

Furthermore, §3B1.3 should be applied if the defendant’s employment in a position that involved regular participation or professional assistance in creating, issuing, buying, selling, or trading securities or commodities was used to facilitate significantly the commission or concealment of the offense. It would apply, for example, to a hedge fund professional who regularly participates in securities transactions or to a lawyer who regularly provides professional assistance in securities transactions, if the defendant’s employment in such a position was used to facilitate significantly the commission or concealment of the offense. It ordinarily would not apply to a position such as a clerical worker in an investment firm, because such a position ordinarily does not involve special skill. *See* §3B1.3, comment. . . .

The following general Guidelines provisions potentially apply in all federal criminal cases, including white collar cases.

§ 3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

- (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by **4** levels.
- (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by **3** levels.
- (c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by **2** levels.

§ 3B1.2. Mitigating Role

Based on the defendant's role in the offense, decrease the offense level as follows:

- (a) If the defendant was a minimal participant in any criminal activity, decrease by **4** levels.
- (b) If the defendant was a minor participant in any criminal activity, decrease by **2** levels.

In cases falling between (a) and (b), decrease by **3** levels.

§ 3E1.1. Acceptance of Responsibility

- (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.
- (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by **1** additional level.

Once the total offense level and criminal history have been calculated under the Guidelines, the court must consult the "Sentencing Table" to derive a sentencing range, expressed in months.

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8
	4	0-6	0-6	0-6	2-8	4-10
	5	0-6	0-6	1-7	4-10	6-12
	6	0-6	1-7	2-8	6-12	9-15
	7	0-6	2-8	4-10	8-14	12-18
	8	0-6	4-10	6-12	10-16	15-21
Zone B	9	4-10	6-12	8-14	12-18	18-24
	10	6-12	8-14	10-16	15-21	21-27
	11	8-14	10-16	12-18	18-24	24-30
Zone C	12	10-16	12-18	15-21	21-27	27-33
	13	12-18	15-21	18-24	24-30	30-37
Zone D	14	15-21	18-24	21-27	27-33	33-41
	15	18-24	21-27	24-30	30-37	37-46
	16	21-27	24-30	27-33	33-41	41-51
	17	24-30	27-33	30-37	37-46	46-57
	18	27-33	30-37	33-41	41-51	51-63
	19	30-37	33-41	37-46	46-57	57-71
	20	33-41	37-46	41-51	51-63	63-78
	21	37-46	41-51	46-57	57-71	70-87
	22	41-51	46-57	51-63	63-78	77-96
	23	46-57	51-63	57-71	70-87	84-105
	24	51-63	57-71	63-78	77-96	92-115
	25	57-71	63-78	70-87	84-105	100-125
	26	63-78	70-87	78-97	92-115	110-137
	27	70-87	78-97	87-108	100-125	120-150
	28	78-97	87-108	97-121	110-137	130-162
	29	87-108	97-121	108-135	121-151	140-175
	30	97-121	108-135	121-151	135-168	151-188
	31	108-135	121-151	135-168	151-188	168-210
	32	121-151	135-168	151-188	168-210	188-235
	33	135-168	151-188	168-210	188-235	210-262
	34	151-188	168-210	188-235	210-262	235-293
	35	168-210	188-235	210-262	235-293	262-327
	36	188-235	210-262	235-293	262-327	292-365
	37	210-262	235-293	262-327	292-365	324-405
	38	235-293	262-327	292-365	324-405	360-life
	39	262-327	292-365	324-405	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life

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In the following decision that could have substantial consequences for white collar sentencing if followed by other courts, the Third Circuit ruled that “intended” loss cannot be used in calculating loss when applying the fraud guidelines.

UNITED STATES v. BANKS, 55 F.4th 246 (3d Cir. 2022)

ROTH, Circuit Judge:

A jury convicted Frederick Banks of wire fraud, and the District Court sentenced him to 104 months' imprisonment and three years' supervised release. On appeal, Banks argues that the District Court erred . . . by . . . applying the loss enhancement to the fraud guideline in the United States Sentencing Guidelines because there was no “actual loss.”

In January 2016, a federal grand jury indicted Frederick Banks for stalking, wire fraud, aggravated identity theft, and making false statements. The wire fraud charges “related to interlocking schemes . . . carried out by [Banks] to fraudulently gain the money and property of others in relation to the FOREX.COM international exchange system by submitting phony registration information for himself and then using those registrations to execute bogus trades that would drop money into bank accounts that he had set up.”

Banks’s scheme targeted Gain Capital Group, which did business as Forex.com. Gain Capital’s clients opened accounts, deposited funds, and then used those funds to invest in the foreign currency exchange market. Banks’s plot was to open Gain Capital accounts and make electronic deposits into those accounts, but his deposits were drawn on bank accounts with insufficient funds. He then tried to withdraw funds from these accounts, “with the goal being to complete the withdrawals/transfers before the lack of supporting funds could be detected.” To support his scheme, Banks made fraudulent representations through text message, telephone conversations, and emails. He misrepresented his identity, his income, his occupation, his net worth, and the balances in his bank accounts.

Importantly, Gain Capital suffered no actual loss. Banks made fraudulent deposits of \$324,000 and unsuccessfully executed 70 withdrawals/transfers totaling \$264,000. Gain Capital, however, did not transfer a single dollar to Banks. . . .

Banks’s offense level computation under the United States Sentencing Guidelines included a special offense characteristic for the attempted loss Banks intended to inflict on Gain Capital. According to the presentence investigation report:

The attempted loss, based on [Banks’s] fraudulent deposits, is \$324,000. Therefore, the base offense level is increased by 12 because the attempted loss was greater than \$250,000 but less than \$550,000. USSG § 2B1.1(b)(1)(G) (As a general rule, loss is the greater of actual loss or intended loss, pursuant to Application Note 3).

The 12-point increase raised Banks’s adjusted offense level from 7 to 19. During sentencing, the District Court explained that the Sentencing Guidelines define “loss to not only be actual loss, but to be intended loss. And the application notes indicate that the intended loss counts into the calculation of the loss amount, even if it’s determined to be improbable or impossible of occurrence.” The District Court found that the loss amount exceeded \$250,000, triggering the 12-point loss-amount enhancement. The District Court explained that Banks “intended to cause a loss in a pecuniary amount in excess of \$250,000” and that Banks “by his conduct, intended to cause such a loss; and, therefore, it is appropriately added into the guidelines calculation under 2B1.1.”

The District Court sentenced Banks to 104 months’ imprisonment and three years of supervised release. . . .

The application of the intended-loss enhancement hinges on the meaning of the term “loss” as used in Guideline § 2B1.1. Because the United States Sentencing Commission

has interpreted “loss” in its commentary, the weight afforded to that commentary may affect the meaning of “loss.”

Courts treat the Sentencing Guidelines as legislative rules, and the Sentencing Commission's comments interpreting its Guidelines as interpretative rules. Historically . . . courts deferred to the Sentencing Commission's interpretation of its own regulations . . . unless that interpretation was plainly erroneous or inconsistent with the Guideline.

Recently, however, the Supreme Court decided *Kisor v. Wilkie*, in which it made clear that, before according . . . deference, “a court must exhaust all the ‘traditional tools’ of construction,” and determine that a regulation is “genuinely ambiguous.” . . . [A] court must consider the “text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on.”

What's more, a court must make an “independent inquiry” into the “character and context” of the reasonable interpretations of the regulation. . . .

The Guideline does not mention “actual” versus “intended” loss; that distinction appears only in the commentary. That absence alone indicates that the Guideline does not include intended loss.

The government concedes that “the presumption is that a word carries its ordinary meaning (and thus may resolve its ambiguity).” We agree. The ordinary meaning of “loss” in the context of § 2B1.1 is “actual loss.” This result is confirmed by dictionary definitions of “loss.” The 1993 edition of *Webster's New International Dictionary* defines “loss” as:

- (a) the act or fact of losing;
- (b) a person or thing or an amount that is lost;
- (c) the act or fact of failing to gain, win, obtain, or utilize;
- (d) A decrease in amount, magnitude, or degree;
- (e) the state or fact of being destroyed or placed beyond recovery; and
- (f) the amount of an insured's financial detriment due to the occurrence of a stipulated contingent event.

The 1988 edition of *Webster's Ninth New Collegiate Dictionary* defines “loss” as:

- 1a: the act of losing possession b: the harm or privation resulting from loss or separation c: an instance of losing
- 2: a person or thing or an amount that is lost . . .
- 3 a: failure to gain, win, obtain, or utilize b: an amount by which the cost of an article or service exceeds the selling price

4: decrease in amount, magnitude, or degree

5: destruction, ruin

6: the amount of an insured's financial detriment by death or damage that the insurer become liable for. . . .

Because the commentary expands the definition of “loss” by explaining that generally “loss is the greater of actual loss or intended loss,” we accord the commentary no weight. Banks is thus entitled to be resentenced without the 12-point intended-loss enhancement in § 2B1.1.

There is currently a circuit split on the question discussed in *Banks* of whether courts should defer to the Sentencing Commission's commentary about how to calculate loss when applying section 2F1.1 in fraud cases. The issue appears ripe for Supreme Court review. See *United States v. Johnson*, 104 F.4th 662 (7th Cir. 2024) (contra *Banks*). In *United States v. Kukoyi*, 126 F.4th 806 (2d Cir. 2025), the Second Circuit affirmed a sentence in a fraud case based on a calculation of intended loss. Rather than address the question of the legal force of Guidelines commentary, the court affirmed on the basis that the district court had cited U.S.S.G. § 2X1.1(a), a provision applicable to all conspiracy cases, which directs the sentencing court to consider “any *intended* offense conduct” (emphasis added) in making Guidelines calculations for conspiracies.

Problem 18-1

Your client was convicted of securities fraud for her involvement in an accounting fraud that, when revealed, resulted in a loss of \$500 million in market capitalization to a U.S. Fortune 100 public company—as measured by the difference in share price before and after the fraud was exposed publicly. She was the Chief Financial Officer of the company at the time of the fraud and has no prior criminal record.

- (a) What sentence might the above Guidelines recommend to the court in her case?
- (b) What else would you want to know to determine whether a court is likely to sentence her within the recommended Guidelines range?

Because the Guidelines are not strictly binding, the question of what constitutes a just sentence for white collar offenders can loom large. The following case contains a lively discussion of that matter, as well as some material expanding upon the manner in which the Guidelines remain relevant or, as some have put it, “exert gravitational pull.”

UNITED STATES v. TOMKO, 562 F.3d 558 (3d Cir. 2009) (en banc)

SMITH, Circuit Judge, with whom McKEE, BARRY, AMBRO, FUENTES, CHAGARES, JORDAN, and HARDIMAN, Circuit Judges, join.

The Government appeals the reasonableness of William Tomko’s below-Guidelines sentence of probation, community service, restitution, and fine for his tax evasion conviction. If any one of a significant number of the members of this Court—including some in today’s majority—had been sitting as the District Judge, Tomko would have been sentenced to some time in prison. But “[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.” *Gall v. United States*. Gall reminds us that “[t]he sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record.” See also *United States v. Dragon* (we afford “deference to the District Court because it is in the best position to determine the appropriate sentence in light of the particular circumstances of the case.”). This reality is why, post-*Booker*, “the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions.” *Gall*. Where, as here, a district court decides to vary from the Guidelines’ recommendations, we “must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance.” These principles require us to affirm Tomko’s sentence.

On May 11, 2004, Tomko pleaded guilty to a one-count information charging him with tax evasion in violation of 26 U.S.C. § 7201. Tomko was the owner and Chief Executive Officer of W.G. Tomko & Son, Inc. (“Tomko, Inc.”), a plumbing contractor. From 1995 to 1998, Tomko directed numerous subcontractors, who were building his multimillion dollar home in Washington County, Pennsylvania, to falsify information on billing invoices so that the invoices would show work being done at one of Tomko, Inc.’s many job sites instead of at Tomko’s home. As a result, Tomko, Inc. paid for the construction of Tomko’s home and illegally deducted those payments as business expenses. Tomko also did not properly report those payments as income on his personal tax return. All told, Tomko’s tax evasion scheme involved twelve different subcontractors and his general contractor, and resulted in a tax deficiency of \$228,557.

The United States District Court for the Western District of Pennsylvania conducted Tomko’s sentencing hearing on September 30, 2005. Using the 1997 edition of the United States Sentencing Guidelines Manual, the District Court calculated Tomko’s total offense level to be thirteen and his criminal history category to be I. Based on these calculations, the Guidelines recommended a range of imprisonment between twelve and eighteen months and a fine between \$3,000 and \$30,000.

Tomko, however, proposed that in light of the then-recent Hurricane Katrina catastrophe and his construction expertise, the Court should sentence him to probation and home detention, and require him to work for Habitat for Humanity. The Executive Director for

Habitat for Humanity's Pittsburgh affiliate testified that the organization would appreciate Tomko's help in its efforts to rebuild the Gulf Coast and that Tomko had performed well in past projects, including providing onsite assistance and advice.

Tomko also proffered testimony from Tomko, Inc.'s Chief Financial Officer that the company was in danger of losing its line of credit if he were imprisoned. If this happened, Tomko, Inc. would be in dire straits financially and the jobs of its 300-plus employees would be threatened.

Finally, Tomko submitted a Motion for Downward Departure. The motion argued that Tomko should be sentenced below his Guidelines range because 1) his incarceration could cause Tomko, Inc.'s innocent employees to lose their jobs; 2) he has performed exceptional charitable acts and good works; 3) he has demonstrated an extraordinary degree of acceptance of responsibility; and 4) a combination of these three factors. As exhibits, Tomko attached over fifty letters from family, friends, community leaders, and others attesting to his pre-indictment charitable activities and other good works. . . .

In response, the Government insisted that the Court impose a sentence that included a term of imprisonment. The Government did not challenge Tomko's factual assertions or submissions. Instead, it juxtaposed his criminal conduct with the patriotism of American soldiers fighting wars abroad and argued that greed, not community service and philanthropy, defined Tomko's character. It focused on the fact that Tomko coerced his subcontractors to file false documentation, and highlighted the "gilded cage" nature of a sentence of home detention. The Government claimed that it would be "absurd" to sentence Tomko to live in the same multimillion dollar mansion that the illegally obtained tax monies helped fund. According to the Government, the Court's failure to incarcerate Tomko would send a message that a rich defendant can buy his way out of prison, and would compromise the general deterrent effect that tax laws have on potential tax cheats.

Despite the Government's arguments, the District Court did not sentence Tomko to a term of imprisonment. Instead, the Court sentenced Tomko to three years of probation (the first of which would be served as home detention), participation in an alcohol treatment program, 250 hours of community service, full restitution, and the statutory maximum fine of \$250,000. The Court explained its sentence with the following colloquy:

The reason for the sentence is as follows: Defendant stands before us for sentencing after pleading guilty to tax evasion. A review of Defendant's financial condition paints a picture of a very wealthy man who had the means and wherewithal to easily pay whatever tax obligation is owing. He was a successful businessman earning a significant salary. There is simply no reason for him to have done this.

This being said, I also note his negligible criminal history, his record of employment, his support for and ties in the community, and the

extensive charitable work he has done. I have also—therefore, I have sentenced him to the period of probation, which I recognize is below the guideline range. I also recognize that the fine is above the guideline range. Given the Defendant’s wealth, the guideline range in fines is insufficient deterrence.

Therefore, I’ve done this mitigation of the sentence under the provisions set forth in 18 U.S.C. [§] 3553 for the reasons I stated. Taking all these factors into account, the Court sentences the Defendant to a period of probation, a substantial fine, and allows for repayment to the Internal Revenue Service of his outstanding tax obligation. The Court views that this sentence will address the sentencing goals of punishment, deterrence and rehabilitation. . . .

Before the implementation of a Guidelines-based sentencing system in 1984, “[s]tatutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long, whether he should be fined and how much, and whether some lesser restraint, such as probation, should be imposed instead of imprisonment or fine.” *Mistretta v. United States*. Reviewing courts, in turn, recognized “that the sentencing judge ‘sees more and senses more’ than the appellate court; thus, the judge enjoyed the ‘superiority of his nether position,’ for that court’s determination as to what sentence was appropriate met with virtually unconditional deference on appeal.” (quoting Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635 (1971)). According to the Supreme Court, appellate review “beg[an] with the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end.” *Dorszynski v. United States*.

Concerns over sentencing disparities and the continued viability of rehabilitation as a penological objective dogged this sentencing system. *Mistretta*. As a result, in 1984, Congress passed the Sentencing Reform Act which, among other things, established mandatory sentencing guidelines. This Act, however, “did not alter a court of appeals’ traditional deference to a district court’s exercise of its sentencing discretion.” *Williams v. United States*. As the Supreme Court explained in *Williams*, “[t]he development of the guideline sentencing regime has not changed our view that, except to the extent specifically directed by statute, ‘it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.’” *Id.* (quoting *Solem v. Helm*).

In *United States v. Booker*, the Supreme Court concluded that the Sentencing Guidelines could only be advisory, and instructed courts of appeals to review the sentencing court’s “broad discretion in imposing a sentence within a statutory range,” for “unreasonableness.” Subsequently, *Gall* made it plain that we assess unreasonableness under the abuse-of-discretion standard. . . .

District courts must provide their explanations and justifications while going through three steps at sentencing. As we outlined in *Levinson*:

A district court must begin the process by first calculating the applicable Guidelines range. After that initial calculation, the court must then rule on any motions for departure and, if a motion is granted, state how the departure affects the Guidelines calculation. Finally, after allowing the parties an opportunity for argument, the court must consider all of the § 3553(a) factors and determine the appropriate sentence to impose, which may vary from the sentencing range called for by the Guidelines.

“Thus, the sentencing court subjects the defendant’s sentence to the thorough adversarial testing contemplated by federal sentencing procedure.” *Rita*.

Our appellate review proceeds in two stages. It begins by “ensur[ing] that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.” *Gall*. We do not presume that a district court considered the factors solely because the sentence falls within the Guidelines range. *Cooper*. If a district court’s procedure passes muster, “we then, at stage two, consider its substantive reasonableness.” *Levinson*. Our substantive review requires us not to focus on one or two factors, but on the totality of the circumstances. *Gall*; *United States v. Howe*. Indeed, we cannot presume that a sentence is unreasonable simply because it falls outside the advisory Guidelines range. *Gall*. At both stages of our review, the party challenging the sentence has the burden of demonstrating unreasonableness. *Cooper*.

The abuse-of-discretion standard applies to both our procedural and substantive reasonableness inquiries. *Gall*; *United States v. Wise*. For example, an abuse of discretion has occurred if a district court based its decision on a clearly erroneous factual conclusion or an erroneous legal conclusion. *Wise*. This also means that, absent any significant procedural error, we must “give due deference to the district court’s determination that the § 3553(a) factors, on a whole,” justify the sentence. *Gall*; *see also United States v. Bungar* (stating that, as an appellate court, we are “highly deferential” to the sentencing court’s application of the § 3553(a) factors). In other words, if the district court’s sentence is procedurally sound, we will affirm it unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided.

Ultimately, “[t]he touchstone of ‘reasonableness’ is whether the record as a whole reflects rational and meaningful consideration of the factors enumerated in 18 U.S.C. § 3553(a).” *United States v. Grier*; *see also Cooper* (“[W]hat we must decide is whether the district judge imposed the sentence he or she did for reasons that are logical and consistent with the factors set forth in section 3553(a).”). “An estimation of the outer bounds of what is ‘reasonable’ under a given set of circumstances may not always be

beyond debate, but the abuse-of-discretion standard by which that estimation must be judged limits the debate and gives district courts broad latitude in sentencing.” *Levinson*.

...

The crux of the Government’s appeal is its claim that Tomko’s sentence is substantively unreasonable. At oral argument, the Government reaffirmed that it would not be satisfied even if the District Court corrected the alleged procedural error on remand, but imposed the same sentence. In the Government’s view, Tomko’s sentence is substantively unreasonable because 1) detention in the house that Tomko partially funded with the illegal tax proceeds is plainly unreasonable, 2) this is a mine-run tax evasion case undeserving of such a lenient sentence, and 3) the statutory maximum fine cannot cure the claimed substantive deficiencies.

We reject the Government’s first and third arguments with limited discussion. Concerning the first, the Government has narrowed its objections to too fine a point by focusing its objections solely on the location of Tomko’s home detention. The Government admitted at oral argument that had the District Court sentenced Tomko to serve his detention in a different house—for example, as the Government suggested, “one of those Habitat for Humanity buildings that he was building in New Orleans could do”—it may not have appealed. Although we agree with the Government that the sort of “gilded cage” confinement imposed here has a certain unseemliness to it, we do not believe that this condition of sentence, by itself, constitutes an abuse of discretion. Whether detention in a particular home is appropriate punishment is precisely the type of fact-bound inquiry that a sentencing court is better suited to make. Even the Guidelines leave this determination to the sound discretion of the sentencing court. *See* U.S. Sentencing Guidelines Manual § 5F1.2 cmt. 3 (1997) (“The defendant’s place of residence, for purposes of home detention, need not be the place where the defendant previously resided. It may be any place of residence, so long as the owner of the residence agrees to any conditions that may be imposed by the court” (emphasis added)). We are in no position to second-guess that decision here.

The Government’s third claim rests on a perceived link between the District Court’s variance to a probationary sentence and its imposition of the statutory maximum fine. According to the Government, the District Court permitted Tomko to buy his way out of prison. This is not simply an overly-pejorative characterization of the sentence; it is a misreading of the record that is unfair to the District Court. Indeed, the record exhibits no connection between the fine imposed and the failure to incarcerate. To the contrary, the District Court explicitly stated that the two served unrelated purposes. On the one hand, probation was warranted because of Tomko’s negligible criminal history, his record of employment, his community ties, and his extensive charitable works. On the other hand, the statutory maximum fine was necessary to effect deterrence in light of Tomko’s wealth. We cannot conclude that the District Court abused its discretion where there exists nothing more than an implication of impropriety arising out of simple coincidence.

The Government’s final argument—that this is an overly lenient sentence in a mine-run case—deserves more attention. At the outset, we address the Government’s characterization of this case as a “mine-run” case. To the extent that the typicality or uniqueness of a case is relevant, the Supreme Court has made clear that it does not alter our deferential standard of review when evaluating a district court’s sentencing determination. To that end, the Court observed in *Gall* that:

[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and punishment to ensue. The uniqueness of the individual case, however, does not change the deferential abuse-of-discretion standard of review that applies to all sentencing decisions.

Such deference acknowledges the district court’s “institutional advantage over appellate courts,” or what the Court in *Gall* labeled the “[p]ractical considerations.” Accordingly, we must apply the abuse-of-discretion standard uniformly, regardless of whether a particular case appears to be a “mine-run” case on appeal.

The Government points out that “closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge’s view that the Guidelines range fails to properly reflect § 3553(a) considerations even in a mine-run case.” *Kimbrough v. United States*. This case, however, is different from those like *Kimbrough*, which involved the “district court’s authority to vary from the . . . Guidelines based on policy disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case.” *Spears v. United States*. Here, the District Court did not vary from the Guidelines range “solely” based on a disagreement with its ability to properly reflect § 3553(a) considerations. *Kimbrough*. Instead, the Court made an individualized determination that the Guidelines range recommended an excessive sentence in this instance. As a result, we are not reviewing “an ‘inside the heartland’ departure (which is necessarily based on a policy disagreement with the Guidelines and necessarily disagrees on a ‘categorical basis’) [that] may be entitled to less respect” in this case. *Spears*.

In essence, the Government is asking this Court to apply the already-rejected “proportionality test” by a different name. The Government’s appeal boils down to a claim that Tomko’s criminal history, employment record, community ties, and charitable works do not differentiate him enough from the “mine-run” tax evasion case to justify his below-Guidelines sentence. Similarly, a “proportionality test” rests on “the proposition that the strength of the justification needed to sustain an outside-Guidelines sentence varies in proportion to the degree of the variance.” *Rita*. As applied by some courts of appeals, this meant that “a sentence that constitute [d] a substantial variance from the Guidelines [had to] be justified by extraordinary circumstances.” *Gall*. In *Gall*, the Supreme Court explicitly barred the application of such an approach because it

necessarily applies a “heightened standard of review to sentences outside the Guidelines range.” That, of course, is “inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions—whether inside or outside the Guidelines range.”

To be sure, “we may look for a more complete explanation to support a sentence that varies from the Guidelines than we will look for when reviewing a sentence that falls within a properly calculated Guidelines range.” *Levinson*. We may also properly consider “the extent of any variance from the Guidelines range.” *Gall*. As the Supreme Court has explained, “it [is] uncontroversial that a major departure should be supported by a more significant justification than a minor one.” This does not mean, however, that we elevate our review of any variance and its accompanying explanation or justification beyond the abuse-of-discretion standard. The Supreme Court has unequivocally stated that “courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.” We must remain faithful to that clear instruction.

Based on our review of the record, we conclude that the District Court did not abuse its discretion here. At Tomko’s sentencing hearing, the District Court explicitly examined subsections (a)(1), (a)(2)(A), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(3), (a)(4), and (a)(6) of § 3553. The District Court also ordered full restitution. *See* 18 U.S.C. § 3553(a)(7). After hearing argument from the Government concerning the need for a term of imprisonment, the Court reiterated its reasons for imposing a sentence without one. The District Court gave specific reasons for why Tomko’s sentence varies from the Guidelines range. This variance took into account his negligible criminal history, his employment record, his community ties, and his extensive charitable works as reasons for not incarcerating Tomko, while also factoring in his substantial wealth as a reason for imposing a fine far above the Guidelines range. Indeed, the District Court provided more than just a boilerplate recitation of the § 3553(a) factors; it detailed, step-by-step, its individualized assessment of the sentence that it believed appropriate in this particular case.

The District Court’s reasons are also “logical and consistent with the factors set forth in section 3553(a).” *Cooper*. They are fully supported by the record. The Government does not dispute that Tomko had a negligible criminal history and that, because of his prominence in the company, his incarceration would threaten the jobs of Tomko, Inc.’s over-300 employees. As for Tomko’s charitable works, even the Government conceded at oral argument that “[t]he district court was entitled to give it whatever weight the district court wanted.” Several dozen letters written on Tomko’s behalf prior to his sentencing also demonstrate Tomko’s community ties and extensive charitable works. These letters indicate that Tomko performed pre-indictment charitable acts that involved not only money, but also his personal time. For several years, Tomko participated in a holiday gift drive in Finleyville, Pennsylvania. He provided Christmas gifts for thirty needy families, provided gloves and scarves to inner city children at a daycare center, and also helped other families in Marianna, Pennsylvania during the holiday season. One letter stated that Tomko performed all of this work anonymously. On a more individual

basis, another letter noted how Tomko “helped a woman in the South Park area that had recently lost her husband and was left with four small children to raise by her[self].” He also went out of his way to accommodate his employees who needed extra time off for personal reasons. Tomko participated in other acts of charity for those in need. A pastor in the community noted Tomko’s pre-indictment proclivity for aiding the poor, and stated that “[b]y requiring him to perform . . . community service, in lieu of incarceration, not only will you help the impoverished lives of the poor, but you will also transform the life of Bill Tomko.”

Additionally, at Tomko’s sentencing proceeding, the Executive Director of Habitat for Humanity’s Pittsburgh affiliate testified on Tomko’s behalf. The Executive Director stated that the Pittsburgh affiliate had been in danger of being closed down by the national Board of Directors because of its precarious financial situation. The Executive Director testified that Tomko became personally involved in the construction and rehabilitation of several houses in the Pittsburgh area. Again, Tomko devoted not only a portion of his wealth, but also his personal time. The Executive Director stated that, for one house that had water runoff problems, “Mr. Tomko came and not only visited with the homeowner, inspected the basement to see what was the matter with the outside of the house, but also worked with the city to determine how best to redirect the water away from the yards. He put in the grading, he completed the front sidewalk, the back driveway, and put in a curb for the city.” The Executive Director gave other examples of Tomko’s providing his construction expertise to aid the Pittsburgh affiliate. The Executive Director then testified as to how Tomko could benefit Habitat for Humanity’s efforts to build houses for poor families whose residences were damaged or destroyed by Hurricane Katrina. The Executive Director of the New Orleans affiliate confirmed that Tomko would be useful in these efforts. The Pittsburgh Executive Director concluded her direct testimony by reading a portion of a letter she wrote to the District Court, which stated that “there is no one like Bill Tomko who provides timely, unselfish, and meaningful contributions to Pittsburgh Habitat for Humanity’s construction operations.”

. . . The Government claims that affirming Tomko’s sentence promotes sentencing disparities and, in turn, undermines general deterrence. Whatever the merits of this possibility, it does nothing to change our disposition. The Government’s concern is not new; it has been a point of constant focus throughout sentencing review’s evolution. Before the Guidelines existed, “[s]erious disparities in sentences . . . were common.” *Mistretta*. When Congress created the mandatory Guidelines system, it did so “to ‘provide certainty and fairness in meeting the purposes of sentencing, [while] avoiding unwarranted sentencing disparities . . . [and] maintaining sufficient flexibility to permit individualized sentences when warranted.’” *Booker* (quoting 28 U.S.C. § 991(b)(1)(B)). When the Supreme Court rendered the Guidelines advisory, it was fully aware that sentencing disparities would likely increase. *See id.* (“We cannot and do not claim that use of a ‘reasonableness’ standard will provide the uniformity that Congress originally sought to secure.”).

Despite that awareness, the Booker Court was confident that the advisory Guidelines system would “continue to move sentencing in Congress’ preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.” In *Gall*, the Court reaffirmed that “a more deferential abuse-of-discretion standard could successfully balance the need to ‘reduce unjustified disparities’ across the Nation and ‘consider every convicted person as an individual.’” 128 S. Ct. (quoting Koon).

If abuse-of-discretion review cannot strike such a balance, it is not our role as appellate judges to adjust the scales. “The National Legislature is equipped to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice.” *Booker* (“I continue to think that the best resolution of the tension between substantial consistency throughout the system and the right of jury trial would be a new Act of Congress: reestablishing a statutory system of mandatory sentencing guidelines (though not identical to the original in all points of detail), but providing for jury findings of all facts necessary to set the upper range of sentencing discretion.”). The risk of affirming an unwarranted sentencing disparity in this case is one we must accept while following the Supreme Court’s “pellucidly clear” command that we apply the abuse-of-discretion standard of review. *Gall*. . . .

FISHER, Circuit Judge, dissenting, with whom Chief Judge SCIRICA, Judge SLOVITER, Judge RENDELL and Judge COWEN join.

As the procedural history of this appeal clearly shows, this Court has wrestled with the decision in this case for close to two and one half years, during which time the judges on this Court have tried to determine whether the sentence given for this crime was substantively reasonable. The offense we encounter in this case is no garden variety tax evasion. The conduct underlying the offense involved an intricate scheme spanning several years and involved the coercion and coordination of numerous other individuals, all for the personal gain of one man, William G. Tomko, Jr., a successful business owner with the means to easily pay the taxes he owed to the Government.

Tomko’s fraudulent tax evasion scheme revolved around the construction of his luxurious new home in southwestern Pennsylvania. During the construction of this home, Tomko had subcontractors falsify their billing invoices to make it appear their work had been done for his construction company, W.G. Tomko, Inc. (“Tomko, Inc.”), at one of its job sites, rather than for Tomko, the individual, at his personal residence. The Internal Revenue Service–Criminal Investigation Division investigators interviewed seventeen individuals with respect to Tomko’s scheme. While the details varied from individual to individual, a consistent pattern of conduct emerged: At Tomko’s behest, subcontractors who performed work at his residence were instructed to write billing invoices that made it appear that their work had been done at one of five local area schools. Because Tomko, Inc. was working jobs at these local schools, the company could appear to be legitimately paying the invoices. As a result, the construction costs were diverted from Tomko personally to Tomko’s company, which

then deducted them as business expenses, while Tomko also failed to report as personal income the value of the services provided to him at no cost. Thus, Tomko's income was under-represented in two regards: The profits earned by his business appeared to be less and the substantial benefit he received as a result of the construction of a new 8,000-square-foot home went unreported.

Tomko's scheme resulted in a stipulated tax deficiency of \$228,557; however, a disputed portion of the record included evidence that the pervasiveness of his scheme was even more extensive. In particular, the Government presented evidence that Tomko on more than one occasion told individuals that his vacation home in Maryland was "a gift from Uncle Sam." Because the Government was unable to provide reliable figures to account for the impact of this alleged fraud with respect to the tax loss incurred by the Government, this disputed evidence apparently did not factor into the District Court's judgment of sentence, and we mention it solely to underscore the point that we are not faced with a garden variety case of tax evasion.

Tomko pleaded guilty to a one-count information charging him with tax evasion, in violation of 26 U.S.C. § 7201. His properly calculated Guidelines range was twelve to eighteen months of incarceration. . . .

In accordance with the standard announced by the Supreme Court in *United States v. Booker*, our task on appeal is to review the sentence imposed by the District Court for "reasonableness." In *Gall v. United States*, the Supreme Court clarified that appellate reasonableness review involves two steps: the first procedural and the second substantive. The Supreme Court categorized, *inter alia*, "failing to consider the § 3553(a) factors" and "failing to adequately explain the chosen sentence," as procedural errors under the first step of *Gall*. The Court then instructed:

"Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance."

Accord United States v. Wise ("As an appellate court, our role is two-fold. . . . If we determine that the district court has committed no significant procedural error, we then review the substantive reasonableness of the sentence under an abuse-of-discretion standard. . . .").

The Court in *Gall* also reaffirmed its decision in *Rita v. United States*, which emphasized the importance of reviewing sentences for substantive reasonableness. *See Gall*. As the Supreme Court stated in *Rita*: “In sentencing, as in other areas, district judges at times make mistakes that are substantive. At times, they will impose sentences that are unreasonable. Circuit courts exist to correct such mistakes when they occur.” Consequently, the substantive component of reasonableness review, while deferential, is not impotent.

For these reasons, we disagree with the Majority’s statement that “if the district court’s sentence is procedurally sound, we will affirm it unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided.” We recognize that “appellate review of sentencing decisions is limited to determining whether they are ‘reasonable,’” *Gall*, but we believe that encompassed within this limited role is the authority and the obligation to vacate sentences that are substantively unreasonable. Therefore, although the Supreme Court “made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions,” we cannot agree with the Majority’s characterization of the appellate courts’ role in reviewing sentences as “requir[ing] us to do nothing more and nothing less than to apply the deferential abuse-of-discretion standard.” We believe that when the Supreme Court instructed appellate courts to review for both procedural and substantive reasonableness, it meant what it said. Accordingly, because we conclude that this sentence is substantively unreasonable, we dissent. . . .

Viewed cumulatively, out of the three reasons offered by the District Court for mitigating Tomko’s sentence, only one—community support based on charitable work—even begins to justify a downward variance in this case. Thus, these considerations fall short of placing the sentence imposed within the albeit broad range of permissible choices, even when we add them together. Moreover, the “mitigating” circumstances relied upon by the District Court only address one of the § 3553(a) factors, namely “the history and characteristics of the defendant” under § 3553(a)(1), and therefore do not reflect the “totality of the circumstances” and the “§ 3553(a) factors, on a whole.” *Gall*. As a number of our sister courts of appeals have recognized, excessive reliance on a single § 3553(a) factor is indicative of an unreasonable sentence. *United States v. Hampton*; *United States v. Givens*, ; *see also Cavera* (considering whether a particular “factor relied on by a sentencing court can bear the weight assigned to it”). As the remainder of our analysis reveals, the District Court’s over-reliance on § 3553(a)(1) as justification for the significant qualitative and quantitative variance it granted pales in comparison to the numerous § 3553(a) factors which suggest that a term of imprisonment is warranted in a case of tax evasion as willful and brazen as Tomko’s. . . .

Problem 18-2

Under current law, what is the role of a federal trial judge during sentencing? What is the role of the appellate court when reviewing a sentencing decision?

Problem 18-3

- (a) List deterrent arguments one could make for and against a sentence of probation for Tomko.
- (b) List retributive arguments one could make for and against a sentence of probation for Tomko.

The following case contains another lively discussion of how to think about sentencing white collar offenders in light of the Guidelines.

UNITED STATES v. CORSEY, 723 F.3d 366 (2d Cir. 2013)

Per Curiam opinion.

This appeal arises out of a conspiracy to defraud a non-existent investor of three billion dollars. In the spring of 2006, defendants John Juncal, James Campbell, Rodney Sampson, and Emerson Corsey were arrested and charged with one count of conspiracy to commit mail fraud and wire fraud in violation of 18 U.S.C. §§ 1341, 1343, and 1349. Over the preceding four months, the defendants had attempted to lure a broker, Thomas Re, into procuring financing for an imaginary Siberian oil pipeline. The two sides exchanged information about possible partners, and the best structure for a loan. But in reality each side duped the other—Juncal and his colleagues had no plans to build a pipeline across the Russian tundra, and Re never represented a hedge fund interested in lending billions to the defendants to do so.

Re was the CEO of Universal Lending Group (“ULG”), a small brokerage firm based in Garden City, New York. Re acted as a “salesperson and networker” for the company; he solicited companies looking for financing and his associate, Joseph Bianco, then matched projects with a hedge fund or bank to act as lender. Re was also an informant for the FBI: Before he worked at ULG, Re sold vending machine routes to snack-food companies. On occasion, Re sold distributors a fake route—the distributors would arrive at a location and find no machine—and the FBI eventually caught up with him. In the hopes of receiving a lighter sentence, Re agreed to turn over information to the FBI about others participating in the vending machine scam.

Re encountered the defendants seven months after he began working with the FBI. Re received a call from an acquaintance, Charles Frazier, who told him to look out for a financier named Emerson Corsey—Juncal, Campbell, and Sampson’s co-defendant. Corsey called a few days later and explained that he was the Chief Operating Officer of Magnolia International Bank and Trust (“MIBT”), a bank that Corsey described as holding assets of sovereign wealth funds. Corsey said that MIBT wanted to borrow three billion dollars to build a pipeline in Siberia and could offer five billion dollars in U.S. Treasury notes (“T-notes”) as collateral for the loan. Re said he would think about it.

Re told his associates about the proposal and, after a brief Google search, they told him the deal “smelled.” Re then reported the potential fraud to his FBI handler, who instructed Re to record his conversations with Corsey.

Over the next few months, Re recorded the defendants as they baited him with an escalating series of lies: Corsey explained that MIBT was the central bank for scores of Native American governments, including the Yamasee Indian tribe, a nation with trillions of dollars in assets. Corsey then said that the bank currently represented John Juncal, a “counsel extraordinaire” for the Republic of Buryatia who had been appointed “Vice Premier of Record under the Edict of the Ukase” by the Buryatian government, and the official charged with finding backers for the pipeline. When Re expressed skepticism, Corsey sent him an email with copies of “bond indentures.” The indentures bore the seal of the Vice-President of Buryatia, and stated that they were valued at five billion U.S. dollars and secured by T-Notes. The certificates were assigned to “the Great Siberian Pipeline Corporation,” which was “a Republic of Wyoming Corporation.” The email also contained proof that Juncal controlled the T-notes: Corsey included another certificate signed by Juncal that listed CUSIP numbers for the T-notes (as an expert would later testify, CUSIP numbers are alphanumeric code created by the U.S. Treasury to identify individual bonds).

Prompted by his handler to record statements by more of the defendants, Re asked to speak with Sampson, the purported Chief Financial Officer of MIBT. Sampson laid out the math behind the deal: MIBT’s client, John Juncal, would assign the T-notes to Re’s client. The T-notes would yield a minimum of 3.9% interest per year and generate over fourteen billion dollars in profit over the course of five years. When Re asked for additional evidence of the T-notes’ authenticity, Sampson sent Re an email from an AOL account for MIBT, rather than from MIBT’s own domain name. Attached to the email were unformatted files containing copies of the T-notes; Re had to use Word Pad to open those files. Sampson then e-mailed Re a “Letter of Acceptance” that re-explained the financing. The letter stated that, in exchange for a loan of three billion dollars, Re’s client would receive T-notes that would yield a 171% return on investment.

Re next pressed Corsey and Sampson to show him physical evidence of the T-notes’ existence. And at that point, Corsey put Re in touch with James Campbell, an associate of Juncal’s. Campbell explained that Juncal had hidden the bonds in Austria in order to prevent enemies from “basically steal[ing] these from him and bump[ing] him out of the corporation.” Re pretended to buy the excuse, but later asked if he could speak with Juncal directly. Juncal agreed, and sought to assuage Re’s fears by comparing his role to the historic secret mission of Christopher Columbus.

During his testimony at trial, Re admitted that much of the talk struck him as ridiculous, and that at some point he stopped believing the deal was real. But because of his relationship with the FBI, he continued working with the quartet of pipeline pipe-dreamers. In March, it came time for the deal to close, and Re arranged to meet Campbell and Sampson in New York to sign documents memorializing their agreement. On the

day of the closing, the FBI arrested all four defendants; Campbell and Sampson were arrested in New York, Corsey was arrested in Atlanta, and Juncal was arrested at his home, a motel in Whitefish, Montana. . . .

In each case, but for the statutory maximum term of imprisonment, the appellants' Sentencing Guidelines recommended range would have been a life sentence, because the offense level was driven off the Guidelines' Sentencing Table by an intended loss amount of three billion dollars. Though each appellant argued that the intended loss grossly overestimated the seriousness of the offense, the District Court disagreed. In March of 2010, the District Court sentenced all four defendants to twenty years' incarceration, the statutory maximum and the Guidelines recommended sentence.

The District Court gave a very brief explanation of the reasons for Campbell's sentence, and largely adopted the logic and recommendations in his Pre-Sentence Investigation Report ("PSR"). Under the Guidelines applicable in 2010, the PSR calculated Campbell's total offense level to be 47. Under U.S.S.G. § 2B1.1, his base offense level was 7. Thirty points were added because Campbell had intended to defraud an investor of over \$400 million. The PSR then added points for four additional enhancements: Campbell received four points because he oversaw five or more co-conspirators, U.S.S.G. § 3B1.1; two levels because he offered fake CUSIPs as an "authentication feature," U.S.S.G. § 2B1.1(b)(10)(A)(ii); two levels because Campbell misrepresented himself as a representative of a government or agency, U.S.S.G. § 2B1.1(b)(8)(A); and two levels because the scheme involved sophisticated means, U.S.S.G. § 2B1.1(b)(9)(C).

At the sentencing hearing, the government withdrew its request for a role enhancement pursuant to U.S.S.G. § 3B1.1. The District Court asked if that change affected the guideline range:

COURT: And where does it put the guidelines recommendation?

MR. MISKIEWICZ: We're not privy to the probation officer's recommendations to the Court. I believe that that is still, at least sent to your Honor. We're never given a copy.

COURT: Well, my question really is: the original guidelines calculation put it in the 240 month range. Correct?

THE PROBATION OFFICER: That would be the maximum, the statutory maxim.

The District Court then inquired why the Guidelines calculation was so far above the statutory maximum. The prosecutor answered:

MR. MISKIEWICZ: Our position, your Honor, and I think counsel has agreed with this; is a level 43, that is 47 minus 4, it is still life. If he were one point below that he would still be at a 360 to life sentence. So he is in many ways well over the statutory maximum. And we, the government, has in our letter asked for the 20 years statutory maximum here.

THE COURT: And that is what I am inclined to give him.

The defense then presented its case against enhancements and for downward departures. The District Court rejected each one, explaining its general approach by referencing other recent financial fraud cases:

I don't know how you can say in this economic age, considering all of the people who have been scammed and defrauded—people of, one would say superior knowledge in finances—I don't know how we can say that hypothetically had Thomas [Re] not existed and not been available, and not been the contact, this scheme would not have been uncovered.

The District Court then explained the reason for imposing a 20-year sentence:

[T]he Probation Department's extensive report of your client's history, and the factors in 3553, and the fact that to date he still shows really no remorse for this crime—still blaming others, and depicting himself as a messenger—I believe this sentence will send a message of deterrence to the defendant, as well as to others.

Sampson's PSR contained an identical offense level score. His attorney objected to all five enhancements, but the District Court only accepted Sampson's arguments on the role enhancement (the government again withdrew its request for the enhancement). As with Campbell, the Court also dismissed the need to recalculate the Guidelines range, explaining that "the maximum is 20 years so it really has no effect."

Sampson was then asked if he wished to make a statement. Sampson said yes, and launched into an impassioned account of the trials of the Yamasee tribe. He stated that the tribe had waged a centuries-long battle against Western encroachment, only signing a treaty with Georgia in 2003. He referred to the people of Buryatia as a "sovereign aboriginal indigenous nation." He then explained the motive of the fraud scheme as "doing something to help the people of Buryatia and the people of the Yamasee nation in order to help as far as education, health, welfare, et cetera, to do for ourselves."

The District Court then sentenced Sampson. Unlike Campbell, Sampson had no prior convictions, but he had been charged with two additional counts of fraud perpetrated while out on bail—he attempted to secure \$100 million for a fake oil field, and actually secured \$35,000 from another investor through a "lifecycle fraud." But the Court did not mention these distinctions, nor any other details of Sampson's case. Instead, the Court made one curt reference to deterrence:

COURT: Anything else you wish to say? These are items counsel can raise on appeal.

MS. GAFFEY: Yes.

COURT: That being said, Mr. Sampson, I am going to sentence you at this time to 240 months in prison, three years supervised release with the following special

conditions. . . . I believe this sentence, which is the maximum permissible under the law, will establish both respect for the law and deterrence to you and perhaps hopefully to others for efforts to engage in fraud.

The District Court again adopted the PSR's calculations, including the role enhancement, despite the fact that the government was no longer seeking it. The District Court also found that Juncal had a criminal history category of II. Juncal's only prior convictions were imposed over fifteen years before he tried to sell Re on the Siberian Pipeline, and thus were not countable. *See* U.S.S.G. § 4A1.2e. In his interview with probation, however, Juncal indicated that he had dreamed of building the Siberian pipeline project since the days of "Reagan." The District Court credited this statement, and found that he had commenced planning the Siberian fraud scheme decades before he was caught, and determined his prior convictions were countable. The District Court then calculated the Guidelines in a cursory way:

COURT: Well, I believe probation is right. They feel that your objections were not substantiated, and that the present guidelines range stands.

MR. WALLENSTEIN: I take it then, that the court has found that the guideline range noted by probation in the original presentence report is the guideline range that the court finds.

COURT: It is.

Juncal chose to speak on his own behalf. He explained that he suffered from a crippling bone marrow disease, and he only had a few years to live. "[T]here is no consequence to whether I die in jail or die outside," he lamented. He then went on to cite his extensive diplomatic service, most of it invented. As with his co-defendants, the District Court imposed the statutory maximum sentence:

COURT: As recommended by the probation department, 20 years of custody, plus three years of supervised release.

The Court made no mention of its consideration of any of the factors set forth in 18 U.S.C. § 3553(a) other than the Sentencing Guidelines and the need for deterrence. . . .

We review a district court's sentence for "reasonableness, which is 'akin to review for abuse of discretion, under which we consider whether the sentencing judge exceeded the bounds of allowable discretion, committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.'" *United States v. Leslie* (quoting *United States v. Williams*). This broad discretion is due to district courts because they are a better positioned institutionally to determine the appropriate sentence in a particular case. *United States v. Fernandez*.

We begin our analysis with a review of the sentences' procedural reasonableness. A district court will normally "begin all sentencing proceedings by correctly calculating the applicable Guidelines range," *Gall v. United States*, and will then consider the factors

listed in 18 U.S.C. § 3553(a) before imposing a final sentence. *United States v. Preacely*. A judge need not utter “robotic incantations” repeating each factor that motivates a sentence. *United States v. Crosby*. Nonetheless, the judge must explain enough about the sentence for a reviewing court both to understand it and to assure itself that the judge considered the principles enunciated in federal statutes and the Guidelines. *Rita v. United States*. Here, appellants offer two critiques of the way the District Court imposed their sentences. First, they argue that the District Court either miscalculated the Guidelines range or failed to calculate the range entirely. Second, defendants claim that the District Court did not appropriately weigh the factors enunciated in 18 U.S.C. § 3553(a).

The District Court technically may have cut a corner when it glossed over the calculation of appellants’ precise adjusted offense level, but that shortcut had no effect on appellants’ ultimate Guidelines range. In each case, the amount of intended loss catapulted appellants’ offense levels to 37, a number yielding a suggested period of incarceration above the statutory maximum of 20 years. Once the offense level crossed that threshold, any additional enhancement would have had at most an academic impact on the Guidelines range; the recommended term of incarceration would have always reverted back to twenty years. U.S.S.G. § 5G1.1 (a) (“[w]here the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.”). Rather than resolve technical arguments about each enhancement, the District Court chose a more pragmatic approach—it calculated the Guidelines in sufficient detail to know that the resulting sentencing range would inevitably equal 20 years regardless whether certain additional enhancements applied.

The District Court was free to prioritize efficiency over an exercise in futility. . . . But the District Court still had an obligation to weigh the factors listed in section 3553(a), and we are not certain that occurred. *See Fernandez* (declining to hold within-Guidelines sentence presumptively reasonable). Here, appellants’ maximum sentences had an air of inevitability. Because appellants’ Guidelines ranges prior to application of the section 5G1.1 limit soared past the statutory maximum, the District Court seemed to assume that imposing a statutory maximum sentence reflected a per se reasonable sentence. At Campbell’s hearing, the District Court chastened the defense attorney by noting that “even without [an] enhancement there would still be a maximum of a life sentence. Correct?” After a confusing colloquy with the probation officer and the prosecutor, the Court then correctly noted that as a technical matter the Guidelines range would revert back to the statutory maximum. That unavailable life sentence, however, hung in the air and framed the Court’s perfunctory analysis of the section 3553(a) factors. A similar dynamic occurred during Sampson and Juncal’s sentencing hearings. The record, then, is muddled by the District Court’s elision of two questions—how to understand the reversions of the Guidelines range to the statutory maximum of 240 months, and whether a statutory maximum sentence was sufficient but not greater than necessary to serve the purposes of sentencing enunciated in section 3553(a).

If in fact the District Court treated 240 months as the only reasonable sentence (because the statutory maximum prohibited imposition of a true Guidelines sentence closer to life), then it committed procedural error. Even when section 5G1.1(a) ratchets down a range, the lower Guidelines range is still the recommendation, and should be treated as a starting point in a deeper analysis, not a revision that obviates the need to consider further what sentence to impose. . . . If, however, the District Court understood the effect of section 5G1.1(a), and still chose to impose the maximum sentence after considering the commands of section 3553(a), then the sentence may have been procedurally sound. But the record here is ambiguous, and we have often vacated and remanded sentences where a “the judge’s sentencing remarks create ambiguity as to whether the judge correctly understood an available option.” *United States v. Thorpe*. In a case clouded by the possibility of error, we feel it appropriate to give the District Court an opportunity to clarify its thinking.

Remand is also appropriate for two additional reasons. First, the sentencing court gave only a passing mention to any of the section 3553(a) factors. In each case, the District Court justified a maximum sentence by relying almost exclusively on one word—“deterrence.” Certainly, a judge need not chronicle the deliberative journey taken to arrive at a sentence, but she must still create enough of a record so that an appellate court can “be confident that the sentence resulted from the district court’s considered judgment as to what was necessary to address the various, often conflicting, purposes of sentencing.” *Cavera*. In other words, just as we do not insist upon “robotic incantations,” we require more than a few magic words.

This is especially true in light of the appellants’ arguments for lighter sentences. “[W]here the appellant or prosecutor presents nonfrivolous reasons for imposing a different sentence the judge will normally go further and explain why he has rejected those arguments.” *Rita*. Here, appellants’ lawyers highlighted significant issues with the intended loss calculation both in their briefs and at sentencing. Given the low risk that any actual loss would result—what hedge fund would fall prey to a purported coalition of Buryatian nationals and Yamasee tribesmen using AOL email accounts to offer five billion dollars in collateral for a loan to build a pipeline across Siberia?—counsel argued that a 30-point mega-enhancement vastly overstated both the seriousness of the offense, and the danger of appellants to their community. The Guidelines acknowledge that potentiality; application note 19(C) to U.S.S.G. § 2B1.1 indicates that a downward departure may be warranted where the offense level resulting from a loss calculation overstates the seriousness of an offense. But the sentencing court never resolved appellants’ significant arguments. At Sampson’s hearing the District Court did draw a comparison between other financial crimes and this case, but it never resolved the question raised by the appellants—whether treating intended loss like actual loss under all the circumstances of this case leads to a sentence consistent with the dictates of section 3553(a). . . .

We affirm the appellants’ convictions, but vacate their sentences and remand for resentencings consistent with this decision.

UNDERHILL, District Judge, concurring:

Although I agree that appellants' sentences should be vacated and remanded for procedural error, the real problem is that those sentences are shockingly high. For that reason, I would reach the question of substantive reasonableness and would reverse on the merits.

In my view, the loss guideline is fundamentally flawed, and those flaws are magnified where, as here, the entire loss amount consists of intended loss. Even if it were perfect, the loss guideline would prove valueless in this case, because the conduct underlying these convictions is more farcical than dangerous. If substantive review of sentences actually exists other than in theory, it must be undertaken at least occasionally. This would have been an appropriate case in which to do so, because it raises so starkly the problems with the loss guideline. Until this Court weighs in on the merits of the loss guideline, sentences in high-loss cases will remain wildly divergent as some district judges apply the loss guideline unquestioningly while others essentially ignore it. The widespread perception that the loss guideline is broken leaves district judges without meaningful guidance in high-loss cases; that void can only be filled through the common law, which requires that we reach the substantive reasonableness of these sentences.

Ordinarily, we review a sentence to determine whether there was a procedural error in a district court's sentencing before we consider "the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard, taking into account the totality of the circumstances." *United States v. Rigas*. That approach is wholly appropriate in the vast majority of sentencing appeals. Nothing, however, "prevents us from reaching both the procedural and substantive reasonableness of the sentence in the course of an appeal where we find both types of error." *United States v. Dorvee*. Indeed, addressing both procedural and substantive reasonableness in the same appeal can serve the interest of judicial economy. It is also the only means of addressing systemic problems with the Sentencing Guidelines. In short, "because procedural error and substantive error are permeable concepts . . . postponing the consideration of substantive reasonableness [can be] a mistake and a missed opportunity." *United States v. Stewart*.

Substantive review of sentences provides "a backstop for those few cases that, [even if] procedurally correct, would nonetheless damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *Rigas* (citation and footnote omitted). Not surprisingly, we have only rarely held that a sentence is substantively unreasonable. *E.g.*, *Dorvee* (vacating "a within-Guidelines sentence"; "the amount by which a sentence deviates from the applicable Guidelines range is not the measure of how 'reasonable' a sentence is. Reasonableness is determined instead by the district court's individualized application of the statutory sentencing factors" (citing *Gall v. United States*). In sum, we will set aside a district court's substantive determination of the appropriate sentence only "in exceptional cases where the trial court's decision cannot be located within the range of permissible decisions." *United States v. Cavera*. This is such a case.

The twenty-year sentences imposed on appellants are not merely harsh, they are dramatically more severe than can be justified by the crime the appellants committed. This was a clumsy, almost comical, conspiracy to defraud a non-existent investor of three billion dollars. That scheme never came close to fruition. During his first meeting with Thomas Re, Emerson Corsey described Magnolia International Bank and Trust as the central bank for scores of Native American governments, including the Yamasee Indian tribe, which a Wikipedia search would have revealed as a tribal confederation that was broken up and defeated early in the 18th century. It took only a brief Google search for Re and his associates to understand that the proposal “smelled”—which is why the appellants were recorded by Re for months before their arrest. At one point, Corsey provided Re with a certificate signed by John Juncal that listed CUSIP numbers for the T-notes; when Re shared the certificate with his colleagues, they responded by bursting into laughter. Even the terms of the proposed deal itself were laughable: the lender of three billion dollars would, according to the appellants, receive fourteen billion dollars in profit over five years. This scheme amounted to a series of absurd lies piled on top of even more absurd lies. Appellants’ conduct was not dangerous because they had absolutely no hope of success.

A single factor—loss, specifically intended loss—drove the Guidelines calculation, and a single section 3553(a) factor—deterrence—provided the basis for accepting the Guidelines recommended sentence. A district court may not presume that a sentence within the Guidelines range is reasonable. *Cavera*. Although the District Court used the intended loss amount correctly for purposes of calculating the Sentencing Guidelines range, the Court erred by failing to dramatically discount that calculation when weighing the section 3553(a) factors against the totality of the circumstances of this case. This conspiracy to defraud involved no actual loss, no probable loss, and no victim. The scheme was treated as sophisticated, but could be more accurately described as a comedic plot outline for a “Three Stooges” episode. Because the plan was farcical, the use of intended loss as a proxy for seriousness of the crime was wholly arbitrary: the seriousness of this conduct did not turn on the amount of intended loss any more than would the seriousness of a scheme to sell the Brooklyn Bridge turn on whether the sale price was set at three thousand dollars, three million dollars, or three billion dollars. By relying unquestioningly on the amount of the intended loss, the District Court treated this pathetic crime as a multi-billion dollar fraud—that is, one of the most serious frauds in the history of the federal courts. See *United States v. Parris* (collecting sentences for major securities fraud convictions). . . .

The fraud guideline was initially set forth in Guideline section 2F1.1. The Sentencing Commission set the original 1987 Guidelines for economic offenses higher than historical sentences in order to further the deterrence and just punishment goals of sentencing. In 1989, in response to the savings and loan crisis, Congress passed legislation increasing the maximum penalties for financial fraud offenses and directing the Sentencing Commission to include specific offense characteristic enhancements in the fraud guideline. See Robert S. Bennett, et al., *Taking it to the Banks: The Use of the Criminal Process to Regulate Financial Institutions*, 109 Banking L.J. (1992). In 2001,

the Sentencing Commission amended the Guidelines to combine the fraud, theft and embezzlement, and property destruction guidelines into a single guideline, section 2B1.1. That change was accompanied by the publication of a new loss table that had the effect of increasing offense level calculations, especially for high-dollar-value crimes. *See* U.S. Sentencing Comm'n, Report to the Congress: Increased Penalties Under the Sarbanes–Oxley Act of 2002 (2003). Most recently, the fraud guideline was amended in 2003 in response to Congressional directives in the Sarbanes–Oxley Act. Those amendments included further changes to the loss table that added offense level points in the highest loss cases. U.S.S.G. app. C amend. 647 (Nov. 1, 2003). The three sets of amendments to the loss table of the fraud guideline alone have effectively multiplied several times the recommended sentence applicable in 1987 for large-loss frauds, which itself was set higher than historic sentences. Each of the three increases in the recommended Guideline ranges for fraud crimes was directed by Congress, without the benefit of empirical study of actual fraud sentences by the Sentencing Commission.

The history of bracket inflation directed by Congress renders the loss guideline fundamentally flawed, especially as loss amounts climb. The higher the loss amount, the more distorted is the guideline's advice to sentencing judges. As a well-known sentencing commentator has put it, "For the small class of defendants . . . convicted of fraud offenses associated with very large guidelines loss calculations, the guidelines now are divorced both from the objectives of Section 3553(a) and, frankly, from common sense. Accordingly, the guidelines calculations in such cases are of diminished value to sentencing judges." Frank O. Bowman, III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent'g Rep. (2008).

When the Guidelines range zooms off the sentencing table, sentencing judges are discouraged from undertaking close examination of the circumstances of the offense and the background and characteristics of the offender. That certainly happened here. But the low marginal utility of the guideline in this very high intended loss case should have prompted greater, not lesser, reliance on the section 3553(a) factors other than the Guidelines. As one District Court applying the loss guideline put it, "Where the Sentencing Guidelines provide reasonable guidance, they are of considerable help to any judge in fashioning a sentence that is fair, just, and reasonable. But where, as here, the calculations under the guidelines have so run amok that they are patently absurd on their face, a Court is forced to place greater reliance on the more general considerations set forth in section 3553(a), as carefully applied to the particular circumstances of the case and of the human being who will bear the consequences." *United States v. Adelson*.

In this case, it is impossible to describe the sentences imposed on appellants as substantively reasonable. In my view, none of the section 3553(a) factors, singly or in combination, can justify these shockingly high punishments, which are far greater than necessary to punish or deter appellants' conduct. The District Court provided "no reason why the maximum sentence of incarceration was required to deter [the appellants] and offenders with similar history and characteristics." *Dorvee*. The bare assertion of the need to deter, unconnected to the background and characteristics of a defendant or the

nature and circumstances of a crime, provides only superficial support for a sentence of imprisonment. Here, the factor of deterrence simply cannot “bear the weight assigned it under the totality of circumstances in the case.” *Cavera*. None of the appellants had ever served a significant term of imprisonment and two of the three had spent no time in prison whatsoever. This raised the question whether a statutory maximum sentence is necessary to deter future wrongdoing. *See United States v. Mishoe* (counseling district courts to consider previous terms of incarcerations and calibrating new sentences to reflect prior time behind bars). That is especially true here because appellants are older than most defendants and, accordingly, can be expected to have a lower risk of recidivism than most. *See* U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 16 (2004). Indeed, one of the appellants will surely die in prison, if required to serve a sentence anywhere close to twenty years; although an effective life sentence, by definition, provides complete deterrence, imposing such a sentence for the conduct underlying this conviction would be senseless.

The absence of any actual loss whatsoever and especially the absence of a victim significantly undercut any argument that this crime was particularly serious. Outside the context of Sentencing Guidelines calculations, intended loss is always less serious than actual loss, so its value as a proxy for seriousness of a crime must be carefully examined. And not all actual loss is equally serious. A fraud that results in the loss of even a few thousand dollars by an elderly or sick person who, as a result of the loss, becomes unable to afford the necessities of life or medical care is much more serious than a fraud that results in ten or a hundred times that loss by a large corporation able to absorb the financial consequences without a need to close plants, fire employees, or even declare the loss as material in public financial reports. Simply put, contrary to the assumption underlying the loss guideline, not all dollars of loss are fungible.

Moreover, the convictions in this case were for conspiracy, which proscribes an agreement to commit fraud and punishes that agreement the same whether or not a fraud was actually committed. “[W]e punish unconsummated efforts to cause harm as ‘attempts’ or ‘conspiracies’ (albeit usually less severely than completed crimes) so long as the would-be-perpetrator has come close enough to success that we can be confident his malignant designs were real and not mere fantasy, and thus that his conduct was morally blameworthy.” Frank O. Bowman, III, *Coping with ‘Loss’: A Re-examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 Vand. L. Rev. (1998). The circumstances of these convictions put them very close to the boundary of mere fantasy (or perhaps the boundary of mental competence) and the sentences should have reflected that fact. As with most attempt crimes and unconsummated conspiracies, the actual loss here was zero. The wrongfulness of the appellants’ conduct does not turn in any meaningful sense on the amount that the conspirators *sought* to obtain; all other things equal, an effort to secure \$3 billion for construction of an imaginary pipeline is not 100 times as serious as an effort to secure \$30 million for construction of an imaginary factory. Accordingly, factors other than intended loss become critical in distinguishing the seriousness of unconsummated criminal conduct. . . .

Problem 18-4

The following documents are abridged versions of the government and defense sentencing memoranda filed in connection with the sentencing of convicted Theranos founder Elizabeth Holmes. After considering these submissions, what sentence would you have imposed on Holmes and for what reasons?

GOVERNMENT’S SENTENCING MEMO, UNITED STATES v. ELIZABETH A. HOLMES, No. CR-18-00258-EJD (N.D. Cal. November 18, 2022)

Over the course of many years, Elizabeth Holmes defrauded dozens of investors of hundreds of millions of dollars. Time and again, she chose deceit over candor. She forged her own endorsements. She preyed on hopes of her investors that a young, dynamic entrepreneur had changed healthcare. She leveraged the credibility of her illustrious board. And, through her deceit, she attained spectacular fame, adoration, and billions of dollars of wealth.

When a journalist dared to ask questions about Theranos’ actual achievements, she tried to dupe him and then attacked him, along with his sources. After her fraud was revealed, she lied, obfuscated, and concealed. At trial, she blamed her COO (and longtime boyfriend), her board, her scientists, her business partners, her investors, her marketing firm, her attorneys, the media—everyone, that is, but herself.

She also put patients at risk. As money was drying up, she went to market with an unproven and unreliable medical device. When her lead assay developer quit as Theranos launched, she chillingly told the scientist: “she has a promise to deliver to the customer, she doesn’t have much of a choice but to go ahead with the launch.” As her lab director kept encountering issues with Theranos’ device and tests, she chose “PR and fundraising” over patient care. During her fraud scheme, women received wrong tests about their pregnancies, Theranos generated wrong results for cancer tests, and one victim was led to believe she had the virus that causes AIDS. Even after Theranos itself concluded that there was a possible patient impact for every single test run for patients on its “Edison” device and voided all Edison tests, Holmes minimized its primary regulator’s findings of immediate jeopardy and condition-level deficiencies as not “major.”

Holmes speaks eloquently about her desire to innovate and improve healthcare. She has demonstrated a strong work ethic, charisma, and ambition. But she is blinded by that ambition. Her reality distortion field put, and will continue to put, people in harm’s way. She stands before the Court remorseless. She accepts no responsibility. Quite the opposite, she insists she is the victim.

She is not. Holmes was the CEO and the Chairperson of Theranos. She repeatedly chose lies, hype, and the prospect of billions of dollars over patient safety and

fair dealing with investors. Elizabeth Holmes' crimes were not failing, they were lying—lying in the most serious context, where everyone needed her to tell the truth.

The Sentencing Guidelines appropriately recognize that Holmes' crimes were extraordinarily serious, among the most substantial white collar offenses Silicon Valley or any other District has seen.

According to the Presentence Investigation Report ("PSR"), they yield a recommended custodial sentence beyond the statutory maximum. The factors set forth in 18 U.S.C. § 3553—notably the nature and circumstances of the offense, the need for the sentence to reflect the seriousness of the offense and promote respect for the law, and the need for both specific deterrence and general deterrence—demand a significant custodial sentence. With these factors in mind, the government respectfully recommends a sentence of 180 months in custody. The Court should also order Holmes to serve a three-year term of supervised release, pay full restitution to her investors (including Walgreens and Safeway), and pay the required special assessment for each count.

FACTS

I. THE OFFENSE CONDUCT

A. The Investor Fraud

Through numerous misrepresentations and half-truths, Holmes sold investors on the fact that Theranos had a customer-ready device—proven through its use and validation by several large pharmaceutical companies, the Department of Defense, and Walgreens—that analyzed tiny drops of blood taken from the finger to produce better, faster, cheaper, more accurate laboratory test results.

Specifically, Holmes secured dozens of investors in Theranos over several years by falsely claiming that Theranos had manufactured one single, proprietary blood analyzer device that could run any blood test that was run by conventional labs, all from a blood sample drawn via a fingerstick rather than the traditional draw from a vein, with higher accuracy and less variability than traditional methods, due in part to its more automated process that reduced human error inherent in running blood tests in a laboratory. To support her bold claims, Holmes repeatedly told potential investors that Theranos' technology had been comprehensively validated by multiple major pharmaceutical companies and was being used in the battlefield by the Department of Defense to treat wounded soldiers. Holmes also asserted that Theranos was a profitable company and had a healthy ongoing relationship with retail pharmacy company Walgreens, through which it provided blood tests to patients beginning in September 2013. Not only did several representatives of investors testify that Holmes made these statements to them in meetings, Holmes also began providing written materials and binders to investors in 2014 and 2015 that contained these false statements.

In truth, scientists who had worked at Theranos testified that Theranos' proprietary device could never complete more than 12 types of blood tests, often with less accuracy, less automation, and more variability than traditional "predicate" machines manufactured by third-party companies, such as Siemens AG. Because of these shortcomings, pharmaceutical companies did very little work with Theranos and did not validate its technology, and the Department of Defense never used Theranos' analyzer to clinically treat soldiers. Theranos had zero revenue in 2012 and 2013 and desperately needed new sources of cash. Holmes hid the shortcomings of Theranos' proprietary device by using—without telling potential investors—modified and unmodified third-party machines to fulfill the remainder of Theranos' available blood test menu to patients at Walgreens stores. As a result, Theranos' relationship with Walgreens was faltering because the percentage of traditional venous draws was too high. But none of this information was shared with investors in Theranos.

As but a few examples of misrepresentations made by Holmes to Theranos investors:

- In April 2010, Holmes emailed executives of Walgreens reports with favorable conclusions about Theranos' technology that were emblazoned with logos of large pharmaceutical companies Pfizer, GlaxoSmithKline, and Schering Plough (now Merck) and Holmes described the attached reports as "three independent due diligence reports on Theranos systems" that were "from" those companies. However, at trial, Holmes admitted that she added the logos of the pharmaceutical companies to reports written by Theranos and enhanced the conclusions shortly before sending to Walgreens. And, while a Pfizer representative testified at trial that he told Holmes directly that Pfizer did not see a use for Theranos' technology in 2009, Holmes continued to send the doctored Pfizer report to investors throughout 2014 and 2015.

- In 2010, Holmes told Steve Burd, then-CEO of Safeway, that Theranos was cash flow neutral and projected revenue for 2011 of \$223 million when, in truth, Theranos' revenue was steadily declining from approximately \$2.8 million in 2009 to less than \$600,000 in 2011. Despite Theranos earning *zero* revenue in 2012 and 2013, Holmes and COO Ramesh Balwani provided investors with projections that Theranos would earn \$140 million in revenue for 2014 and nearly \$1 billion in 2015.

Indeed, Holmes told one investor in December 2013 that Theranos had historically earned over \$200 million from its work with the Department of Defense and pharmaceutical companies, when, in reality, Theranos had never earned more than \$10 million from both sources combined.

- In August and September 2013, internal Theranos scientists, including long-time employee Surekha Gangakhedkar and then-laboratory director Dr. Adam Rosendorff warned Holmes that Theranos' proprietary device was not able to reliably test patient samples. They both testified that Holmes pressured and rushed the scientists to quickly validate assays for clinical use in advance of the launch with Walgreens. Ms.

Gangakhedkar and other scientists ultimately resigned shortly before the Walgreens launch because of concerns with reliability of running patient tests on Theranos' proprietary device, but when Ms. Gangakhedkar informed Holmes of her concerns, Holmes responded that she had made a promise to deliver to the customer (Walgreens) that she must fulfill. Despite these internal concerns being voiced repeatedly to Holmes, Holmes reviewed and approved an article in *The Wall Street Journal* claiming Theranos' device could run 1,000 laboratory tests with more accuracy than conventional methods. Holmes shared the article with investors.

- In 2013 and 2014, Holmes repeatedly told investors that the Department of Defense was using Theranos' proprietary analyzer on medevac helicopters, in the battlefield, or to treat soldiers in Afghanistan or Iraq. In truth, the Department of Defense never used Theranos' device to clinically treat patients, nor did it ever move out of initial testing phases. One investor victim impact statement captures the depravity of Holmes' lies in this respect as follows: "I feel strongly that the sentencing should take into account Defendants' intentional decision to prey upon investors' reverence for our servicemen and servicewomen in the Armed Forces. Our country's freedom is protected everyday by the courageous and selfless service of these men and women, and the Defendants took advantage of investors' patriotic feelings for selfish gain through deceit. Indeed, Elizabeth Holmes lied to me about saving soldiers' lives through military contracts and Theranos' use of 'proprietary technology' on military helicopters. Simply put, Holmes's actions were loathsome and un-American."

- In August 2014, Balwani forwarded to Holmes an email from Walgreens executives expressing a desire to reduce venous draws to below 10% (whereas they had been hovering around 40% for most of the year) before expanding further. Nevertheless, Holmes presented financial projections to at least one investor in October 2014 that projected Theranos would increase from being in a few dozen Walgreens stores to being in 900 locations by 2015.

Holmes exploited investors' altruistic motives to dupe investors of all experience levels to invest in Theranos. Holmes fooled investors who were new to the healthcare investment sphere as well as investors with deep sophistication and experience in the healthcare and bio-tech sector, such as PFM, a regulated investment entity, led by managing partner and chief investment officer Brian Grossman, who had over twenty years of experience analyzing or investing in companies like Theranos. Mr. Grossman testified that he sent lengthy due diligence questions to Holmes and Balwani to ensure there was no ambiguity about the limitations of Theranos' proprietary technology, and yet he was shocked to learn more than eighteen months after his investment that Theranos used third-party commercial machines and not exclusively Theranos' proprietary device as Holmes had previously led him to believe. Former Secretary of State George Shultz invested in Theranos on behalf of his family members and, as his son and daughter-in-law described in their victim impact statement, "[Holmes] succeeded by using my father (and others) and played him for the fool."

Holmes often seized upon investors' desire to make the world a better place in order to lure them into believing her lies. For example, Lisa Peterson, a representative of investor RDV Corporation, was moved by Holmes' pitch because she could envision the benefits Holmes promised Theranos could deliver on her husband's health condition. Holmes and Balwani knew this and even sent text messages to each other such as "[t]hey also care about our mission to do good because they are a religious org" to which Holmes responds "Good[.]"

Holmes' fraud was spectacularly successful. At the peak, she was "one of the richest and most celebrated woman leaders in our [country's] history." Victim Impact Statement of Alex and Janel Shultz. By the end of 2014, Holmes' shares in Theranos were valued at more than \$4 billion. She took home hundreds of thousands of dollars in annual salary. She traveled in a Theranos-paid private jet. She and Balwani ruled Theranos from a \$15 million mansion in Atherton. She donned the cover of *Fortune*, *Forbes*, *Inc.*, *Glamour*, and *T: The New Your Times Style Magazine*. She dined at the White House; she gave the commencement address at Pepperdine University; she joined the Board of Fellows of Harvard Medical School; and at the peak of the fraud was named by *Time* as one of the 100 Most Influential People in the World.

Between 2010, when she induced Walgreens and Safeway to invest based on false pharmaceutical company endorsements and fantastical revenue projections, and March 2015, Holmes raised hundreds of millions of dollars. As the PSR notes, \$730,840,309 came from "Series C-1" and "Series C-2" investors who invested subsequent to Theranos' public relations push in September 2013 during the conspiracy. . . .

B. The Impact on Patients

Throughout the relevant time period, Holmes touted Theranos as a company that would revolutionize blood testing, making health information more reliable and more accessible. Beginning in late 2013, Theranos actually offered clinical blood testing services to the public, first in the Bay Area, then in Arizona. To jumpstart the process of making its tests available to the public, and to reach as many patients as it could, Theranos partnered with retail pharmacy chain Walgreens—a company with a nationwide footprint that could make Theranos' product accessible to most of the country's population.

In so doing, Holmes and Balwani benefitted from goodwill and credibility associated with the Walgreens name. There can be no doubt that, as with investors, patients were more comfortable trusting Theranos because they assumed that an established business like Walgreens would not promote a service that was not similarly legitimate and reputable. Thus, Walgreens was not only Theranos' launchpad but also its de facto ambassador. Throughout the partnership with Walgreens, Defendants pushed for wider and faster expansion, with Walgreens holding back and expressing concerns over Theranos' inability conduct much of its testing using its vaunted

fingerstick method, among other things. Despite Walgreens' hesitations about expanding the Theranos partnership more rapidly, thousands of patients ended up receiving blood test services from Theranos between 2013 and 2015.

The evidence at trial revealed something Holmes and Balwani worked hard to hide from those patients: Theranos' proprietary testing was not reliable. Theranos' homegrown "TSPU" device—used for several important tests including HCG (to assess the presence and stage of a pregnancy), PSA (to check for potentially lethal prostate cancer), and TSH (a measure of thyroid health)—was plagued by issues. It broke down frequently and, when it did return results, it suffered from serious accuracy problems. Erika Cheung, a Theranos employee who operated the TSPU to generate patient test results, had the following to say about her faith in the technology: I was really stressed and uncomfortable with what was going on because I had at that point amassed a lot of evidence to suggest that the technology, the Edison device specifically, were not adequate to test on patients, and I did not feel comfortable running patient samples. Ms. Cheung went on to explain that she was concerned about patients, who "think that they're getting accurate results, and they're making very important medical decisions about what their treatments are, what their diagnoses are, what medications they take. . . ." Dr. Rosendorff agreed that the Edison device was flawed, explaining that he resigned from his job as Theranos lab director partly because he was being asked to vouch for tests that he did not have confidence in, and he felt that the testing platform "was not allowing [him] to function effectively as a lab director." Similar problems arose when Theranos used modified third-party devices to test finger-stick samples. *See* 10/6/21 Tr. (Dr. Rosendorff testifying that the Theranos modifications to third-party devices made them less accurate).

Erika Cheung and Dr. Rosendorff were not alone in their concerns about the reliability of Theranos technology. Surekha Gangakhedkar was a senior scientist who resigned from Theranos upon learning of the company's plan to use its Edison 3.0 and 3.5 devices to conduct clinical testing for patients. She explained that she knew of "reliability issues" with those devices that were not fully resolved, affecting their ability to return consistent results.

Given the dim view that Theranos' own scientists took of its technology, it is no surprise that a number of Theranos patients received results that were suspicious or demonstrably incorrect. For example, Dr. Mark Burnes testified at trial about a patient named Mehrl Ellsworth, who sought PSA (prostate specific antigen) testing from Theranos in advance of an international trip. Theranos reported Dr. Ellsworth's PSA levels to be extremely elevated compared to his previous results—a change that could have indicated of prostate cancer if accurate. Dr. Ellsworth's next test from Theranos, however, showed normal PSA levels. The third test from Theranos was once again dramatically elevated, but subsequent testing returned normal results. It turned out that the two unexpectedly elevated PSA results from Theranos had something in common: they were both run on a Theranos proprietary system, whereas the normal results had been generated by traditional, FDA-approved methods. Dr. Burnes was able to conclude

that the elevated PSA levels indicated by the Theranos-specific tests were not valid. Theranos' repeated failure to return an accurate PSA test result after multiple attempts using its proprietary equipment speaks volumes about the reliability of Theranos technology.

Theranos patients also experienced problems with the company's PT/INR test, which relates to blood clotting. Patient "AT" suffered from atrial fibrillation (AFib) and her doctor instructed her to obtain a PT/INR test from Theranos. Although her PT/INR level was normally between two and three, Theranos returned an unusually low level of 0.08. "AT's" doctor did not believe the Theranos results could be accurate, and sent her to a traditional lab for confirmatory testing, which yielded a result of 2.8—in her typical range for that assay. "AT" told government investigators that, had she adjusted her medication in response to the erroneously low Theranos PT/INR value, she would have been at risk for internal bleeding, a common complication of AFib. Theranos' own employees were not immune from questionable results. "EG" was a Theranos phlebotomist who had been on blood-thinning medication for years due to a history of blood clots. When she went to Theranos for a PT/INR test, her results came back markedly different from her usual levels, and her doctor adjusted her medication in response. Due to skepticism over the validity of the Theranos results, "EG" had confirmatory testing performed at a traditional lab and received results matching her usual values, showing that the adjustment to her medication had been unnecessary.

Several Theranos patients received erroneous HCG tests providing inaccurate information about the status of their pregnancies. Brittany Gould and her treating nurse practitioner, Dr. Audra Zachman, testified at trial about multiple dubious HCG results provided by Theranos in October 2014. Ms. Gould, who had suffered multiple miscarriages in the past, obtained a series of HCG values from Theranos and traditional lab Quest Diagnostics over the course of a week. The Theranos results—which included a dramatic drop in HCG value—strongly indicated that Ms. Gould was having another miscarriage, but confirmatory testing by Quest indicated a viable pregnancy, and Ms. Gould went on to deliver a healthy baby. Dr. Zachman testified that she doubted the accuracy of both Theranos test results received by Ms. Gould, and stated that she had never had accuracy issues with HCG tests from other labs the way she did with the results for Ms. Gould. Unfortunately, Ms. Gould's experience with Theranos' HCG test was not unique. In May 2014, a physician had called Theranos about HCG results that turned out to be unexpectedly low and would have suggested a miscarriage if accurate, prompting the company to collect another sample and rerun the test. Five months later, a provider contacted Theranos to complain about Theranos HCG tests that had suggested that a pregnant patient was miscarrying. In response to that Theranos test value, the patient's doctor had her discontinue pregnancy medications and get ready for her next cycle. When the patient was tested again for HCG, however, her value was over 2000 and a subsequent scan detected a fetal heartbeat. When Holmes learned about this erroneous test result, she asked Balwani, "How did that happen?"—a strange question from someone who had been aware of problems with Theranos' HCG test for months.

It is impossible to know exactly how many times frightening scenarios like these played out in the lives of patients who trusted their blood testing to Theranos. The government's investigation of Theranos did not reveal a centralized, comprehensive log of customer complaints. Instead, that information was apparently stored in multiple places and compiled as needed. Equally alarming is the high likelihood that numerous patients relied on inaccurate blood test results from Theranos without ever realizing that they were unreliable. It is likely that some portion of Theranos patients experienced harm to their health as a result of invalid Theranos test results without ever realizing the cause.

The evidence available paints a bleak picture of Theranos' ability to return valid results using its TSPU analyzer. Internal quality control checks at Theranos provided a valuable objective measure of how accurate the analyzer was. Analyzing standardized samples, with known concentrations of the substance being tested, the Theranos machines would either pass or fail daily checks of individual assays. In March of 2014, records indicate that nearly 26% of quality control checks on the TSPU resulted in failures, i.e., inaccurate results. Some of the individual assays performed even worse. Theranos' PSA test failed quality control nearly 30% of the time, and the company's test for triiodothyronine failed more than 50% of the time. Because there is no guaranteed way to identify inaccurate patient test results, Theranos' poor QC numbers are the best available method to estimate how frequently Theranos was sending incorrect values to patients.

When Centers for Medicare and Medicaid Services (CMS) inspected Theranos in the late summer and fall of 2015, the agency found systemic issues with quality control for the Theranos miniature analyzer or TSPU. In particular, CMS put Theranos on notice of "multiple and recurrent time periods (across all analytes tested) of abrupt shifts in [quality control] means, high rates of 1-2s QC rule failures, and QC CVs far exceeding limits for a stable testing process." In other words, Theranos' own quality control data revealed severe reliability problems with its testing systems, just as employees had warned Defendants years earlier. Faced with CMS's findings, Theranos itself admitted that there had been "a global and long-term failure of the quality control program for this instrument," and further concluded that "there is a possible patient impact for every test reported from the laboratory's TPS 3.5 instruments." Based on the scale of the problems highlighted by CMS, Theranos voided every patient test result ever run on its Edison device in the clinical lab. Of course, this step did nothing to mitigate the harm patients would already have suffered due to their reliance on inaccurate medical test information.

C. The Cover Up

In April 2015, Holmes learned that a *Wall Street Journal* reporter was working on a negative story about Theranos. She and Balwani scrambled to have the Phoenix store prepared to perform only fingerstick tests rather than vein draws—hoping to avoid the possible impression Theranos was doing ordinary blood testing. (SB: "We need tomorrow to test and then the team can push production tomorrow night [redacted] So

Wednesday it will trigger fs for gc18 [general chemistry] [s]o if he comes it may be 3 fs.”). Ultimately, Balwani told Holmes “[t]he team is not confident about pushing out fingerstick tonite we don’t want to rush this. We went thru hell.” Unable to dupe the reporter, they then hired David Boies to try to get him to drop the story. When that failed, Holmes personally appealed to the owner of *The Wall Street Journal*, who also was a significant investor in Theranos, to quash the story.

Holmes also attacked those she believed to be the reporter’s sources. See Victim Impact Statement of Alex & Janel Shultz at 1 (“[S]he sure did her best to intimidate and silence the truth tellers.”). In June 2015, she had a man sit all day outside of Erika Cheung’s new workplace to serve a letter from Boies Schiller Flexner LLP threatening her with legal action. (SB: “I am ok sending letter to Erika as in [General Counsel] heather [King’s] email”). After the reporter published a negative story, Holmes tried to dismiss Cheung as a low-level disgruntled employee. She also had Boies Schiller lawyers surprise Tyler Shultz at his grandfather George Shultz’s house to have him sign an affidavit identifying himself as a source for the reporter. Leach Decl.; (EAH: “If Tyler thinking abt George fyi at right time”); (SB: “You not calling George back also sends a message that we are about to suit”). The incident enraged George Shultz, which he described as “one of the worst little things he had seen anybody try to do.” Leach Decl.; (“George wants to know what Tyler has done. Would you ask David if I should say or tell him we’ll let him know la[t]er and txt me back”). During this time period, Holmes and Balwani also discussed “nail[ing] this mother fucker” “in CLIA” who they believed to be spreading negative information, and at various times contemplated action against “Tyler [Shultz],” “Erika [Cheug],” “Adam [Rosendorff],” and “Rochelle [Gibbons],” the wife of a Theranos scientist who committed suicide in 2013.

When the negative *Wall Street Journal* story broke, Holmes lied and dissembled. On October 15, 2015, when confronted on Jim Cramer’s *Mad Money* with the *Journal*’s claim that Edison could only do 15 out of 240 tests, Holmes falsely stated “every test that we offer in our laboratory can run on our proprietary devices.” At the time, Theranos was not using Edison (or any future iteration of its device) for *any* tests, and had never used Edison for more than 12. On October 21, 2015, she falsely stated at a public conference that Theranos “never used commercially available lab equipment for fingerstick based tests.” The comment so concerned Balwani that he texted: “Worried about your ‘all fingersticks on our technology’ comment.”

Months later, Holmes “continued to withhold information from [RDV] and other investors, which . . . made it impossible to make informed decisions about the status and value of our investment.” She insisted the issues CMS identified were not major and downplayed their significance.

Holmes’ coverup had lasting and devastating effects. According to one victim impact statement, Holmes “intentionally lied to [George Shultz] about Tyler to discredit him to prevent [George Shultz] from learning the truth,” creating a “permanent rift” within the family. See Victim Impact Statement of Alex & Janel Shultz (describing how

Holmes “[took] a wrecking ball to [Shultz’s] family” and stating “[t]he most heart breaking of all is to hear your son describe that he contemplated suicide because he felt abandoned, isolated, threatened and hopeless, for doing the right thing.”). . . .

THE SENTENCING GUIDELINES CALCULATION

The PSR calculates the total offense level as follows:

a. Base Offense Level, U.S.S.G. § 2B1.1(a)(1)	7
b. Specific offense characteristics, U.S.S.G. § 2B1.1(b)	
Loss more than \$550,000,000, U.S.S.G. § 2B1.1(1)(P)	+30
Offense involving 10 or more victims, U.S.S.G. § 2B1(b)(2)(A)	+2
Offense involving the conscious or reckless risk of death or serious bodily injury, U.S.S.G. § 2B1.1(b)(16)	+2
c. Adjustment for Role in the Offense, U.S.S.G. § 3B1.1(c)	+4
d. Total Offense Level	43

Holmes falls within Criminal History Category I. Thus, for Offense Level 43, the Guidelines recommend a sentence beyond the statutory maximum of 80 years. The PSR recommends that the Court vary from Guidelines and impose a sentence of 108 months. . . .

For the reasons set forth above, the 30-point enhancement for a loss of more than \$550 million is warranted. In no event is the loss less than \$150 million.

II. OFFENSE INVOLVING 10 OR MORE VICTIMS

The PSR applies a two-point enhancement for the number of victims. This enhancement also is warranted. . . .

The PSR correctly finds that this enhancement applies. More than 10 individuals and entities invested in Theranos in the C-1 and C-2 rounds subsequent to September 2013, when Theranos issued a press release announcing its launch and induced *The Wall Street Journal* to falsely tout Theranos’ capabilities. Seven of those investors testified in the trials to the misrepresentations and half-truths they were told. An additional nine provided statements to the government or the SEC or submitted a victim impact statement. *See generally* Leach Decl. Representatives of Walgreens and Safeway also testified in the trial to how they were deceived into investing in Theranos. Under any measure, more than 10 individuals or entities sustained a loss as a result of Holmes’ conspiracy and wire fraud offenses.

III. OFFENSE INVOLVING CONSCIOUS OR RECKLESS RISK OF DEATH OR SERIOUS BODILY INJURY

A. Defendant's Conduct Created a Risk of Serious Harm to Theranos Patients

The Guidelines provide for a two-level increase in offense level if the conduct involved “the conscious or reckless risk of death or serious bodily injury.” U.S.S.G. § 2B1.1(b)(16)(A). The evidence in this case establishes that this enhancement is warranted. Holmes could have founded any kind of business when she dropped out of Stanford. She chose to create a startup operating in the medical field, where the stakes are inevitably high. As described above, Holmes caused Theranos to market and perform blood tests that were not sufficiently accurate or reliable for clinical use. Despite knowing of the serious flaws in Theranos’ testing, Holmes continued to promote and offer those tests to patients with the knowledge that those patients and their physicians would rely on the Theranos tests to make medical decisions. Her conduct created a significant risk of death or serious injury as a result of misdiagnosis; an inaccurate test result could cause a patient to undergo an unnecessary treatment that could harm them, or to forego a necessary treatment that could save them. As Dr. Rosendorff testified at trial, “Accuracy is critical. Physicians and other health care providers depend on the accuracy of a test to make medical decisions, sometimes life and death medical decisions.” The obvious danger associated with inaccurate and unreliable medical tests is sufficient to warrant application of U.S.S.G. § 2B1.1(b)(16)(A), regardless of whether the government can show how much harm resulted. Courts recognize that this two-level enhancement “focuses on the defendant’s disregard of risk, rather than on the result.” *United States v. Henderson*. In other words, the government “need not show actual injury to any particular victim.” Additionally, under Ninth Circuit law, a defendant cannot escape this enhancement by claiming ignorance of the risk created by his conduct. *United States v. Johansson* (interpreting similar provision in U.S.S.G. § 2F1.1, now consolidated with Section 2B1.1). “[A] defendant does not have to subjectively know that his conduct created the risk.” Nor does the enhancement require that the defendant take some violent or direct action toward victims. Thus, in *Henderson*, it was enough that the government presented evidence that false entries in a computerized patient record system “could have delayed and influenced patient care.” *Henderson*. In *United States v. Moran*, the enhancement was applied where defendants ran a healthcare facility and admitted elderly patients with dementia although the facility and staff were not equipped to meet those patients’ needs. *United States v. Moran*. In *Popov*, the Ninth Circuit affirmed application of the standard where a doctor signed patient charts and Medicare reimbursement forms indicating he had supervised medical examinations when he had not. *United States v. Popov*. The risk to Theranos patients created by Holmes’ conduct is at least as serious and certain as the dangers posed by the criminal conduct in the above cases.

Moreover, the evidence shows that Holmes was fully conscious of the risks caused by Theranos’ unreliable tests—starting years before the company launched its

testing service and continuing through the point when they finally discontinued it. As early as 2010, Holmes laughed off a dire warning she received from an outside consultant evaluating Theranos technology. Kevin Hunter was hired by Walgreens in May or June 2010 as a laboratory consultant to advise Walgreens on its incipient partnership with Theranos. Hunter participated in regular meetings with Holmes and Balwani, during which they told him that the Theranos Edison analyzer could perform approximately 193 tests. Hunter's team wanted to perform comparison testing of Theranos against a lab at Stanford, but Holmes and Balwani would not agree. Nor would Holmes allow Hunter to take a tour of the Theranos lab. As Hunter asked more pointed questions, Holmes and Balwani began to take him out of the loop in conversations with Walgreens. Eventually, Hunter's frustration with the lack of substantiation for Theranos' claims moved him to confront Holmes during a video teleconference. He admonished her that her company was going to offer lab tests that people would use to make medical decisions, and warned her of the risk that she could be responsible for killing someone if the lab put out bad tests, and that she might go to jail as a result. Holmes reportedly responded with something to the effect of, "They don't put pretty people like me in jail." Hunter eventually separated from the Theranos-Walgreens project.

Holmes's lax attitude toward patient safety continued into 2013 and beyond. Leading up to the launch of Theranos' testing services, Theranos' lab director spoke to Holmes personally in order to "raise alarm bells" about assays that he "didn't feel were ready for launch." During that time period, Holmes and Balwani had set a schedule for assay validation that Dr. Rosendorff viewed as "rushed." In his communication to Holmes, Dr. Rosendorff suggested that Theranos might need to delay the launch and work on its calibrators or chemistry—essentially returning to the fundamentals to identify and solve "a basic problem" with the company's equipment. Dr. Rosendorff testified that Holmes did not seem surprised to hear of problems with Theranos' tests, but that the conversation seemed to make her very nervous. Ultimately, she refused to delay the launch as he recommended, suggesting instead that certain tests could be performed on traditional equipment. While Theranos' clinical lab was in operation, Holmes received reports of serious problems with the company's tests. In April 2014, Balwani received an email from a senior scientist at Theranos reporting that the company's proprietary potassium results were running high as a result of sample hemolysis, forcing the lab to review images of all samples to determine whether to rerun—a practice Balwani told Holmes was "not scalable." Earlier in that email chain, Balwani had questioned the accuracy of the test "given this is an ISE," indicating awareness of preexisting accuracy problems with Theranos' ion-selective-electrode blood tests. Also in April, employee Tyler Shultz sent Holmes a detailed email to alert her to several ways in which Theranos was overstating the accuracy of its tests and potentially masking problems. The points raised by Mr. Shultz gained no traction with Holmes. In late May 2014, Dr. Rosendorff halted all testing of HCG (a pregnancy hormone) on Theranos analyzer in light of inaccurate results, and Balwani immediately passed along that news to Holmes. Dr. Rosendorff testified that the company resumed HCG testing on the Edison despite the fact that issues with that test persisted.

In August of that year, Dr. Rosendorff emailed Balwani to inform him that Theranos' bicarbonate test had lost all diagnostic value "and probably also reliability" due to the fact that the company voided all abnormal results in response to accuracy problems with this test. Balwani forwarded that notice to Holmes. Around that same time, another email exchange memorialized Balwani asking another Theranos scientist about the company's PT/INR test reporting inaccurately low numbers. When the scientist provided a theoretical explanation and proposed an internal study to address the problem, Balwani emailed Holmes complaining, "Always another study after the fact.". In September 2014, Defendant's brother Christian Holmes sent her an individual email seeking a "candid conversation" because it was "pretty obvious" the company was having issues with the accuracy of its calcium, potassium, and sodium tests. In that message, Christian went so far as to suggest Theranos stop offering those tests until the problem was identified and solved. By late November 2014, Defendants' collective faith in their lab still had not improved, with Balwani texting Holmes that the Normandy lab (where Theranos conducted its proprietary testing) was a "f-ing disaster zone." Despite ample notice of serious issues plaguing Theranos' technology, Holmes and Balwani stubbornly continued to send out clinical test results from their "disaster zone" of a laboratory, forcing Theranos' patients to unknowingly incur a risk of death or injury. Ultimately, they had to void every single Edison test following extremely negative CMS findings and their own assessment of possible patient impact. . . .

IV. ROLE IN THE OFFENSE

Holmes should also receive an additional enhancement due to her role as a manager and leader of the extensive criminal activity that occurred in connection with the company she founded. Under the Guidelines, a four-level increase is warranted if a defendant was an "organizer or leader" of criminal activity that either (1) involved five or more participants or (2) was otherwise extensive. U.S.S.G. § 3B1.1(a). The commentary for that section of the Guidelines defines "participant" as "a person who is criminally responsible for the commission of the offense," although that person "need not have been convicted." In this case, the Court need not determine whether the offense involved five or more participants. Section 3B1.1(a) applies because, regardless of the number of culpable participants, the criminal activity here was "otherwise extensive." The Guidelines commentary advises that, in determining whether criminal activity was extensive under this provision, a court should consider "all persons involved during the course of the entire offense." Even if a fraud involves fewer than five participants, it still can qualify as extensive under section 3B1.1(a) if it "used the unknowing services of many outsiders." That language perfectly describes the way Holmes and Balwani used the many employees of Theranos—along with Walgreens personnel, marketing experts, journalists, and others—to carry out their scheme to defraud investors. . . .

[The] government respectfully recommends a sentence of 180 months in custody.

The factors the Court should consider in determining the appropriate sentence include (i) the nature and circumstances of the offense and the history and characteristics of the defendant, (ii) the need for the sentence imposed to reflect the seriousness of the offense, to provide just punishment for the offense, to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed correctional treatment, (iii) the Sentencing Guidelines and related Sentencing Commission policy statements, (iv) the need to avoid unwarranted sentence disparities among similarly-situated defendants, and (v) the need to provide restitution to the victim of the crime. 18 U.S.C. § 3553(a).

As described above, Holmes' Total Offense Level (43) and Criminal History Category (I) yield a sentence within Zone D. Zone D sentences shall be satisfied with a custodial sentence. § 5C1.1(f). The applicable sentencing custodial range is capped at 960 months' imprisonment. This range assumes a sentence of 240 months' imprisonment (the statutory maximum) would be imposed for each of the four counts of conviction, run consecutively. Considering the extensiveness of Holmes' fraud, the sentencing factors support a sentence of 180 months' imprisonment, as it would reflect the seriousness of the offenses, promote respect for the law, provide for just punishment for the offenses, and deter Holmes and others. . . .

The nature and circumstances of Holmes' crimes are aggravating factors for several reasons. First, Holmes' crimes were not isolated events. They were not the result of poor choices on a single day. They were not limited to her interactions with one investor or a single patient. Instead, Holmes developed a complex scheme, and executed it over the course of many years. Holmes presented a fake story about Theranos' technology day after day in meeting after meeting. Holmes maintained this façade of accomplishments, after making the calculated decision that honesty would destroy her company. She ignored innumerable opportunities to choose a lawful path.

Second, each investment in Theranos came with opportunity cost. Money invested with Holmes' company was money not invested in legitimate, promising technology. Holmes' scheme not only diverted valuable funding to her fraudulent purposes, but it also has the effect of discouraging investments generally in new technologies, as investors reasonably remain skeptical that the next investment pitch is too good to be true. In short, Holmes' criminal activities were serious, extended, and extremely damaging. The nature and circumstances of Holmes' criminal activity are significant aggravating factors in determining an appropriate sentence.

In addition to the nature of the offenses, Holmes' history and characteristics militate in favor of a significant custodial sentence. Some defendants have difficult childhoods filled with obstacles that must be overcome. Holmes did not. Some defendants have few formal educational opportunities, and instead are left to receive their educations informally, where they can find them. Holmes had many educational opportunities. Some defendants have no support networks, and instead must fend for themselves. Holmes had and continues to have a substantial one. While some defendants

certainly deserve consideration from a sentencing court for the obstacles they have overcome and the regrettable criminal motivations they adopt, Holmes does not. Holmes, with strong family support, exceptional educational opportunities, and financial stability, chose to commit fraud, repeatedly. Holmes' history and characteristics are aggravating factors that should lead this Court to impose a significant custodial sentence. Similarly, the presence of these aggravating factors should discourage the Court from varying substantially from the applicable Guidelines range.

This Court should send a clear message to the community that white collar crime is serious and deserving of significant punishment. Through this sentencing proceeding, the public will observe the law, through this Court, treat fraudsters fairly for significant crimes. Statements from victims in this prosecution provide additional support for the argument that a significant custodial sentence is needed to promote respect for the law. In his statement, investor Craig Hall wrote, "I urge you, first and foremost, to consider the broader and more significant impact this sentencing will have on our society moving forward. Given the high-profile nature of this case, the sentencing will undoubtedly send a message to the community at large. That messaging should, in my opinion, clearly and unequivocally communicate that there is no justification for or tolerance of fraud in the business world. Deterring similar debacles is critical to avoid society's future loss of hundreds of millions of dollars, amounts which could otherwise be used to aid in the entrepreneurial efforts of hard-working, honest Americans, bolstering the economy and fostering the American Dream." Craig Hall Letter, dated Sept. 6, 2022. In Brent Bingham's victim impact statement, he wrote, "I feel sentencing should reflect a standard that medical related technology shouldn't be Beta tested by patients without consent. Medical technology companies should receive a very clear message that placing finance and 1st to market considerations above engineering and science is not acceptable." In Elizabeth R. Daoust's victim impact statement, she wrote, "Penalties for white collar crime seem too often to be slap[]s on the wrist. People/companies perpetuating financial fraud often get light, if any, sentences in a minimum security prison and keep most of the stolen money. This system of 'justice' has alienated a large swath of our citizens, weakened values, and turned more people against our government. It is a serious problem that both the courts and legislatures need to remedy." These, and many other, victim impact statements demonstrate the need for this sentence to reflect the seriousness of the offenses and promote respect for the law. . . .

For these reasons, the government recommends the Court sentence the defendant to 180 months in custody and order her to pay \$803,840,309 in restitution and a \$400 special assessment.

DEFENDANT ELIZABETH HOLMES' SENTENCING MEMO, UNITED STATES v. ELIZABETH A. HOLMES, No. CR-18-00258-EJD (N.D. Cal. November 18, 2022)

I. PRELIMINARY STATEMENT

Elizabeth Holmes stands before the Court having been convicted of conspiracy to commit wire fraud and three individual counts of wire fraud with respect to certain sophisticated investors in her company, Theranos. In sentencing her, the Court's task is a heavy one. Ms. Holmes was 19 when she founded her company, her first business experience; in 2010, the beginning of the charged period, she was 25 and turned 26; and when her company shut down in 2018 she was just 34 years old. She founded and built Theranos for indisputably good reasons. She worked tirelessly along with hundreds of brilliant and committed employees to improve access to affordable health information. The company achieved incredibly valuable inventions for which the United States government is still issuing patents as recently as July of *this year*. She suffered substantial trauma throughout the time period of the offense. When criticisms arose, she committed fully to identifying, acknowledging, and fixing errors. She never cashed out, and she went down with the ship when the company failed. And regardless of the sentence the Court imposes, for the rest of her life, she and her family will be punished. As her partner knows all too well, "[t]here is no avoiding the scorn that accompanies Elizabeth Holmes."

Among the countless people in our society who do not know Elizabeth Holmes yet think they know about her case from the unusually intense media coverage of it, Ms. Holmes has become a caricature to be mocked and vilified. The Court has the opportunity (and obligation) here to look beyond that caricature, as it has throughout this case, and examine Ms. Holmes the human being. More than 130 individuals who actually know Ms. Holmes have written to the Court to help in that process. Among them are friends, family, Theranos investors, Theranos Board members, and former employees who served in a variety of roles at Theranos, all of whom submit these letters despite the risk that they will be criticized for their support. These are people who know Ms. Holmes and her character, remorse, and capacity to do good.

The real Elizabeth Holmes is "a compassionate friend who is there for the people around her—to support, comfort, cheer on, problem solve, and connect."

The real Elizabeth Holmes is the friend who writes "letters that I still keep and read again anytime I need to be reminded of my purpose and inner strength."

The real Elizabeth Holmes is a devoted mother who "turns . . . ordinary moments into magical experiences of unbounded love and wonder" for her son.

The real Elizabeth Holmes is "[e]xtremely genuine, giving, and selfless," "unlike anyone else I've met in Silicon Valley."

The real Elizabeth Holmes was an "approachable, attentive, and supportive" "employee focused CEO[.]".

The real Elizabeth Holmes faced the challenges at Theranos from 2016 to 2018 with “steadfast ethical principles, complete dedication to what was best for Theranos, and admirable courage.”

The real Elizabeth Holmes is “driven by a single and simple purpose; she wants to make the world a better place than it would have been without her.”

The real Elizabeth Holmes “has within her a sincere desire to help others, to be of meaningful service, and possesses the capacity to redeem herself.”

* * *

Section 3553(a) requires the Court to fashion a sentence “sufficient, but not greater than necessary,” to serve the purposes of sentencing. If a period of confinement is necessary, the defense suggests that a term of eighteen months or less, with a subsequent supervised release period that requires community service, will amply meet that charge. But the defense believes that home confinement with a requirement that Ms. Holmes continue her current service work is sufficient. We acknowledge that this may seem a tall order given the public perception of this case—especially when Ms. Holmes is viewed as the caricature, not the person; when the company is viewed as a house of cards, not as the ambitious, inventive, and indisputably valuable enterprise it was; and when the media vitriol for Ms. Holmes is taken into account. But the Court’s difficult task is to look beyond those surface-level views when it fashions its sentence. In doing so, we ask that the Court consider, as it must, the real person, the real company and the complex circumstances surrounding the offense conduct, and the important principle that “no defendant should be made a martyr to public passion.” *United States v. Gupta*. As discussed in more detail in the pages that follow, this is a unique case and this defendant is a singular human with much to give.

II. MS. HOLMES’ PERSONAL HISTORY AND CHARACTERISTICS

As the more than 130 letters submitted on her behalf attest, Ms. Holmes is a warm, thoughtful friend; a loving and dedicated mother and partner; a good listener; a mentor to young women and entrepreneurs; a boss who cared about the company’s employees; a chief executive dedicated to her company’s mission; an intelligent and inventive problem solver; and a humble, hardworking, and compassionate woman who deeply wants to give what she can to the world. Her positive impact on her friends, family, and former employees and advisors is evident in this outpouring of support. Despite her current circumstances, she is an “ardently resilient optimist”—a person whose “devotion to constructive impact remains natural, profound, and inspirational” even as she faces the prospect of a profound loss of liberty.

A. Ms. Holmes’ Personal History

1. Childhood

Ms. Holmes began developing her good qualities through a childhood for which she has always been grateful. Born in Washington, D.C. in 1984, Ms. Holmes was raised primarily in Washington, D.C. and Houston, Texas with her brother Christian, two years her junior. Her parents were both public servants. Her mother, Noel, worked on Capitol Hill for Members of Congress and Committees in the House of Representatives. Her father, Chris, spent years working at the Environmental Protection Agency, the United States Agency for International Development (USAID), and the State Department, focused on issues related to disaster relief. Chris was Ms. Holmes' personal hero. He would return from his work abroad with stories about responding to disease, genocide, war, and natural disasters and imparted the view that the most important thing he could do with his life was to help others. From her father, Ms. Holmes learned the lessons of stoicism and sacrifice in service of the greater good, and she took them to heart early in her childhood as a foundational trait.

Ms. Holmes was a studious and hard-working child. She had, as her mother describes, a "gritty determination." She was naturally curious with "a deep hunger for knowledge," which she explored as a young child through talking about nature and the world with her parents. As a teenager, she poured that curiosity into schoolwork and extracurriculars, such as spending part of her Saturdays taking Chinese lessons from the time she was a pre-teen. Ms. Holmes' brother Christian describes her focus and work ethic as a teenager:

She was driven and goal-oriented and thrived in whatever she set her mind to, whether it was academics, personal challenges she set for herself, developing a new skill, etc. She had an extraordinary work ethic and has always excelled as a student. She never cut corners. . . . It was critical to her to apply herself fully to whatever she took on. She especially valued the relationships with people she felt she could learn from and be challenged by. Teachers and mentors were just as important as friends, and she actively sought out direction from people with experience who she could learn from. . . .

2. College

Ms. Holmes began attending college at Stanford University in the fall of 2002. Consistent with her longtime interest in science, Ms. Holmes focused on chemical engineering with an eye toward combining several engineering disciplines. She brought to those difficult classes her deep work ethic and sound moral compass. As her college friend Lauren Stat describes, Ms. Holmes insisted that there was no need to rely on study groups who had inherited the answers to problem sets, "those relics of dubious morality. And so with her leadership, we proceeded to learn the right way, the hard way." Ms. Holmes started auditing graduate-level courses and working in the laboratory of Professor Channing Robertson, where she was part of a team developing microfluidic sensors.

Ms. Holmes also enjoyed the social aspects of college life, including the friends she made there. Her mother describes that in her regular calls “she was full of joy and enthusiasm about her life.” Her brother Christian recalls how she came out of her academic shell towards the end of high school and that in the first year at Stanford “she seemed happy and well-adjusted to college life.” Her friends describe her as a caring person who believed in the genuine goodness of people and loved to talk about ideas. She was “full of vibrancy, curiosity, kindness, and warmth,” “extremely intellectual yet unpretentious and always looking to better herself and those around her.” As friend Prerna Gupta describes:

We spent countless hours traversing the Stanford hills and discussing the meaning of life. She was raised as a Christian, and I as a Hindu, but we found common ground in our explorations of Buddhism. We shared a belief that we were meant to do good in the world. That the purpose of life was love. That we could achieve anything we set our mind and hearts to, as long as we didn’t give up. And that, most of all, we must dedicate our lives to having a positive impact on the world.

Ex. A; *see id.* (“While fraternity boys puked on carpets and tried to coerce us into endless games of beer pong, Elizabeth whispered in the corner about things like philosophy, psychology, consciousness, and the meaning of life.”). This period was one of the happiest of Ms. Holmes’ life.

The summer following her freshman year at Stanford, Ms. Holmes interned at the Genome Institute in Singapore. Putting together concepts from various types of research she had conducted, she came up with the idea that would form the basis for her first patent application. When she returned home from the summer abroad, she holed up in her room with her research and filed the provisional patent application with a mind to build something from the invention that would make early detection of disease easier.

Stanford’s autumn quarter began in September 2003. Ms. Holmes had moved into her sorority house at Kappa Alpha Theta, surrounded by friends. Less than two weeks into the quarter, Ms. Holmes attended a fraternity party with some of her sorority sisters. While intoxicated and initially unconscious, she was raped by a friend who was a member of one of the Stanford-affiliated fraternities.

Following the rape, Ms. Holmes experienced acute self-blame, isolation, and depression, and struggled with suicidal thoughts. Her demeanor “instantly changed.” She moved out of the sorority house to a smaller dorm across campus, where she lived alone. As a coping mechanism, Ms. Holmes devoted all of her energy and focus into starting a company based around her invention. Her brother observes that after the assault, she “became more withdrawn, less social, and mono-focused on the next venture.” “After her rape, she was both broken and resolute, using her anger and hurt as an impetus to make the changes she so strongly believed in.” Rather than seeking to heal, she came to view the assault as a crucible that would help drive her work as she turned to the higher

purpose of helping solve difficult health care challenges through the company she was forming.

After the winter quarter of 2004, Ms. Holmes chose to take a leave of absence from Stanford to focus on building the nascent company she was forming around her invention. That company, originally called RealTime Cures, became Theranos.

3. CEO of Theranos

When Ms. Holmes started the company that became Theranos, she was a teenager who had four quarters of college and some laboratory research experience under her belt but no business or management experience. She learned how to navigate that complex world without the benefit of completing college, studying for a Masters in Business Administration, or obtaining years of industry experience, like most CEOs. She relied instead on her personal determination, advisors, employees, and lessons learned from her own mistakes and successes. She served as CEO from the company's founding until her June 2018 indictment. At the time she was indicted, two and a half years after significant public controversy about Theranos had arisen, Ms. Holmes was just 34 years old, still a relative newcomer to the business world.

Though she lacked business and management experience, Ms. Holmes brought to Theranos the qualities she had developed in her childhood—a deeply held interest in improving lives and doing good; an unmatched work ethic; a creative mind and willingness to learn; and kindness, compassion, and gratitude. Ms. Holmes recognized (at least some of) her limits and sought out advice from those who could provide the expertise that she lacked. Sunny Balwani was one of them, and became her most important advisor. But there were others as well. A consultant who worked with Ms. Holmes in 2004 observes that Ms. Holmes “was very good to acknowledge where she did have expertise but also to respect when she didn’t and to defer to those who did.” As time went on, Ms. Holmes hired experienced scientists and other personnel with appropriate experience. Over the company’s life, it had hundreds of employees: dozens of scientists and engineers with Ph.Ds, M.D.s, and Masters degrees; employees who had previously worked at medical device, pharmaceutical, and software companies; manufacturing personnel who worked on machining, injection molding, and assembly; experienced marketing personnel; and in-house lawyers who had worked at major law firms. Theranos also hired outside law firms, including Wilson Sonsini, Boies Schiller, and Hyman Phelps for corporate, intellectual property, and regulatory work; outside accounting firms; a leading laboratory consultant to help start and advise on Theranos’ clinical laboratory; and outside marketing firms. Ms. Holmes accepted recommendations for Board members whom she believed would provide an appropriate mix of business, public policy, legal, and medical expertise, and who also had experience making sweeping changes to institutional structures that could help Theranos in its journey to fulfill its grand but challenging aspirations. Ms. Holmes was a visionary without a college degree who was learning how to be a CEO, but she surrounded herself with

employees, directors, advisors, mentors, and consultants whom she believed had the right experience to make Theranos successful.

People who worked with her describe Ms. Holmes as an enthusiastic, inspiring, compassionate, and humble CEO. Ms. Holmes' "drive and ambition was infectious." During some of Theranos' most difficult periods, "[w]hile there were without question more difficult days than not, Elizabeth came to the office every single day with a highly engaging and positive energy that created the foundation of an environment that allowed us to focus on 'doing our very best work.'" Dr. Fabrizio Bonanni, a former Amgen executive who served on Theranos' Board of Directors from 2016 to 2018, was "struck" by Ms. Holmes' ability to listen: "She is really interested in hearing feedback, particularly when the feedback is critical of her, her actions, or her company. She listens intently and internalizes the message for further processing. She may ask clarifying questions but never interjects biases or defensiveness." Craig Josephson, who was a member of Theranos' executive team in the last year of the company, echoes these sentiments, describing Ms. Holmes as focused on making decisions with integrity, doing the right thing for the patient, and being responsive to suggested changes.

Former Theranos employees observe that Ms. Holmes genuinely cared about the people who worked for her company. Former Theranos Vice President of Hardware Manufacturing Tim Cooper notes: "Her display of genuine care for employees drove a tremendous sense of value and worth within many of us." "She also reached out, to her best ability, to thank the employees for their dedication to the company." Whether it was addressing an employee's health or personal loss or considering difficult staffing decisions at key points in the company's history, Ms. Holmes demonstrated "care and compassion" about individual employees. One former employee describes how, when Ms. Holmes heard about Holmes heard about [redacted] she "came to the Newark facility where I worked, sought me out, embraced me and said she would completely support me in every way possible."

When staffing reductions were necessary, "Elizabeth struggled with the implications of these decisions on the individual and was never comfortable with the negative consequences for those affected, regardless of the business rationalization or justification." This care did not go unnoticed. A former security supervisor for Theranos' Arizona operations recalls: "Elizabeth was there for every employee, especially when Theranos closed. Elizabeth made it a point to be there and show significant support during a sudden and arduous job search. Theranos provided every employee with a separation package, resume support services, and job placement before it closed its doors." Former Theranos Laboratory Director Donald Tschirhart summed it up: "Everyone at Theranos liked her; she was strong, she fought for us and she treated us well until the last moments."

Ms. Holmes did not build Theranos for nefarious reasons—indeed, the opposite is true. The company's mission was to provide access to actionable health information to improve human health on an equitable basis. Ms. Holmes was fundamentally

committed to this lofty purpose, and not to her own monetary gain. As former Board Member Bill Foege, former Director of the Centers for Disease Control and Prevention (CDC), puts it in his letter to the Court: “Ms. Holmes was not interested in money.” Former Vice President of Hardware Manufacturing Tim Cooper notes that through his many interactions with Ms. Holmes, “it is my view and strong belief that she has never been motivated by anything other than realizing this vision. She never brought financial considerations into our discussions and always placed a heavy emphasis and focus on ensuring that a positive experience and outcome for the individual (patient) was at the forefront of our work.”

Ms. Holmes did not personally profit from the investments of others into Theranos. Those investments were used to pay for research and development of groundbreaking inventions and the company’s operations—not to enrich Ms. Holmes or anyone else. Although Ms. Holmes was touted as a billionaire in the media, her purported “fortune” was entirely on paper based on the Theranos stock she owned. She never cashed in that ownership; in fact, she never sold a share of stock, despite the opportunity to do so at several points over the years. *See* Ex. A (“In the 2015 timeframe, Ms. Holmes was offered the opportunity to sell hundreds of millions of dollars in her stock holdings in Theranos. She turned down that opportunity because she felt that she should not profit until all of her investors had returned their investment profitably.”). She asked to be paid in Theranos shares rather than cash for her work as CEO, a request that the Theranos Board denied. *See also* Ex. A (describing how Ms. Holmes was “far from being the most compensated employee” at Theranos and the Board’s efforts to increase her compensation were met by “her strong resistance”). Near the end of the company’s life, “she volunteered even to give up her ownership of the company in hopes of saving it. . . . and voluntarily gave investors a “good portion of her own shares.” Nor did Ms. Holmes use corporate resources inappropriately for her own benefit. Dr. Foege, who was a member of the Board of Directors from 2014 through 2018, recalls: “The Board had an audit performed which found no evidence of fraud nor diversion of money.”

“She always put the interests of the company ahead of her own,” notes Daniel Warmenhoven, a technology industry executive who served on Theranos’ Board from 2016 to 2018. Dr. Fabrizio Bonanni, also a Board member from 2016 to 2018, observes: “In my almost fifty years in business, I have not seen or heard of a more selfless CEO.”

4. Relationship with Mr. Balwani

It is impossible to understand Ms. Holmes’ experience at Theranos, and particularly with respect to the offense conduct, without closely examining her relationship with Sunny Balwani. In the wake of her rape, around the time she was considering leaving Stanford, Ms. Holmes reconnected with Mr. Balwani. Ms. Holmes first met Mr. Balwani just after she graduated from high school on the Stanford-sponsored trip to China. She was eighteen, and he was thirty-eight. She understood that he was a successful businessman who had built and sold his own company and had

worked with Microsoft, and she viewed him as a potential advisor and mentor during that summer. As Ms. Holmes was thinking about leaving Stanford, she responded to outreach from Mr. Balwani. Mr. Balwani encouraged and supported her decision and offered his business advice. Ms. Holmes confided her trauma and depression to him. He told her she was safe now that she was with him. They began a romantic relationship.

The relationship between Ms. Holmes and Mr. Balwani was characterized by severe emotional, psychological, and sexual abuse perpetrated by Mr. Balwani.

Mr. Balwani expressed his desire to help Ms. Holmes develop as a person and a leader. As time went on, that expressed love and desire manifested as progressively controlling behavior. . . .

Mr. Balwani demanded that Ms. Holmes follow a series of prescriptions, including keeping a strict schedule with little sleep, limiting her food intake, refraining from alcohol, and maintaining a particular manner and personality style. Mr. Balwani prescribed tenets for Ms. Holmes to follow, which he wrote for her, and Ms. Holmes was required to write out her schedule regularly and confirm her commitment to his teachings,

Mr. Balwani also insisted, in the form of verbal and written berating, that Ms. Holmes was incompetent, fundamentally flawed as a person and a leader, and needed to change who she was—in his words, “kill” the current Elizabeth and become a new one—to become a worthy leader. The “advice” he provided was large and small—from live criticisms of her manner of speaking, (“You are speaking with everyone in your giddy voice”), (“U r rambling now. Let’s stay focused”), to lengthy diatribes that went to her core as a leader. Ms. Holmes’ assistant from 2014 through 2018 confirms: “[Mr. Balwani] would constantly go into her office, shut the door, and then kick out whoever was in her office. He would then scream at her. I could overhear the screaming.” Because Mr. Balwani insisted that she write down and repeat back to him what he was saying, Ms. Holmes captured some of these tirades in iPhone notes, such as one modified April 5, 2015. (“Toughen up. Become masculine be in battle [sic]. Masculine game. Business masculine game.”); (“I’m so sick and tired of his mediocrity you create. It’s astonishing. You’ll never hold anybody responsible for any actions. You’ll never do that. . . . Monkey’s [sic] can’t fly spaceships.”). Text messages also show Ms. Holmes seeking Mr. Balwani’s approval as she repeated back his lessons. (Ms. Holmes: “My new life as of this night and forever more: —total confidence in myself best business person of the year—focus—details excellent—don’t give what anyone thinks—engage employees in meetings by stories and making it about them (ie prepare well)” . . . Mr. Balwani: “Awesome. U r listening and paying attention.”).

Ms. Holmes believed Mr. Balwani’s criticisms of her and sought to do better. She likewise believed he was fundamentally important to the company: in her mind, as in his screeds, setbacks were due to her failures, but success was due to him—after all, according to him: “I have molded you.” Although the precise contours evolved over

time, this pattern played out on a regular basis throughout the relationship, including when Mr. Balwani was at the company. Dynamics such as these are common in abusive relationships and especially effective at creating a culture of control. . . .

Over the first several years of their relationship, Ms. Holmes became increasingly isolated from friends and family. Friends describe losing contact with Ms. Holmes. Ex. A (“She also fell into an all-consuming relationship with Sunny, who seemed to pull her farther away from me. She became reserved and withdrawn, and strangely secretive. I was worried about the effect Sunny was having on her, and I urged her to take caution, but to no avail.”); *id.* (“Sunny was significantly older than we were, to an alarming degree, but Elizabeth was very taken in by him. He struck me at the time like a father figure, someone she trusted, who could guide and mentor her, who could validate her, as she shouldered this incredible undertaking she felt was necessary for the world. I lost contact with Elizabeth after that.”).

Ms. Holmes’ parents recall their own discomfort and concern with their daughter’s relationship with Mr. Balwani. They were aware that Mr. Balwani insisted on listening when they spoke with their daughter on the phone, and they witnessed Mr. Balwani criticize and yell at Ms. Holmes until she cried, along with other behavior that made them uncomfortable. Noel Holmes recalls a trip she took with Ms. Holmes:

In January 2007, we were finally able to go away to Big Sur for two days over the weekend with just our family. Although it was difficult to connect by phone there[,] Sunny kept calling and berating Elizabeth. He had her in tears and she insisted we needed to leave. When we started driving back and the connection was better, I could hear him yelling at her for not working. She became very nervous and kept asking if we could somehow drive faster to get home.

Ex. A. Ms. Holmes’ brother Christian similarly recalls how his relationship with Ms. Holmes changed after she began her relationship with Mr. Balwani:

In the years that followed, my relationship with my sister was reduced to a series of formalities around her work. She spent all her time with Sunny and rarely included our family. She stopped coming to family gatherings and became more remote. I lived within driving distance from Elizabeth for about 5 years during this time period and worked with her for a number of years, and can’t remember sharing a meal with just the two of us more than a handful of times, let alone many meaningful conversations.

Ex. A ; (“Elizabeth was not allowed to have lunch or dinner with anyone but Mr. Balwani because Mr. Balwani would not allow otherwise.”); Isolating behavior is a hallmark abuse tactic.

Mr. Balwani's abuse involved severe sexual elements that caused Ms. Holmes particular distress, including thoughts of suicide. These events occurred in the home they shared. Contemporaneous records corroborate the aftermath: after a February 2015 incident, Ms. Holmes both expressed her personal despair in an iPhone note, and also apologized to Mr. Balwani for her inability to be strong for him. (Ms. Holmes: "I'm sorry I wasn't stronger for you this morning. That is my responsibility and my role. I will never let that happen again." . . . Ms. Holmes: "My job is to love you when you're stressed." Mr. Balwani: "I know."). . .

The severe abuse Ms. Holmes suffered at the hands of Mr. Balwani affected her deeply, including in her role as CEO of Theranos. As she testified, the abuse occurred throughout the relationship, including during the period when they both worked at Theranos and in the course of and with regard to that work. At Theranos, Mr. Balwani took primary responsibility for "operational" aspects of the company. That included preparing the company's financial statements (including revenues and revenue projections), managing the retail partnership with Walgreens, overseeing operations of the clinical laboratory, as well as manufacturing operations and general personnel matters. Mr. Balwani was also responsible for following up with potential investors after an initial meeting, as he was the best positioned to answer questions about Theranos' financial model and projections, as well as the operational issues that are often the topics of due diligence requests. Mr. Balwani not only ran Theranos' operations but was also Ms. Holmes' most important advisor, and he had outsized influence given the circumstances of their relationship. That is reflected in the government's most recent assessment of the relationship:

Besides his position that we talked about, you can also infer that his close relationship with Ms. Holmes would have given him a lot of influence over her, more than just his title alone would provide. Remember also that Mr. Balwani was older and more experienced than Ms. Holmes. So it would be no surprise that his advise [sic], his input would carry a lot of weight with her. And that's what showed up in the text messages.

Until late 2015 or early 2016, Ms. Holmes trusted Mr. Balwani completely. As Ms. Holmes explained, between 2010 and 2016, Mr. Balwani "had taught me everything that I thought I knew about business, and I thought he was the best business person that I knew. And I think that I didn't question him in the way that I otherwise would have." Ms. Holmes is still processing what effect the relationship had on her. As she testified, Mr. Balwani "impacted everything about who I was, and I don't fully understand that." The fact that the abusive dynamic affected their workplace relationship and the fact that Ms. Holmes deferred to Mr. Balwani, especially in areas where he was formally responsible, is consistent with research on intimate partner abuse. . . .

Ms. Holmes was finally able to leave her relationship with Mr. Balwani once he left the company. When he was on a trip abroad, Ms. Holmes enlisted her brother to help

her move out of their shared residence. Once Mr. Balwani understood what was happening, he began to text and call Ms. Holmes—he insisted she wait until he came home, told her she was making a mistake, and moved up his international travel to fly back to California from Asia as soon as possible. Since leaving the relationship, Ms. Holmes has been able to begin processing its effects and healing from it. Part of that has been supporting friends and family who have had similar experiences as they work through their own trauma. . . .

IV. 18 U.S.C. § 3553(a) SUPPORTS SUBSTANTIAL LENIENCY FOR MS. HOLMES.

The Court’s task in sentencing is to identify and “impose a sentence sufficient, but not greater than necessary, to comply with the purposes” of sentencing. 18 U.S.C. § 3553(a). Although the Sentencing Guidelines are the starting point for the calculation of an appropriate sentence, a district court “may not presume that the Guidelines range is reasonable.” *Gall v. United States*. Instead, the Court “must make an individualized assessment based on the facts” of each case, recognizing that a within-Guidelines sentence may be greater than necessary to serve the purposes of sentencing. *Kimbrough v. United States*; see *United States v. Gupta* (“Imposing a sentence on a fellow human being is a formidable responsibility. It requires a court to consider, with great care and sensitivity, a large complex of facts and factors.”). If the Guidelines calculation in a given case results in an “inordinate emphasis” on “putatively measurable quantities,” like financial loss, a court should focus more on the statutory factors set forth in 18 U.S.C. § 3553(a) to determine an appropriate sentence. *United States v. Adelson*. Indeed, the Court “may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.” *Kimbrough*.

The Court must make an assessment of what sentence is reasonable based on all the factors, including: (1) the nature and circumstances of the offense and history and characteristics of the defendant; (2) the purposes of sentencing, including the need for deterrence and to protect the public; (3) the kinds of sentences available; (4) the Sentencing Guidelines; (5) any relevant policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentence disparities; and (7) the need to provide restitution to any victims of the offense. 18 U.S.C. § 3553(a). “[T]he amount by which a sentence deviates from the applicable Guidelines range is not a measure of how ‘reasonable’ a sentence is. Reasonableness is determined instead by the district court’s individualized application of the statutory sentencing factors.” *United States v. Dorvee* (citing *Gall*). These factors support a sentence with no to minimal incarceration.

A. The Nature and Circumstances of the Offense Strongly Support Leniency.

Ms. Holmes has been convicted of defrauding certain sophisticated investors who knew they were investing in a company with a big, world-changing dream and substantial potential that had not yet been, and might never be, realized. Far from a house

of cards, Theranos was well on its way to achieving its mission: it was a technology company that developed substantial, innovative technology over its fourteen-year life through the research and development efforts funded by investments and performed by Theranos' many qualified, brilliant scientists and engineers. Ms. Holmes, whose first real job was CEO of this company she founded at 19, was all-in on the company's mission to increase access to health information: she worked constantly, never sold any stock, and remained firmly committed to the company's mission until the company's end. For the reasons discussed below, the circumstances of the offense strongly support a lenient sentence.

1. The Offense Conduct Occurred Within a Unique World of Investments in Start-Up Companies.

Theranos was never a public company. It had limited operational history and had never paid dividends to its shareholders. Both Theranos and the offense conduct are best understood through the lens of a Silicon Valley start-up company. That is the environment in which Theranos was founded, in which it was built, and in which investors decided whether and how much to invest. Theranos had massive potential, but its success was uncertain—even highly unlikely, in light of the overall odds for start-ups. The company and Ms. Holmes faced the typical challenges that confront such companies and their inexperienced CEOs. No one is arguing these factors excuse fraud, but they do situate the offense conduct in context, as § 3553(a) requires.

It is common sense that investing in any uncertain venture brings with it substantial risk. Investors know that is especially true with investments in startups, the majority of which fail. Tim Draper is a venture capitalist with 35 years of experience whose company backed some of Silicon Valley's greatest technology success stories and was an early investor in Theranos. Mr. Draper makes the simple observation that some companies succeed and some fail. David Sokol, an experienced venture capital investor who has built and led several companies, including for Berkshire Hathaway, echoes that sentiment: "Through my career, I have invested in venture capital transactions which have been failures and successes." He goes on to explain that because a venture investment usually relies on estimates of the business's value if it succeeds, "[v]enture capital is inherently very risky investing and often only 1 out of 10 such investments prove successful. The reason is obvious in that most venture capital ideas are attempting to do something never before tried or achieved." Yinne Yu, an investor in early-stage companies, similarly observes: "A few of my first-time founders made it; most did not. Even with the best of intentions, all can go wrong." Alex Moore, also a venture capitalist, agrees: "90% of my 'bets' (they are bets, nothing is certain) fail and go to 0. This is expected." . . .

Ms. Holmes' conduct should also be considered in the context of this world, and filtered through her role as a young, first-time founder without independent business experience. Venture investors, advisors, and founders describe the unique challenges faced by a founder and CEO and the unique perspective required to bring a new venture

to success. “Inventing the future is hard. Founders are called upon to strike the incredibly difficult balance between painting a picture of the world as it could be, and as it actually is.” “The CEO and founder must carry the torch of the vision through every obstacle and terrain and protect its flame from naysayers, doubters, and challengers day in and day out to create an environment for innovation to take hold.”

Set against that backdrop is the role that optimism and lack of experience play in business challenges faced by start-up founders, who may not anticipate the setbacks. “Most first-time founders are visionary but naïve about how to build a business and how long it takes to build a business”— especially the latter. “For example, recently one of my companies gave me a set of financial projections to review before fundraising. I cut the numbers by over 50% because I see operational hiccups that the first time CEO doesn’t yet have the foresight to see.” See Paul A. Gompers et al., *How Do Venture Capitalists Make Decisions?*, 135 J. of Fin. Econ. (2020) (“VCs report that fewer than 30% of the companies meet projections.”). Dr. Susan Evans, a member of Theranos’ Scientific and Medical Advisory Board (SMAB) beginning in 2016, has spent her career in product development and technology assessment in the diagnostics industry. She writes: “I have met many young entrepreneurs who have a dream and many if not most, oversell what they have, and when it will be ready for market. This optimism is what often drives innovation, and the development of new products that go beyond what is the norm.” See *id.* (“Venture-backed startup companies often announce and deliver products to the market before they are ready.”).

These challenges are only compounded for female founders, as letters by female founders explain in sharing those writers’ experiences. For example:

Liz and I attended some of the same entrepreneurship events in Silicon Valley while she was at Theranos. These events often featured panels and fireside chats, where prominent people in business would make the case that a key reason less than 2% of venture capital goes to women is because female founders don’t present bold enough visions. The advice at these conferences was to picture what massive success would look like in 5 or 10 years, and sell that vision, because that’s what male founders were doing, and that’s what venture capitalists expect to see. When I think back on my younger days as a CEO, I was frequently told that my financial projections were too conservative.

Ex. A. Likewise:

Speaking as a woman who has raised \$60M in venture capital, I can confirm it is not easy. It is not easy for anyone, but I feel it’s worth noting that approximately 3% of venture capital goes to women CEOs. The only scientific evidence I have encountered between men and women when it comes to raising capital is that men are more frequently

asked about opportunities and women are more frequently asked about risks.

Ex. A. “The nuanced elements of Elizabeth being a female CEO cannot be overstated.”
...

2. Theranos Developed Innovative Technology and Provided Real Services to Real Customers in Furtherance of Its Mission to Improve Access to Healthcare.

Also crucial to understanding the nature and circumstances of the offense is the fact that Theranos “was a real company.” This was not an empty vehicle for Ms. Holmes’ gain. Money that was invested went into the research and development and operations of the company with real results.

a. Theranos developed real, valuable technology.

Theranos spent most of its efforts developing products and improving the products it had developed. Financial records show that the majority of the company’s funds were spent on research and development and operations.). Theranos also built and improved its sophisticated manufacturing capabilities in California to have the infrastructure to build its inventions as products. The technology Theranos invented can be broadly categorized into three categories:

- Assays: Assays include the chemicals and processes for testing blood samples for particular substances. Theranos developed hundreds of small sample assays over its many years of research and development, and also developed the ability to manufacture the chemicals in-house.

- Hardware: This set of technology included the various versions of Theranos Sample Processing Units (“TSPU”), as well as the small sample collection device (called the nanotainer) and various other hardware and components that Theranos developed to perform analysis of blood, urine, swabs, and other samples (and to complete other tasks). Between 2010 and 2015, the time period at issue here, Theranos was working to build, perfect, and continuously improve its 4-series TSPU (the minilab), which had the capability to run a host of different types of assays at once. Theranos submitted an application for approval of this device and one blood test to the FDA in 2014, and the FDA approved that application in 2015. Theranos planned to put the 4-series TSPU into operation when a sufficient number of assays were approved. Other hardware inventions, including other versions of the TSPU, were also developed.

- Software: Theranos’ software developments included medical recordkeeping software, laboratory applications, diagnostic tracking, patient- and doctor-specific applications, and infectious disease modeling.

The company obtained hundreds of patents in the United States and across the world covering many of its inventions. The company chose to protect other innovative breakthroughs as trade secrets. To receive such protection under California law, Theranos was required to make “efforts that are reasonable under the circumstances” to ensure the continued secrecy of its technology. Cal. Civ. Code § 3426.1(d)(2). Theranos employed common methods, including nondisclosure agreements, security measures, limiting knowledge to “need to know,” and legal enforcement of breaches of nondisclosure agreements. *See* 1 Melvin F. Jager, Trade Secrets Law §§ 5:21, 5:26, 13:3 (2022); 1 Roger M. Milgrim & Eric E. Benson, Milgrim on Trade Secrets § 1.04 (2020).

b. Theranos was on its way to achieving its mission to make health information more accessible through its commercial activities.

The company also executed real contracts and provided real services to real customers. In its early years, it worked with 10 pharmaceutical companies. Many of the pharmaceutical companies praised what Theranos had developed. Theranos also ran studies in conjunction with leading academic medical institutions, including the Mayo Clinic. It ultimately formed retail partnerships with Walgreens and Safeway in 2010 and, beginning in fall 2013, offered tests to customers in retail stores.

Theranos worked toward its goal of making health information more accessible through a number of different avenues. Making the process of drawing blood more comfortable and humane, including by drawing smaller samples, was one. Advocating to allow patients to order their own tests directly, without a doctor’s visit, was another. Working to bring the lab testing equipment to retail locations was a third. While Theranos’ brand symbol became the small sample collection device known as the nanotainer, Theranos learned that what was most important to patient-consumers was cost. In that arena, Theranos was revolutionary: Theranos offered tests at substantially lower prices than the industry leaders; it offered the same price to insured and uninsured patients; and it posted the prices on its website—a practice that was unusual at the time. Theranos’ offering was so groundbreaking with regard to cost that customers flew from other states to get their blood tested at Theranos, and still paid less (including airfare) than what they would have paid to the industry incumbents. Ex. U (“[Bot Anecdote] Mother and daughter came from California for a day to visit there [sic] Dr. and he sent them here for labs because at Quest Diagnostics the labs were \$2,400 (she showed me the print out of the cost!) and they paid \$177.00 and \$192.00. With there [sic] plane tickets, taxi, and labs they spent a total of 300.00 they said. That isn’t even half of what there [sic] labs would have been. They were so thankful and love everything about Theranos[.]”). The vast majority of Theranos’ tests were processed using FDA-approved machines and processes. All tests were processed in government-certified Theranos laboratories. Customers raved about the experience in feedback provided to Ms. Holmes. *See, e.g.*, Ex. U (“The main reason I went was because of the cost. I am often sent a high bill for my bloodwork with insurance. When I got there, the service was fast, the ladies were super and professional and I must say, it was the best experience I have ever had.

Plus, no bruising whatsoever! I will continue going there for my bloodwork from now on and thank you!”).

c. Theranos employed hundreds of employees.

These technological and commercial accomplishments were the work of hundreds of individual members of the community employed by Theranos over its life. Investments in Theranos also paid the salaries of the many brilliant, talented, and committed members of the Theranos employee family working to achieve its mission. As former employees describe, Ms. Holmes was personally invested in the well-being of these individuals and their families, and took their personal circumstances and professional accomplishments seriously.

d. Theranos’ technology and operations involved scientific and regulatory complexity.

Theranos operated in a space that involved serious scientific and regulatory complexities- challenges that were known or knowable to investors through public research, beyond the information they got from Theranos (if any). Ms. Holmes did not work to address these complexities alone. Company scientists-all more highly educated and experienced than she was-reported on the state of the technology, including successes, efforts to resolve challenges, and response to criticisms or questions from those now considered whistleblowers. The company worked through regulatory questions and solutions with sophisticated partners and experienced outside lawyers. And policies and procedures were also in place. None of this is to say that Theranos operated without error; it is simply context to understand (i) that Ms. Holmes did not sit at the top of a company that simply implemented her commands and (ii) that Ms. Holmes understood there were teams and processes in place to address issues. This ambitious venture was full of the complications that come with launching any business, with the added complexities of scientific advancement and government regulatory schemes.

One regulatory challenge was how Theranos and its retail partners would operate the testing as a practical matter. Early in the retail partnerships, the parties had envisioned putting Theranos devices in retail locations. Those partners and Theranos soon recognized the potential regulatory barriers to that approach-namely, a risk the devices might need to be FDA-approved or each retail location would need to be certified as a high-complexity CLIA laboratory—and shifted the rollout strategy. Theranos and Walgreens agreed that Phase I of the company’s retail operations would involve shipping samples back to certified central CLIA laboratories and Phase II, putting Theranos devices in retail locations, would occur once the Theranos devices had been FDA-approved. As a result of this shift, during Phase I, because the samples were being shipped to the Theranos laboratory for processing, the device used for testing a sample was less important to the commercial project than the experience customers had in stores. Theranos shared the details of this strategic plan with the FDA shortly after it publicly announced its partnership with Walgreens.

Laboratory testing is also highly regulated. By 2015, Theranos had two laboratories certified by authorities in California and Arizona (working under the authority of federal agency CMS (Centers for Medicaid & Medicare Studies)). Those laboratories, which were staffed with qualified employees, processed blood samples collected at retail locations (such as the Walgreens locations). The vast majority of the eight million-plus test results produced by Theranos were generated on FDA-approved methods; tests performed on lab-developed methods had been validated under appropriate standards, with validation reports signed by a qualified laboratory director. Ms. Holmes, who does not have a college degree, was not qualified to and did not process patient samples. Nor did she determine what methods were appropriate for patient use.

In addition to being highly regulated, blood testing is scientifically complex. Laboratory testing has inherent imprecision and imperfections. Even FDA-approved tests can produce inaccuracies for a particular patient at a particular time. Government regulations indicate that test results can be considered “accurate” even if they differ from a target by large percentages. Every test has some expected inaccuracy rate, as its associated FDA labeling information makes clear. Even among well-accepted testing methodologies, different measurement procedures can lead to different results that are difficult to compare. *See* Myers, Gary L. & W. Greg Miller, *The International Consortium for Harmonization of Clinical Laboratory Results (ICHCLR)—a pathway for harmonization*, The Journal of the International Federation of Clinical Chemistry and Laboratory Medicine (2016) (“A basic problem in laboratory medicine is that different laboratory measurement procedures that intend to measure the same measurand may give different results for the same specimen.”). And for some tests the risks of inaccuracy are common enough that physicians’ groups recommend against giving the test in many circumstances because the risks of an inaccurate test outweigh the benefits. Ex. Q Additionally, even companies that make FDA-approved assays sometimes produce faulty chemicals or errant calculations that lead to erroneous results. Whether and why any particular laboratory test result is incorrect is a deeply technical scientific issue. These scientific complexities provide context for the impact that any anecdotal potential errors and inaccuracies that were brought to Ms. Holmes’ attention may have had on her own beliefs in the state of Theranos’ laboratory when she spoke to investors. . . .

4. The Circumstances Show Ms. Holmes To Be a Founder and CEO Deeply Committed to the Company’s Mission, Rather Than Her Own Personal Gain.

Ms. Holmes’ actions showed her to be a selfless CEO focused on the success of the company and its mission, and not on increasing her own wealth. As the Court knows, Ms. Holmes did not personally profit from the investments Theranos received, never sold any of her stock, and was, as Dr. Bonanni described it, a “selfless CEO.” Additionally, Ms. Holmes’ actions in the wake of criticism that began in late 2015 show a CEO interested in identifying errors, fixing them, and learning from them—not running from them. She did not flee the enterprise when the company faced criticism.

To the contrary, as described in section III(E), above, Ms. Holmes embarked on a broad, resource-intensive effort to bring outside voices into Theranos and to identify, acknowledge, and correct errors or missteps, and went down with the ship when the company shuttered. Ms. Holmes' extensive efforts in this regard are relevant to consider when weighing the circumstances of the offense, especially given her youth and the fact that her role as CEO of Theranos was her first business experience. The fact that Ms. Holmes was not motivated by personal gain or greed is a mitigating factor under § 3553(a)(2). *See, e.g., United States v. Prosperi* (affirming district court's sentence, including based on finding that the defendants had not "sought to enrich themselves"); *United States v. Connors* (considering as a mitigating factor the fact that the defendant was "motivated by a desire to save the company and to save the jobs of its employees," in contrast to "greed and pure personal gain," which "are usually the driving force for many, if not most, fraud offenders").

5. Because of Their Extreme Focus on Loss, the Guidelines Are Unhelpful in Fashioning a Fair, Just, and Reasonable Sentence.

But in the event the Court finds the government has proven loss under § 2B1.1, the Court should decline to impose any sentence primarily driven by the calculation of loss.

First, this is the type of case where the impact of the loss enhancement means that the Guidelines fail to "provide reasonable guidance," and are of no "help to any judge in fashioning a sentence that is fair, just, and reasonable." *United States v. Adelson*. "For the small class of defendants. . . convicted of fraud offenses associated with very large guidelines loss calculations, the guidelines now are divorced both from the objectives of Section 3553(a) and, frankly, from common sense. Accordingly, the guidelines calculations in such cases are of diminished value to sentencing judges." Frank O. Bowman, III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent'g Rep. (2008). Across the country, judges seem to agree: the Sentencing Commission's own data shows that there is an "increasing divergence between the average Guidelines minimum and the average sentence actually imposed as loss amount grows." Mark H. Allenbaugh, "Drawn from Nowhere": *A Review of the U.S. Sentencing Commission's White-Collar Sentencing Guidelines and Loss Data*, 26 Fed. Sent'g Rep. (2013); *see* Jillian Hewitt, *Fifty Shades of Gray: Sentencing Trends in Major White-Collar Cases*, 125 Yale L.J. (2016) (concluding that review of the post-*Booker* sentencing data "empirically corroborate[d] scholarly criticism that the loss table often vastly overstates the seriousness of an offense").

Second, more generally, the loss guideline does not bear the weight the Sentencing Guidelines give it. Under § 2B1.1, in any modern white-collar case, loss has an inordinate and inappropriate effect on the calculation of a Guidelines sentence that flies in the face of the statutory considerations in 18 U.S.C. § 3553(a). The loss table "frequently produces arbitrary and unduly severe sentences for two related reasons": (1) loss is "defined so broadly that it can produce lifelong sentencing ranges for defendants

who neither cause much economic harm nor derive much economic benefit from their crimes” and (2) “the loss table’s enhancements are so large that, in practice, they dwarf other potentially more relevant considerations.” Hewitt, 125 Yale L.J. As result, like with narcotics sentences, “[s]omewhere between 50 and 70 percent of the Sentencing Guidelines calculation . . . is based on a single factor[.]” Jed S. Rakoff, Why the Federal Sentencing Guidelines Should Be Scrapped, 29 Fed. Sent’g Rep. (2017). “But it should be obvious that in a great many, perhaps most, cases, . . . the amount of the loss does not fairly convey the reality of the crime or the criminal.” “By making a Guidelines sentence turn, for all practical purposes, on this single factor, the . . . Commission. . . effectively guaranteed that many such sentences would be irrational on their face.” *United States v. Gupta*; see also *United States v. Johnson*; *United States v. Parris*. As a result, “[t]he higher the loss amount, the more distorted the guideline’s advice to sentencing judges.” *United States v. Corsey*. These issues are compounded by the fact that the loss Guideline “was not developed by the Sentencing Commission using an empirical approach based on data about past sentencing practices.” See *id.* (describing the history of amendments to the Guideline and noting that “[t]he history of bracket inflation directed by Congress renders the loss guideline fundamentally flawed”).

As Judge Rakoff has observed:

Where the Sentencing Guidelines provide reasonable guidance, they are of considerable help to any judge in fashioning a sentence that is fair, just, and reasonable. But where, as here, the calculations under the guidelines have so run amok that they are patently absurd on their face, a Court is forced to place greater reliance on the more general considerations set forth in section 3553(a), as carefully applied to the particular circumstances of the case and of the human being who will bear the consequences.

Adelson; see also *id.* (Guidelines place an “inordinate emphasis” on “putatively measurable quantities, such as . . . the amount of financial loss in fraud cases,” but they have failed to “explain[] why it is appropriate to accord such huge weight to such factors.”); *Corsey* (“[T]he low marginal utility of the guideline in this very high intended loss case should have prompted greater, not lesser, reliance on the section 3553(a) factors other than the Guidelines.”). Ms. Holmes urges the Court to focus on the § 3553(a) factors that allow the Court to engage in the “uniform and constant” exercise “in the federal judicial tradition” of “consider[ing] every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” *Koon v. United States*.

B. Ms. Holmes’ Personal History and Characteristics Strongly Support Leniency.

“[I]f ever a [person] is to receive credit for the good [she] has done, and [her] immediate conduct assessed in the context of [her] overall life hitherto, it should be at

the moment of [her] sentencing, when [her] very future hangs in the balance.” *Adelson*. Described by over [130] different letters as a compassionate, honest, and humble woman with much to give the world and a deep commitment to doing so, Ms. Holmes’ personal history and characteristics (outlined in section II, above) strongly counsel against a lengthy incarceration. “Anyone who knows Liz recognizes that she is a genuine and generous person who cares deeply for those around her,” someone to rely on “for an honest opinion, words of encouragement, and a selfless interest in [their] life and well-being.”

Ms. Holmes asks the Court to consider the words of those who know her when weighing the importance of § 3553(a)(1) in this case, including on the following points:

- Ms. Holmes is no danger to the public. She has no criminal history, has a perfect pretrial services compliance record, and is described by the people who know her repeatedly as a gentle and loving person who tries to do the right thing.
- Ms. Holmes is deeply devoted to her partner and son, and plays an integral and irreplaceable role in their lives.
- Ms. Holmes has lived her life with a purpose to change the world for the better, on scales large and small. These basic qualities motivated her in founding and leading Theranos, and they continue to shine in the way she lives her life today. She is the person her friends turn to when they need support, regardless of what is going on in her life.
- Ms. Holmes lives with this kindness, purpose, and selflessness despite significant personal trauma that occurred before and during the time period of the offense, and from which she is still recovering.
- Friends and family note with admiration that she has handled her indictment and trial with grace and without expressing and indeed discouraging ill-will towards the prosecutors who seek to incarcerate her, the media that has vilified her, or those who have been unwilling to stand by her. Additionally, the letters are striking in showing how Ms. Holmes wholeheartedly commits to the things that matter to her—today, the people she loves and the service work she cares about. Courts in other cases have exercised their discretion to impose non-Guidelines sentences based on the personal characteristics of the defendant. *E.g.*, *United States v. Gupta* (premising downward variance, in part, on defendant’s “big heart and helping hand, which he extended without fanfare or self-promotion, to all with whom he came in contact”); *Adelson* (premising downward variance, in part, on letters from “persons from all walks of life . . . attesting, from personal knowledge, to [defendant’s] good works and deep humanity,” his “generosity of spirit,” and his “integrity and generosity”). Similar considerations are present here. Ms. Holmes’ mother “beg[s] you to see her goodness, her unique circumstances and her promise.”

C. Incarceration Is Not Necessary to Afford Adequate Deterrence or Protect the Public.

The needs “to afford adequate deterrence to criminal conduct” and “protect the public from further crimes of the defendant,” 18 U.S.C. § 3553(a)(2)(B)-(C), are not served by a custodial sentence for Ms. Holmes.

1. Incarceration Is Not Necessary for Specific Deterrence.

Incarceration is not necessary to either protect the public from Ms. Holmes or to deter her from committing future offenses. Ms. Holmes is not a danger to society. She has been out of custody, with a perfect pretrial services record, for more than four years. And there is no reason to believe she would commit another fraud—or that she will ever be in a position to do so. Ms. Holmes has readily and repeatedly acknowledged the many mistakes she made while serving as CEO of Theranos—in interviews, to the SEC, on the witness stand in front of the jury, and to friends and family.

“Elizabeth understands what has been lost.” Ms. Holmes has suffered the consequences of the offense daily for years, in ways large and small. She has been formally penalized for her mistakes in other forums—through the administrative state by CMS and by this Court in connection with her settlement with the SEC. Ms. Holmes spent her entire adult life building Theranos until its collapse—a personal and public failure she feels deeply. Beyond that failure and loss of this company she loved so much, eight years of investigations and lawsuits have taken their toll. Having never cashed in on the value of Theranos to her own benefit, Ms. Holmes has incurred substantial debt from which she is unlikely to recover. She is unable to get a job and was prevented from investing what money she did have when her trading accounts were repeatedly closed by financial institutions as a result of her indictment. She has lost personal friendships to the process surrounding investigations, lawsuits, and lawyers, and it is difficult to make new ones. . . .

Moreover, the incessant drum of media criticism has ensured Ms. Holmes will be punished for the rest of her life. The Court is well aware of the unusually intense media attention on this case before, during, and after Ms. Holmes’ trial. The coverage of her as a person is universally negative. Portrayals of Ms. Holmes are at best unflattering caricature and at worst dehumanizingly cruel. Almost all depict her—inaccurately, as the scores of letters submitted with this filing make clear—as unfeeling and self-absorbed. Even putting aside the fact that her appearance and voice are considered appropriate for mockery (a gender-specific punishment), her worst personal traumas have been treated as appropriate for derision as well. Following Ms. Holmes’ testimony about the psychological and sexual abuse she endured at the hands of Mr. Balwani, one outlet ran a humor column in which the author wondered whether she would have been able to comply with Mr. Balwani’s demands. Alexandra Petri, “Opinion: I tried the Elizabeth Holmes schedule, and here is how it went,” *Wash. Post* (Dec. 3, 2021). Ms. Holmes will never be able to seek another job or meet a new friend without the negative

caricature acting as a barrier. She worries about how her notoriety affects friends and family—and those effects are meaningful. Several letters describe how Ms. Holmes avoids friends’ life events and social occasions because she does not want to be a distraction. “I cannot overemphasize the degree to which Liz is ostracized by people who do not know her and the degree to which this social isolation has affected Liz, Billy, and their families.”

Ms. Holmes has also suffered a substantial loss of privacy, despite her best attempts to stay out of the public eye and to respect the legal process around this case. Mr. Evans describes the precautions he and Ms. Holmes have taken in furtherance of their own privacy and safety, from dressing in hats and glasses to using P.O. boxes for mail to living in private buildings or a secluded location. Yet members of the press have taken dramatic steps to identify and publish Ms. Holmes’ address, leading to cameras, visits from the press and the public (as well as a recent visit from a key government witness), and threats. Ms. Holmes and Mr. Evans have moved several times as a result. Threats are also ever-present online.

These forms of punishment, including the extrajudicial collateral consequences going well beyond “civil death” that Ms. Holmes will endure for the rest of her life regardless of her sentence, make clear why incarceration is unnecessary and unhelpful in achieving specific deterrence in this case. . . .

D. Just Punishment and Respect for the Law Are Not Served by a Lengthy Incarceration.

Section 3553(a)(2)’s goals “to promote respect for the law” and “to provide just punishment for the offense” are likewise not achieved by the incarceration of Ms. Holmes. “Where offenders appear to have been unfairly singled out, respect for the law and law enforcement suffers.” Frase, *Punishment Purposes*, 58 Stanford L. Rev.

The prosecutorial and cultural focus on punishing Ms. Holmes stands out. As numerous letters observe, the decision to prosecute Ms. Holmes and the associated vilification of her stands in stark contrast to the treatment of other prominent entrepreneurs who have been accused in media of fraud. Take Adam Neumann, the founder of WeWork, who was accused of diverting millions of corporate assets for personal gain and walked away from his first company with hundreds of millions of dollars. Mr. Neumann recently received a *\$350 million investment* in his next venture. Even observers who believe Ms. Holmes was rightly the subject of prosecution cannot help but notice the discrepant treatment. And within the Theranos story, Ms. Holmes has borne the brunt of the vitriol despite the fact that many factors—some failures of judgment on her part, some simply the operational hurdles of a complex endeavor, and some no doubt the missteps of others—contributed to Theranos’ failures. The government’s decision to charge Ms. Holmes personally with wire fraud in connection with Theranos’ laboratory practices is one example of that singling-out, given the regulatory and personnel structures that governed Theranos’ laboratory operations. Its

attempt to paint Theranos' trade secrets practices as nefarious when such practices are commonplace and required by law is another. *See, e.g.*, 1 Melvin F. Jager, Trade Secrets Law §§ 5.21, 5.26, 13.3; 1 Roger M. Milgrim & Eric E. Benson, Milgrim on Trade Secrets § 1.04 (2020).

E. Section 3553(a)(6) Supports a Downward Variance from the Guidelines.

The “need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct” counsels in favor of a below-Guidelines sentence. 18 U.S.C. § 3553(a)(6). In this district, the majority of defendants convicted of crimes for which the main Guideline is § 2B1.1 have received below-Guidelines sentences. From 2015 through 2021, in this district, the median sentence for a defendant convicted of fraud, with no criminal history, and in Zone D of the guidelines received a sentence that included a term of incarceration of 24 months. The national statistics are similar.

Even if the Court determines—over Ms. Holmes' objection—that the government has proven a substantial loss, the Court would be in good and abundant company in varying downward from the Guidelines range. Given the numerous and duplicative enhancements that apply to cases driven by § 2B1.1, courts frequently sentence defendants with high loss figures and no criminal history to substantially below-Guidelines sentences. For example:

- In February 2021, the COO of a publicly traded biopharmaceutical company was sentenced after a trial guilty verdict on one count of wire fraud to 12 months in custody in light of the ongoing economic hardship he would face in the future, his general good works, his comparatively lower culpability than his codefendant, and the need for some prison time to address general deterrence; the “[b]izarre, barbaric,” and “absurd” Guidelines range was the statutory maximum of 20 years (on an initial range of 262 to 327 months). *United States v. Taylor*, 1:19.

- In November 2019, a hedge fund trader who was found guilty after trial of overinflating the hedge fund's assets by \$100 million was sentenced to 40 months' imprisonment; the government and the Probation Office had calculated a Guidelines range of 168 to 210 months. *See United States v. Shor*, 1:18.

- In November 2018, an individual who was convicted of securities fraud after trial in the District of Massachusetts, was sentenced to a term of six months' imprisonment where the government had calculated a Guidelines prison sentence of 63 to 78 months. *See United States v. Wang*, 1:16.

- In October 2018, a former State Street executive who was convicted after trial of securities fraud, was sentenced to a term of 18 months' imprisonment; the

government had calculated a Guidelines sentence of 14 to 17 years. *See United States v. McClellan*, 1:16.

- In October 2018, a serial fraudster who committed additional crimes while awaiting sentencing after his fraud guilty plea, was sentenced to 72 months' imprisonment where the government calculated a Guidelines sentence of 188 to 235 months and the government requested a sentence of 15 or more years. *See United States v. McFarland*, 1:17.

- In May 2018, a defendant convicted at trial of four conspiracies, including conspiracy to commit bank fraud, and facing a PSR Guidelines range of life and a Court-determined Guidelines range of 97 to 121 months was sentenced to 32 months based on his otherwise exemplary life and relative role. *United States v. Atilla*, 1:15. . . .

Ultimately, the touchstone of this factor is the idea of treating defendants who are found to have committed similar crimes similarly. It is nearly impossible to do that here given the unique circumstances of the offense—the sophisticated investors investing in a non-public, novel technology company with limited history seeking to change a complex, established industry and the indisputable value of that company regardless of the offense conduct—and of Ms. Holmes—her intent to do good, her lack of greed, her commitment to fixing her errors, and her positive personal qualities. “Whereas apples and oranges may have but a few salient qualities, human beings in their interactions with society are too complicated to be treated like commodities, and the attempt to do so can only lead to bizarre results.” *United States v. Gupta*. . . .

G. Ms. Holmes' Capacity to Do Good Supports a Sentence That, In Part, Orders Ms. Holmes to Engage in Significant Community Service.

Despite her mistakes, Ms. Holmes' personal characteristics—including her deeply held desire to make the world a better place, her self-reflection, her determination and work ethic, and her visionary and creative mind—leave her with capacity and potential to positively contribute to the world. While the over 130 letters attached to this memorandum are consistent in believing that “society is better off with her in it,” it is noteworthy how many different opportunities there are for Ms. Holmes to be a force for good. Whether it is working with individual survivors of sexual assault, teaching the lessons of her own errors, inventing new technologies, developing projects that have the potential to help solve social health problems, or something else entirely, the chorus of letters emphasize a belief among those who know her that society's best use of Ms. Holmes is “out in the world working on the next thing to improve the lives of others.” . . .

One meaningful approach would permit Ms. Holmes to continue the work she has done over the past several months volunteering in support of sexual assault survivors. [Redacted]welcomes Ms. Holmes' continued services helping “the ever-increasing number of callers on the statewide sexual assault helpline” and “research[ing] gaps in

services and resources for victims, while working to increase access to services throughout the state.” . Requiring Ms. Holmes to continue these efforts as part of her sentence would be a better use of society’s resources than incarcerating her. . . .

B. Corporate Sentencing Guidelines

Corporations can’t be imprisoned, of course, but the Sentencing Guidelines do provide alternative ways to punish corporations. As you read the following Guidelines provisions, note the major ways a corporation can be punished by a sentencing judge in a criminal case, and the main factors and rationales that appear to be driving the Guidelines on corporate sentencing. Do these Guidelines matter if the vast majority of corporate criminal cases settle via DPAs or NPAs and never see a judge?

UNITED STATES SENTENCING GUIDELINES MANUAL (Excerpts)

CHAPTER EIGHT - SENTENCING OF ORGANIZATIONS

Introductory Commentary

The guidelines and policy statements in this chapter apply when the convicted defendant is an organization. Organizations can act only through agents and, under federal criminal law, generally are vicariously liable for offenses committed by their agents. At the same time, individual agents are responsible for their own criminal conduct. Federal prosecutions of organizations therefore frequently involve individual and organizational co-defendants. Convicted individual agents of organizations are sentenced in accordance with the guidelines and policy statements in the preceding chapters. This chapter is designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.

This chapter reflects the following general principles:

First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused.

Second, if the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organization of all its assets.

Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally will be reflected by the greatest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table. Culpability generally will be determined by six factors that the sentencing court must consider. The four factors that increase the ultimate punishment of an organization are: (i) the involvement in or

tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice. The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility.

Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct.

These guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program. The prevention and detection of criminal conduct, as facilitated by an effective compliance and ethics program, will assist an organization in encouraging ethical conduct and in complying fully with all applicable laws. . . .

PART B - REMEDYING HARM FROM CRIMINAL CONDUCT, AND EFFECTIVE COMPLIANCE AND ETHICS PROGRAM

Historical Note: Effective November 1, 1991 (*see* Appendix C, amendment 422). Amended effective November 1, 2004 (*see* Appendix C, amendment 673).

1. REMEDYING HARM FROM CRIMINAL CONDUCT

Historical Note: Effective November 1, 2004.

Introductory Commentary

As a general principle, the court should require that the organization take all appropriate steps to provide compensation to victims and otherwise remedy the harm caused or threatened by the offense. A restitution order or an order of probation requiring restitution can be used to compensate identifiable victims of the offense. A remedial order or an order of probation requiring community service can be used to reduce or eliminate the harm threatened, or to repair the harm caused by the offense, when that harm or threatened harm would otherwise not be remedied. An order of notice to victims can be used to notify unidentified victims of the offense.

Historical Note: Effective November 1, 1991.

§ 8B1.1. Restitution - Organizations

- (a) In the case of an identifiable victim, the court shall—
 - (1) enter a restitution order for the full amount of the victim's loss, if such order is authorized under 18 U.S.C. § 2248, § 2259, § 2264, § 2327, § 3663, or § 3663A; or

- (2) impose a term of probation or supervised release with a condition requiring restitution for the full amount of the victim's loss, if the offense is not an offense for which restitution is authorized under 18 U.S.C. § 3663(a)(1) but otherwise meets the criteria for an order of restitution under that section.
- (b) *Provided*, that the provisions of subsection (a) do not apply—
 - (1) when full restitution has been made; or
 - (2) in the case of a restitution order under § 3663; a restitution order under 18 U.S.C. § 3663A that pertains to an offense against property described in 18 U.S.C. § 3663A(c)(1)(A)(ii); or a condition of restitution imposed pursuant to subsection (a)(2) above, to the extent the court finds, from facts on the record, that (A) the number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.
- (c) If a defendant is ordered to make restitution to an identifiable victim and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.
- (d) A restitution order may direct the defendant to make a single, lump sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments. *See* 18 U.S.C. § 3664(f)(3)(A). An in-kind payment may be in the form of (1) return of property; (2) replacement of property; or (3) if the victim agrees, services rendered to the victim or to a person or organization other than the victim. *See* 18 U.S.C. § 3664(f)(4).
- (e) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments. . . .

§ 8B1.2. Remedial Orders - Organizations (Policy Statement)

- (a) To the extent not addressed under §8B1.1 (Restitution - Organizations), a remedial order imposed as a condition of probation may require the organization

to remedy the harm caused by the offense and to eliminate or reduce the risk that the instant offense will cause future harm.

- (b) If the magnitude of expected future harm can be reasonably estimated, the court may require the organization to create a trust fund sufficient to address that expected harm.

Commentary

Background: The purposes of a remedial order are to remedy harm that has already occurred and to prevent future harm. A remedial order requiring corrective action by the organization may be necessary to prevent future injury from the instant offense, e.g., a product recall for a food and drug violation or a clean-up order for an environmental violation. In some cases in which a remedial order potentially may be appropriate, a governmental regulatory agency, e.g., the Environmental Protection Agency or the Food and Drug Administration, may have authority to order remedial measures. In such cases, a remedial order by the court may not be necessary. If a remedial order is entered, it should be coordinated with any administrative or civil actions taken by the appropriate governmental regulatory agency.

§ 8B1.3. Community Service - Organizations (Policy Statement)

Community service may be ordered as a condition of probation where such community service is reasonably designed to repair the harm caused by the offense.

Commentary

Background: An organization can perform community service only by employing its resources or paying its employees or others to do so. Consequently, an order that an organization perform community service is essentially an indirect monetary sanction, and therefore generally less desirable than a direct monetary sanction. However, where the convicted organization possesses knowledge, facilities, or skills that uniquely qualify it to repair damage caused by the offense, community service directed at repairing damage may provide an efficient means of remedying harm caused.

In the past, some forms of community service imposed on organizations have not been related to the purposes of sentencing. Requiring a defendant to endow a chair at a university or to contribute to a local charity would not be consistent with this section unless such community service provided a means for preventive or corrective action directly related to the offense and therefore served one of the purposes of sentencing set forth in 18 U.S.C. § 3553(a). . . .

2. EFFECTIVE COMPLIANCE AND ETHICS PROGRAM

§ 8B2.1. Effective Compliance and Ethics Program

- (a) To have an effective compliance and ethics program, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (b)(1) of §8D1.4

(Recommended Conditions of Probation - Organizations), an organization shall—

- (1) exercise due diligence to prevent and detect criminal conduct; and
- (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.

- (b) Due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law within the meaning of subsection (a) minimally require the following:

- (1) The organization shall establish standards and procedures to prevent and detect criminal conduct.
- (2)
 - (A) The organization’s governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.
 - (B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.
 - (C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.
- (3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom

the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.

- (4) (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subparagraph (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.
 - (B) The individuals referred to in subparagraph (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.
 - (5) The organization shall take reasonable steps—
 - (A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;
 - (B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and
 - (C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.
 - (6) The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.
 - (7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program.
- (c) In implementing subsection (b), the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify

each requirement set forth in subsection (b) to reduce the risk of criminal conduct identified through this process. . . .

PART C - FINES

1. DETERMINING THE FINE - CRIMINAL PURPOSE ORGANIZATIONS

§ 8C1.1. Determining the Fine - Criminal Purpose Organizations

If, upon consideration of the nature and circumstances of the offense and the history and characteristics of the organization, the court determines that the organization operated primarily for a criminal purpose or primarily by criminal means, the fine shall be set at an amount (subject to the statutory maximum) sufficient to divest the organization of all its net assets. When this section applies, Subpart 2 (Determining the Fine - Other Organizations) and §8C3.4 (Fines Paid by Owners of Closely Held Organizations) do not apply. . . .

2. DETERMINING THE FINE - OTHER ORGANIZATIONS . . .

§ 8C2.4. Base Fine

- (a) The base fine is the greatest of:
- (1) the amount from the table in subsection (d) below corresponding to the offense level determined under §8C2.3 (Offense Level); or
 - (2) the pecuniary gain to the organization from the offense; or
 - (3) the pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly.
- (b) *Provided*, that if the applicable offense guideline in Chapter Two includes a special instruction for organizational fines, that special instruction shall be applied, as appropriate.
- (c) *Provided, further*, that to the extent the calculation of either pecuniary gain or pecuniary loss would unduly complicate or prolong the sentencing process, that amount, i.e., gain or loss as appropriate, shall not be used for the determination of the base fine.

(d) Offense Level Fine Table

<u>Offense Level</u>	<u>Amount</u>	<u>Offense Level</u>	<u>Amount</u>
6 or less	\$5,000	23	\$1,600,000
7	\$7,500	24	\$2,100,000

8	\$10,000	25	\$2,800,000
9	\$15,000	26	\$3,700,000
10	\$20,000	27	\$4,800,000
11	\$30,000	28	\$6,300,000
12	\$40,000	29	\$8,100,000
13	\$60,000	30	\$10,500,000
14	\$85,000	31	\$13,500,000
15	\$125,000	32	\$17,500,000
16	\$175,000	33	\$22,000,000
17	\$250,000	34	\$28,500,000
18	\$350,000	35	\$36,000,000
19	\$500,000	36	\$45,500,000
20	\$650,000	37	\$57,500,000
21	\$910,000	38 or more	\$72,500,000.
22	\$1,200,000		

...

§ 8C2.5. Culpability Score

(a) Start with **5** points and apply subsections (b) through (g) below.

(b) Involvement in or Tolerance of Criminal Activity

If more than one applies, use the greatest:

(1) If—

(A) the organization had 5,000 or more employees and

(i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or

- (ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or
 - (B) the unit of the organization within which the offense was committed had 5,000 or more employees and
 - (i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or
 - (ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add 5 points; or
- (2) If—
 - (A) the organization had 1,000 or more employees and
 - (i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or
 - (ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or
 - (B) the unit of the organization within which the offense was committed had 1,000 or more employees and
 - (i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or
 - (ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit,

add 4 points; or
- (3) If—
 - (A) the organization had 200 or more employees and
 - (i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense; or

- (ii) tolerance of the offense by substantial authority personnel was pervasive throughout the organization; or
 - (B) the unit of the organization within which the offense was committed had 200 or more employees and
 - (i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or
 - (ii) tolerance of the offense by substantial authority personnel was pervasive throughout such unit,
 - add **3** points; or
 - (4) If the organization had 50 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense, add **2** points; or
 - (5) If the organization had 10 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense, add **1** point.
- (c) Prior History
- If more than one applies, use the greater:
- (1) If the organization (or separately managed line of business) committed any part of the instant offense less than 10 years after (A) a criminal adjudication based on similar misconduct; or (B) civil or administrative adjudication(s) based on two or more separate instances of similar misconduct, add **1** point; or
 - (2) If the organization (or separately managed line of business) committed any part of the instant offense less than 5 years after (A) a criminal adjudication based on similar misconduct; or (B) civil or administrative adjudication(s) based on two or more separate instances of similar misconduct, add **2** points.
- (d) Violation of an Order
- If more than one applies, use the greater:
- (1) (A) If the commission of the instant offense violated a judicial order or injunction, other than a violation of a condition of probation; or (B) if the organization (or separately managed line of business) violated a condition of probation by engaging in similar misconduct, i.e.,

misconduct similar to that for which it was placed on probation, add **2** points; or

- (2) If the commission of the instant offense violated a condition of probation, add **1** point.

(e) Obstruction of Justice

If the organization willfully obstructed or impeded, attempted to obstruct or impede, or aided, abetted, or encouraged obstruction of justice during the investigation, prosecution, or sentencing of the instant offense, or, with knowledge thereof, failed to take reasonable steps to prevent such obstruction or impedance or attempted obstruction or impedance, add **3** points.

(f) Effective Compliance and Ethics Program

- (1) If the offense occurred even though the organization had in place at the time of the offense an effective compliance and ethics program, as provided in §8B2.1 (Effective Compliance and Ethics Program), subtract **3** points.

- (2) Subsection (f)(1) shall not apply if, after becoming aware of an offense, the organization unreasonably delayed reporting the offense to appropriate governmental authorities.

- (3) (A) Except as provided in subparagraphs (B) and (C), subsection (f)(1) shall not apply if an individual within high-level personnel of the organization, a person within high-level personnel of the unit of the organization within which the offense was committed where the unit had 200 or more employees, or an individual described in §8B2.1(b)(2)(B) or (C), participated in, condoned, or was willfully ignorant of the offense.

- (B) There is a rebuttable presumption, for purposes of subsection (f)(1), that the organization did not have an effective compliance and ethics program if an individual—

- (i) within high-level personnel of a small organization; or
- (ii) within substantial authority personnel, but not within high-level personnel, of any organization,

participated in, condoned, or was willfully ignorant of, the offense.

- (C) Subparagraphs (A) and (B) shall not apply if—

- (i) the individual or individuals with operational responsibility for the compliance and ethics program (*see* §8B2.1(b)(2)(C)) have direct reporting obligations to the governing authority or an appropriate subgroup thereof (*e.g.*, an audit committee of the board of directors);
- (ii) the compliance and ethics program detected the offense before discovery outside the organization or before such discovery was reasonably likely;
- (iii) the organization promptly reported the offense to appropriate governmental authorities; and
- (iv) no individual with operational responsibility for the compliance and ethics program participated in, condoned, or was willfully ignorant of the offense.

(g) Self-Reporting, Cooperation, and Acceptance of Responsibility

If more than one applies, use the greatest:

- (1) If the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **5** points; or
- (2) If the organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **2** points; or
- (3) If the organization clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **1** point. . . .

§ 8C2.6. Minimum and Maximum Multipliers

Using the culpability score from § 8C2.5 (Culpability Score) and applying any applicable special instruction for fines in Chapter Two, determine the applicable minimum and maximum fine multipliers from the table below.

<u>Culpability Score</u>	<u>Minimum Multiplier</u>	<u>Maximum Multiplier</u>
10 or more	2.00	4.00
9	1.80	3.60
8	1.60	3.20
7	1.40	2.80
6	1.20	2.40
5	1.00	2.00
4	0.80	1.60
3	0.60	1.20
2	0.40	0.80
1	0.20	0.40
0 or less	0.05	0.20

§ 8C2.7. Guideline Fine Range - Organizations

- (a) The minimum of the guideline fine range is determined by multiplying the base fine determined under §8C2.4 (Base Fine) by the applicable minimum multiplier determined under §8C2.6 (Minimum and Maximum Multipliers).
- (b) The maximum of the guideline fine range is determined by multiplying the base fine determined under §8C2.4 (Base Fine) by the applicable maximum multiplier determined under §8C2.6 (Minimum and Maximum Multipliers).

Historical Note: Effective November 1, 1991.

§ 8C2.8. Determining the Fine Within the Range (Policy Statement)

- (a) In determining the amount of the fine within the applicable guideline range, the court should consider:
 - (1) the need for the sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public from further crimes of the organization;

- (2) the organization's role in the offense;
 - (3) any collateral consequences of conviction, including civil obligations arising from the organization's conduct;
 - (4) any nonpecuniary loss caused or threatened by the offense;
 - (5) whether the offense involved a vulnerable victim;
 - (6) any prior criminal record of an individual within high-level personnel of the organization or high-level personnel of a unit of the organization who participated in, condoned, or was willfully ignorant of the criminal conduct;
 - (7) any prior civil or criminal misconduct by the organization other than that counted under §8C2.5(c);
 - (8) any culpability score under §8C2.5 (Culpability Score) higher than 10 or lower than 0;
 - (9) partial but incomplete satisfaction of the conditions for one or more of the mitigating or aggravating factors set forth in §8C2.5 (Culpability Score);
 - (10) any factor listed in 18 U.S.C. § 3572(a); and
 - (11) whether the organization failed to have, at the time of the instant offense, an effective compliance and ethics program within the meaning of §8B2.1 (Effective Compliance and Ethics Program).
- (b) In addition, the court may consider the relative importance of any factor used to determine the range, including the pecuniary loss caused by the offense, the pecuniary gain from the offense, any specific offense characteristic used to determine the offense level, and any aggravating or mitigating factor used to determine the culpability score. . . .

PART D - ORGANIZATIONAL PROBATION

§ 8D1.1. Imposition of Probation - Organizations

- (a) The court shall order a term of probation:
 - (1) if such sentence is necessary to secure payment of restitution (§ 8B1.1), enforce a remedial order (§ 8B1.2), or ensure completion of community service (§ 8B1.3);
 - (2) if the organization is sentenced to pay a monetary penalty (*e.g.*, restitution, fine, or special assessment), the penalty is not paid in full at

the time of sentencing, and restrictions are necessary to safeguard the organization's ability to make payments;

- (3) if, at the time of sentencing, (A) the organization (i) has 50 or more employees, or (ii) was otherwise required under law to have an effective compliance and ethics program; and (B) the organization does not have such a program;
- (4) if the organization within five years prior to sentencing engaged in similar misconduct, as determined by a prior criminal adjudication, and any part of the misconduct underlying the instant offense occurred after that adjudication;
- (5) if an individual within high-level personnel of the organization or the unit of the organization within which the instant offense was committed participated in the misconduct underlying the instant offense and that individual within five years prior to sentencing engaged in similar misconduct, as determined by a prior criminal adjudication, and any part of the misconduct underlying the instant offense occurred after that adjudication;
- (6) if such sentence is necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct;
- (7) if the sentence imposed upon the organization does not include a fine; or
- (8) if necessary to accomplish one or more of the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).

§ 8D1.2. Term of Probation - Organizations

- (a) When a sentence of probation is imposed—
 - (1) In the case of a felony, the term of probation shall be at least one year but not more than five years.
 - (2) In any other case, the term of probation shall be not more than five years.

§ 8D1.3. Conditions of Probation - Organizations

- (a) Pursuant to 18 U.S.C. § 3563(a)(1), any sentence of probation shall include the condition that the organization not commit another federal, state, or local crime during the term of probation.
- (b) Pursuant to 18 U.S.C. § 3563(a)(2), if a sentence of probation is imposed for a felony, the court shall impose as a condition of probation at least one of the following: (1) restitution or (2) community service, unless the court has imposed

a fine, or unless the court finds on the record that extraordinary circumstances exist that would make such condition plainly unreasonable, in which event the court shall impose one or more other conditions set forth in 18 U.S.C. § 3563(b).

- (c) The court may impose other conditions that (1) are reasonably related to the nature and circumstances of the offense or the history and characteristics of the organization; and (2) involve only such deprivations of liberty or property as are necessary to effect the purposes of sentencing. . . .

Problem 18-5

Recall the JP Morgan “London Whale” case from Chapter 3. If the government had proceeded against JP Morgan to a trial and conviction, rather than a settlement, estimate how the above Guidelines would have calculated JP Morgan’s recommended fine range, assuming that revelation of the mismarking in the London books caused a \$750 million loss in JP Morgan’s market capitalization.

C. Sentencing Firms Through Plea Agreements

UNITED STATES v. AEGERION PHARMACEUTICALS, INC., 2017 WL 5586728 (D. Mass. Nov. 20, 2017)

WILLIAM G. YOUNG, District Judge:

Let’s see if I’ve got this straight. Aegerion Pharmaceuticals, Inc. (“Aegerion”) developed an effective medicine, called Juxtapid, to treat high cholesterol in people with a rare genetic disease. The treatment did not come cheap. “At market launch in January 2013, Juxtapid cost roughly \$295,000 per patient per year. The annual cost of Juxtapid later increased to over \$330,000 per patient per year.”

Thereafter Aegerion engaged in a series of unfair and deceptive acts, including outright fraud, which pervaded corporate management, all designed to increase the use of Juxtapid in circumstances where such treatment was not medically indicated. Aegerion wrongfully received a great deal of money from this corporate criminal conduct. Still more important, it appears that Aegerion knowingly induced the prescription of Juxtapid to many patients for which it would do no good, thus crowding out more promising therapies. Indeed, “[n]umerous HeFH, statin-intolerant, and diabetic patients, including elderly and pediatric patients suffered adverse events, including liver toxicity and gastrointestinal distress, and had to discontinue use of Juxtapid.”

Facing two misdemeanor counts of introducing misbranded drugs into interstate commerce, Aegerion now seeks to plead guilty, pursuant to Fed. R. Crim. P. 11(c)(1)(C) (the “C” plea). Under a “C” plea, the judge’s choice at sentencing is limited to imposing the sentence agreed between the government and the offender or rejecting the plea altogether. The judge, of course, is forbidden from engaging in the plea bargaining itself. These two requirements conflict whenever a court is inclined to reject a “C” plea

since an unexplained rejection smacks of personal fiat and any explanation sounds like court interference in the parties' good faith bargaining. There is no easy course. Seeking to avoid this difficulty, this Court in *United States v. Orthofix, Inc.*, thoroughly considered the issues and explained its conclusion that the "C" plea has no place, save in the rarest circumstances, in the context of corporate criminal pleas.

As this case illustrates, the issues presented by the "C" plea in the corporate context are more disquieting than I had originally thought.

To begin:

Here, there is much to commend the proffered plea; unfortunately much of it remains sealed so as not to compromise on-going criminal investigations. It suffices here to say that Aegerion's top management has undergone a near complete makeover and that its cooperation with the government's law enforcement efforts is truly extraordinary.

That said, in light of the larger issues discussed below, it is the duty of this Court candidly to explain the issues it has with this proffered "C" plea. This Court is not bargaining with the parties. None of these points—singly or together—is necessarily a deal breaker. Each one is a consideration—and perhaps I may well not yet have considered every relevant issue.

Oh, Aegerion amended "C" plea—

How do I dislike thee?

Let me count the ways:

- The government agrees that sentencing may take place immediately upon this Court's acceptance of the "C" plea even without the preparation of a Pre-Sentence Report. Why? One can readily understand why Aegerion wants its plea and sentence to be a one-day story, soon forgotten. Why does the government agree? Isn't it better to permit the Court to obtain a thorough Pre-Sentence Report from its own Probation Office the better to understand this complex case?
- Are the Sentencing Guidelines properly calculated? Why is there no enhancement for vulnerable victims? U.S.S.G. § 3A1.1(b)(1). One would think that the marketing of misbranded drugs to a patient population in need of appropriate treatment would meet the quintessential definition of vulnerable victims. Is there no enhancement for the use of sophisticated means to commit the crimes? After all, the scheme here involved falsely marketing Juxtapid for off-label uses to sophisticated physicians. One can readily infer that such false marketing was itself sophisticated.
- Assuming without concluding that the Sentencing Guidelines are properly calculated, the recommended fine range is not less than \$18,542,192 to \$30,903,653. Even so, the "C" plea calls for a fine of only \$6,200,000 paid in installments and forfeiture of \$1,000,000. The parties justify the downward variance by pointing to the extraordinary

cooperation of Aegerion's new management and its present precarious financial condition.

What is left unexplained is why the government does not simply let Aegerion collapse in disgrace. Surely Aegerion is not too big to fail. After all, its stock apparently is now owned by Novelion, Inc., an innocent investor but one knowledgeable of Aegerion's criminal conduct at the time of its investment. Couldn't an asset sale to Novelion fund the civil settlement, the fine, and the forfeiture? Couldn't Novelion pick up Aegerion's employees? After all, Juxtapid is an FDA approved medicine with an appropriate therapeutic value.

Perhaps these questions do not make economic, real world sense. The point is, I do not know and the proffered "C" plea does not begin to explain the financial picture in detail. Apparently the parties think their representations suffice. They do not. I have a job to do—an independent judicial responsibility I may not delegate to others.

- Most problematic, this "C" plea provides not one cent of restitution to the actual victims. This result is justified say the parties by the multi-million dollar proposed settlement between Aegerion and the third-party payors, federal and state, who were fleeced into paying for misbranded drugs. Thus, governmental actors (who inferentially provided most of the purloined funds) get partial repayment but the actual victims, many of whom suffered medical complications and physical and emotional harm, get nothing.

How can I possibly justify such a result? The parties aver "that the complication and prolongation of the sentencing process that would result from an attempt to fashion a proper restitution order under 18 U.S.C. § 3663 outweighs the need to provide restitution to any non-governmental victims in this case." Really?

Why? The parties are utterly silent on this point. Indeed, in light of this Court's management of the *In Re Relafen Antitrust Litigation*, it hardly seems an insurmountable burden to find out who got Juxtapid when such medication was not clinically indicated. After all, the parties agree Aegerion's gross gain is \$15,451,827.

- This "C" plea obligates the government not to undertake any further prosecution of Aegerion. What is the government trading away here? Why? What other companies may be implicated? None of this information is provided. Are we not concerned we may be foisting misbranded drugs on innocent and unsuspecting victims in other nations without adequate notification to their regulatory authorities?

- This Court has already commended the new management of Aegerion for its truly remarkable cooperation. It appears to go far beyond the cooperation required in the plea agreement. Why, then, is the cooperation agreement portion of the proffered "C" plea so pallid? The language of the proffered "C" plea is hardly a template for other cases. It obligates the corporate defendant to do little more than could be required by a proper subpoena.

- The proffered “C” plea includes a comprehensive—and in this Court’s mind adequate—internal compliance and review program to prevent any recurrence of this wrongdoing. The problem is that the proposed program is entirely internal. There is no provision for the Court’s personnel (or some independent employee) independently to examine compliance much like an on-site bank examiner. Even with strict compliance, independent evaluation provides valuable insight. *See* Gretchen Morgenson, *The Fed Wants to Make Life Easier for Big-Bank Directors*, N.Y. TIMES (Aug. 11, 2017), (“[R]educing the information flow between bank boards and [bank examiners] just doesn’t seem smart.”); *see also* Katrice Bridges Copeland, *The Yates Memo: Looking for “Individual Accountability” in all the Wrong Places*, 102 IOWA L. REV. (2017) (“One of the principal problems with the government’s approach to corporate crime is that the government expects the corporation to police itself. The notion that the corporation should perform the prosecutor’s function of investigating, identifying, and providing evidence against the wrongdoer within the corporation is ludicrous. . . . If the government truly wants to achieve individual accountability, it must therefore conduct its own investigations from start to finish, rather than relying upon the corporation’s internal investigation.”).

- While the amended “C” plea now includes a period of probation, it still prohibits this Court from setting any special conditions beyond those set forth in the agreement.

- Perhaps Aegerion’s plea is premature. Maybe the Court ought stay its hand until the other criminal investigations have run their course. In that way, the Court fairly could evaluate the actual value of Aegerion’s cooperation. *Cf.* U.S.S.G. 5K1.1. . . .

Aware of the concern for promoting justice, Aegerion advances three reasons why this Court ought nevertheless here take a pass and accept this proffered “C” plea.

First, Aegerion argues that times have changed since *Orthofix, Inc.* Look, it says, today we have the “Yates Memo” within the Department of Justice “emphasizing the importance of prosecuting the individuals responsible for the underlying wrongdoing when combatting corporate crime.” Such prosecutions depend on corporate cooperation, Aegerion claims, and therefore “C” pleas must be granted to garner such cooperation. These are questionable premises. There has been no uptick in the prosecution of criminal executives since the issuance of the “Yates Memo” in 2015. Moreover, no responsible analysis suggests that, given the government’s extensive powers to secure cooperation, granting “C” pleas plays any role in aiding its law enforcement goals.

Second, Aegerion posits that “[e]ntering into a Rule 11(c)(1)(C) plea is often a corporation’s only option to resolve criminal charges as the uncertainty in sentencing inherent in Rule 11(c)(1)(B) pleas causes too great a risk to innocent employees, shareholders, investors, and other interested parties.” Say what? Why is a “C” plea often a corporation’s only option to resolve criminal charges? Does Aegerion think district judges simply are not competent to sentence corporate criminals? Or is it that the interests of drug dealers’ innocent wives, children, neighbors, and colleagues are somehow less important than those of a corporation’s shareholders and investment

bankers? A “C” plea is never a corporation’s only option—it has the option of a fair and impartial trial before an American jury, the purest and most incorruptible justice humankind has ever conceived.

Finally, Aegerion argues forcefully that rejecting its “C” plea would result in impermissible disparity in our sentencing regime. It notes, with apparent accuracy, “[t]he vast majority of corporate criminal charges involve (C) pleas. Since Orthofix pled guilty in December 2012, at least 85 companies have had (C) pleas accepted by federal courts.” Aegerion supports this general statement with a footnote carefully limited to detailing the practice concerning criminal pharmaceutical corporations in this district. . . .

Reduced to its essence, Aegerion’s argument goes like this: Look at this roster of criminal pharmaceutical corporations sentenced in Massachusetts:

ROSTER OF CRIMINAL PHARMACEUTICAL CORPORATIONS

Warner Chilcott Sales U.S. (LLC)

GlaxoSmithKline LLC

Merck Sharp & Dohme Corp.

Elan Pharm., Inc.

SB Pharmco Puerto Rico, Inc.

Forest Pharm, Inc.

Ortho-McNeil Pharm., LLC.

Pharmacia & Upjohn Co.

Biovail Pharm. Inc.

Bryan Corp.

Schering Sales Corp.

Serono Laboratories, Inc.

Warner-Lambert Co. LLC

Bayer Corp.

TAP Pharm. Products, Inc.

Like these corporations, we [Aegerion] are a criminal pharmaceutical corporation. They all got “C” pleas. Therefore we should too—it’s forbidden disparity if we don’t.

This argument is silly—complete balderdash. The disparity addressed by the Sentencing Reform Act of 1984 and the jurisprudence that follows it deals with unwarranted disparity among sentences actually imposed, not the analyses the judges used to get there.

Aegerion has, however, proved a different type of unwarranted disparity—the shocking disparity between the treatment of corporations and individuals in our criminal justice system. I am ashamed I had not recognized this glaring inequity until this case. Passing without further comment the truly breathtaking extent of pharmaceutical corporate criminality revealed by the “roster” above, Aegerion proves beyond peradventure that a forbidden two-tier system pervades our courts. Corporations routinely get “C” pleas after closed door negotiations with the executive branch while individual offenders but rarely are afforded the advantages of a “C” plea. Instead, they plead guilty and face a truly independent judge. This is neither fair nor just; indeed, it mocks our protestations of “equal justice under law.”

It’s not hard to understand why corporations facing criminal charges seek “C” pleas. It gives them various advantages, including the most effective damage control.

Save when they are themselves on the attack, seeking to enforce their own property rights, corporations today seek to avoid the legal system altogether, *see In re Relafen Antitrust Litigation*; Mark Galanter, *The Hundred-Year Decline of Trial and the Thirty Years War*, 57 STAN. L. REV. (2005) (“The recent accelerated decline in the number of trials is . . . part of a much broader turn from law, a turn away from the definitive establishment of public accountability in adjudication . . .”), negotiating their differences with the administrative state in other fora, *see William G. Young, An Open Letter to U.S. District Judges*, 50–JUL FED. LAW. (2003) (“[Corporations have] a good chance of opting out of the legal system altogether. Today’s expansive reading of the Federal Arbitration Act allows the unilateral imposition of arbitration clauses to trump all sorts of civil rights and consumer protection legislation. Coupled with today’s expansive preemption jurisprudence, business can (and does) make a rational calculus that leads it to lobby for an ever-diminishing role for the federal district courts.”). They have been enormously successful. The insurance industry found it could largely immunize itself from suit due to the Employee Retirement Income Security Act (“ERISA”). In light of Supreme Court jurisprudence, many corporations found that through mandatory anti-consumer arbitration they could largely lock the little guy out of the courthouse. Moreover, corporations frequently found they could make peace with many executive agencies without admitting liability (thus exposing them to related civil litigation) and, even more important, could compel the imprimatur of the courts thereon.

Small wonder, then, that corporations seek the same cozy model (and act as though it is their due) even when facing serious criminal charges. Consider the advantages to the corporation of the “C” plea: All negotiations are private. No charges are brought until the plea deal is finalized so the risk of investigative journalism is minimized. All aspects of the sanction are negotiated so there will be no surprises from the judiciary. As the

record here makes clear, the likelihood of the judge turning down the “C” plea is virtually non-existent. In a best case scenario, the court will perform the plea colloquy with a lower level functionary and will immediately impose the agreed upon sanction. Case over—in the vernacular of the days of the print journalism, “a one day story, second section, below the fold.”

What is far more difficult to fathom is why the government negotiates a “C” plea with a corporation. In my experience, individuals are afforded “C” pleas only when the government’s case is weak and it is trying to lock in the plea or when it is trying to flip an implicated co-defendant and obtain evidence against others. Neither of these concerns apply in most corporate criminal prosecutions. A corporation has no Fifth Amendment privilege, *Braswell v. United States*, and it cannot testify. In my experience, the government never even commences a criminal prosecution against a corporation unless it has a very strong case.

So why does the government uniformly buckle on this point? Knowledgeable commentators have levelled harsh criticisms against prosecutors for such risk aversion. See e.g., JESSE EISINGER, *THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES* (Simon & Schuster 2017); Jed S. Rakoff, *Justice Deferred is Justice Denied*, N.Y. REVIEW OF BOOKS (Feb. 19, 2015). Lacking sufficient knowledge, this Court expresses no opinion.

I can, however, offer two observations prosecutors ought always keep in mind.

First, trials matter. “Every lawsuit—whether it is a dispute arising out of a contract, the purchase of a defective product, or the conduct of a government official—has the potential to change the rules that govern behavior going forward.” ALEXANDRA LAHAV, *IN PRAISE OF LITIGATION* 6 (Oxford Univ. Press, 2017). The verdict of an American jury has a moral force incomparably greater than any plea. That’s why corporations are so desperate to avoid them. Corporate pleas involve well-educated elites talking to other equally well-educated elites. Things are said, sanctions imposed, nothing really happens. Prices do not come down. Consumers gain no perceptible benefit. Corporations march on, apparently impervious to government regulation or the law itself.

Contrast an actual trial: every trial is a public morality play—perhaps a story of greed and avarice or amoral chicanery, all of it played out live upon actual understandable evidence before twelve public judges largely chosen at random. The result is the fairest, most incorruptible, democratic expression of justice humankind has ever known. “[L]itigation is a social good [which] enables people to promote the rule of law and affirms our citizen-centered political system.”

Litigation helps democracy function in a number of ways: it helps to enforce the law; it fosters transparency by revealing information crucial to individual and public decision-making; it promotes participation in self-government; and it offers a form of social equality by giving litigants equal opportunities to speak and be heard. . . .

Second, every corporate “C” plea diminishes the legitimacy of our independent judiciary. Even when prosecutors agree to bargain for a plea, why make it a “C” plea? What does a “C” plea add to the public good where prosecutors have a sound case? Face it, if used in strong cases the “C” plea delegitimizes the central role of the trial judge.

Any injustice rankles Americans, systemic injustice rankles them profoundly. Those of us who occupy the constitutional offices of the United States—in whatever branch we serve—must humbly acknowledge that there exists in America today a deep and pervasive sense of injustice. . . .

Upon this record and against this background, accepting this “C” plea simply is not in the public interest. There are just too many unknowns here and the “C” plea process itself unduly hobbles this Court’s sworn constitutional duty to “do equal right to the poor and to the rich.” 28 U.S.C. § 453.

I end as I began. I am not bargaining with anyone. The problem is the “C” plea process itself. Indeed, as I have already said, there is much in the proffered plea agreement to commend. Moreover, there is here not a scintilla of evidence of collusion among the parties. This does not appear to be a sweetheart deal. Were this Court to have a free hand, I might well sentence Aegerion to virtually the same sentence as the parties here urge on the Court (that’s what happened in Orthofix)—or I might not. I simply do not know because, as yet, the parties have deprived me of that responsibility, perpetuating an improper and unjust two-tier system that erodes public confidence in the sentence to be imposed in violation of 18 U.S.C. § 3553(a) (if indeed it does not violate the Equal Protection clause of the 14th Amendment to the U.S. Constitution).

This case will stand for trial as previously ordered.

Problem 18-6
Let us end where we started, with a question of theory. How should the legal system punish corporations (assuming that one agrees that they are appropriate subjects of punishment)?

AUTHOR

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