

EXECUTIVE BRANCH REGULATION OF CRIMINAL DEFENSE COUNSEL AND THE PRIVATE CONTRACT LIMIT ON PROSECUTOR BARGAINING

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INTRODUCTION

As is true of most constitutional rights, the right to counsel in criminal cases is subject to regulation by all three government branches: judicial, legislative, and executive. Some of those regulatory actions are well known and uncontroversial, such as appellate courts defining the parameters of constitutional rights or trial judges setting standards for admission to practice in local courts. Others are sometimes controversial but similarly well known, such as legislatures setting funding levels—often too low—to pay for indigent defendants' appointed counsel. But the executive branch's capacity to affect access to, and the effectiveness of, defense counsel is more troublesome and, as a consequence, often discussed by scholars, practitioners, and even legislators.¹ Nonetheless, in recent years, prosecutors have more actively affected the power and effectiveness of defense counsel, especially privately financed counsel in white-collar crime cases.

The U.S. Department of Justice has faced a range of objections to its recently revised policy,² outlined in the so-called Thompson

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1. See Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007); Tamar R. Birkhead, *The Conviction of Lynne Stewart and the Uncertain Future of the Right to Defend*, 43 AM. CRIM. L. REV. 1 (2006); Peter J. Henning, *Targeting Legal Advice*, 54 AM. U. L. REV. 669 (2005); Letter from Michael S. Greco, American Bar Association (ABA) President, to Att'y Gen. Alberto Gonzales, Proposal for Revising Department of Justice Attorney-Client Privilege and Work Product Doctrine Waiver Policy (May 2, 2006), available at http://www.abanet.org/poladv/letters/attyclient/060502letter_acprivgonz.pdf; AM. CHEMISTRY COUNCIL ET AL., THE DECLINE OF THE ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE CONTEXT, available at <http://www.acca.com/Surveys/attyclient2.pdf>.

2. See Memorandum from Paul J. McNulty, Deputy Att'y Gen., to Heads of Dep't Components & U.S. Att'ys (Dec. 12, 2006), available at http://www.usdoj.gov/dag/speeches/2006/mc-nulty_memo.pdf [hereinafter McNulty Memo]; Memorandum from Robert D. McCallum, Jr.,

Memo.³ That policy undercuts private counsel in white-collar crime cases in two ways. First, prosecutors often make the severity of charges against the firm contingent upon the firm waiving attorney-client and work-product privileges, a practice that lowers barriers to the government's investigation of the firm. A range of industry groups, defense attorneys, and the American Bar Association have objected to this policy,⁴ and some in Congress have pushed to limit the practice.⁵ Last year, the U.S. Sentencing Commission abandoned a similar two-year-old guideline that made sentence reductions contingent upon privilege waivers.⁶

Second, federal prosecutors encourage—critics say coerce—corporate defendants to not pay the legal fees of corporate officers who face separate indictments by making leniency for the firm contingent upon nonpayment. Individual defendants in the KPMG tax fraud case recently won a challenge to that policy.⁷ There, a federal district court held that prosecutors violated the Due Process Clause and the Sixth Amendment Counsel Clause and dismissed thirteen individuals from the case.⁸ Prosecutors have also targeted firms' payments of attorneys' fees to officers through forfeiture statutes, under which prosecutors restrain assets that defendants need to pay defense counsel.

Acting Deputy Att'y Gen., to Heads of Dep't Components & U.S. Att'ys (Oct. 21, 2005) (on file with author).

3. Memorandum from Larry D. Thompson, Deputy Att'y Gen., to Heads of Dep't Components & U.S. Att'ys (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guide_lines.htm [hereinafter Thompson Memo]. The policies established by the Thompson Memo were later reprinted in the U.S. ATTORNEYS' MANUAL, tit. 9, § 162 (2006), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00162.htm.

4. The ABA House of Delegates adopted a resolution in August 2005 opposing prosecutorial policies that seek waivers of attorney-client and work-product privileges. *See* <http://www.abanet.org/poladv/priorities/privilegewaiver/> (last visited Oct. 17, 2007) (describing the ABA's involvement).

5. Senator Arlen Specter introduced a bill barring federal prosecutors from demanding waivers of attorney-client privilege. Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007). The House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held hearings on the issue on March 7, 2006. *See* <http://judiciary.house.gov/oversight.aspx?ID=222> (last visited Oct. 17, 2007) (providing a webcast of the hearing and written statements of witnesses Associate Attorney General Robert D. McCallum, Jr., former Attorney General Dick Thornburgh, U.S. Chamber of Commerce President and CEO Thomas J. Donohue, and others).

6. On April 2, 2006, the Commission removed the privilege-waiver amendment from U.S. Sentencing Guidelines § 8C2.5; the amendment went into effect as of November 1, 2006. UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL app. C (Supp. 2006).

7. *United States v. Stein (KPMG I)*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

8. *United States v. Stein (KPMG II)*, 495 F. Supp. 2d 390 (S.D.N.Y. 2007) (dismissing indictments for violation of substantive due process).

Prosecutors use this strategy not only in drug and organized-crime cases, but also in corporate and white-collar crime cases.⁹

It is helpful to view these recent practices in the context of other Justice Department strategies to monitor or limit defense representation. The Department has successfully defended its policy of breaching attorney-client privilege when national security or the risk of serious crime requires it. In these cases, government officials eavesdropped on private attorney-client communications.¹⁰ Additionally, with the aid of trial judges, prosecutors have long had other, indirect means to limit defendants' choice of counsel. They can urge local courts to enforce narrow standards for *pro hac vice* admission of attorneys¹¹ and object to defendants' willingness to waive an attorney's conflict of interest, thereby denying a defendant the attorney she most prefers.¹²

This Article has two goals. The first is to situate Justice Department pressure on corporate and white-collar defense counsel within a larger framework of executive regulation of defense counsel. The second is more specific: this Article criticizes the constitutional rationale of the KPMG court but identifies a distinct constitutional limit—more consistent with the doctrines governing plea bargaining and asset forfeiture—on prosecutorial power to undermine privately funded defense counsel. Like the KPMG holding, this doctrine provides a means for defendants to resist one significant form of such Justice Department regulation: nonpayment of corporate employees' attorneys' fees.¹³

Part II of this Article sketches the government's abilities to regulate the various components of defense counsel practice as a basis for as-

9. In a recent corporate fraud case, prosecutors convinced the trial judge to restrain the corporations from making attorneys' fee payments for two of its top officers charged with fraud offenses on grounds that the firm's payments were traceable to the officers' fraud. *United States v. Wittig*, No. 03-40142-JAR, 2004 WL 1490406 (D. Kan. June 30, 2004) (allowing a firm to give defendant-officers funds for attorneys' fees but enjoining defendants from transferring those funds to their attorneys), *modified*, 333 F. Supp. 2d 1048 (D. Kan. 2004), *reinstated*, 2005 WL 1227914 (D. Kan. May 23, 2005) (after mistrial and re-indictment, reinstating restraining order on attorneys' fees payments by firm and placing funds for attorneys' fees in escrow). For an overview of the Wittig case disputes over payments for attorneys' fees, see Robert G. Morvillo & Robert J. Anello, *Criminal-Case Compensation of Fees: Not A Defendant's Right?*, 233 N.Y. L.J. 1 (June 7, 2005).

10. See 28 C.F.R. § 501.3(d) (2005) (describing the Bureau of Prisons's "special administrative measures" for "prevention of acts of violence and terrorism" that allow the Bureau to monitor attorney-client communications when it has "reasonable suspicion" that those communications will "further or facilitate acts of terrorism").

11. See, e.g., *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006).

12. See, e.g., *Wheat v. United States*, 486 U.S. 153 (1988).

13. See *KPMG II*, 495 F. Supp. 2d 390.

sessing executive branch policies to undermine counsel.¹⁴ It suggests that the organizing concern for regulation of counsel is not simply fairness or defendants' self-interest,¹⁵ but also accuracy and a less-noted goal, effectiveness of criminal law enforcement. As the Supreme Court noted, the parameters of defendants' constitutional rights are crafted in light of "the adverse impact . . . upon the Government's interests," including "the Government's interest in securing those guilty pleas that are factually justified . . . [and] the efficient administration of justice."¹⁶

Part III analyzes the government's regulation of privately funded defense counsel in relation to accuracy and enforcement objectives.¹⁷ The Court has recognized and deferred to prosecutors' unique abilities, especially knowledge of law enforcement needs and management of litigation burdens.¹⁸ When prosecutors block defendants' choice of counsel by pushing for defense counsel's disqualification or seeking forfeiture of defendants' funds to pay counsel, courts have been supportive, in substantial part because courts must approve those tactics as well.¹⁹ But Part III argues that demands for privilege waivers and firms' nonpayment of employees' attorneys' fees fit a different model, in which prosecutors are much less restrained or regulated by courts. Despite the recent district court decision in the KPMG case finding such prosecutorial tactics unconstitutional, the Supreme Court has left little doctrinal basis for restricting prosecutors' incentives to bargain for defendant cooperation.²⁰

Part IV suggests how firms, through private contract, can take much of the sting out of prosecutors' abilities to demand nonpayment of attorneys' fees.²¹ Further, courts are likely to be receptive to a narrow constitutional doctrine that bars prosecutorial incentives for firms to breach duties to pay fees, because that doctrine would be grounded in protecting contract obligations as much as the right to counsel. Part V concludes that, because the policies underlying the Thompson Memo

14. See *infra* notes 23–50 and accompanying text.

15. Nor is a primary concern of this set of doctrines the lawyer's discretion and the tension between clients' interests and public interests, which are prominent themes in professional responsibility literature. See, e.g., WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998).

16. *United States v. Ruiz*, 536 U.S. 622, 631 (2002) (noting that "due process considerations" require balancing defendants' interests against the "adverse impact . . . [o]n the Government's interests").

17. See *infra* notes 51–89 and accompanying text.

18. See *id.*

19. In the case of forfeiture, legislatures must first authorize such tactics.

20. *United States v. Stein (KPMG II)*, 495 F. Supp. 2d 390 (S.D.N.Y. 2007).

21. See *infra* notes 90–122 and accompanying text.

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are unlikely to be revised any time soon, the contract approach proposed in this Article may provide a feasible method of limiting prosecutors' ability to bargain for nonpayment of attorneys' fees.²²

II. METHODS AND GOALS OF REGULATING DEFENSE COUNSEL

The Sixth Amendment's Counsel Clause grants two legal entitlements.²³ The first, which tracks the Counsel Clause's original intent, allows defendants to hire counsel.²⁴ The second grants indigent defendants publicly financed counsel.²⁵ Both versions of counsel entitlement leave questions about government power to limit counsel unanswered, because, like other entitlements, this one is comprised of several components, each of which can be regulated differently. The counsel entitlement—again, like others—can be defined by two different variables: eligibility criteria and benefit levels.²⁶ The Supreme Court has clearly defined the former in constitutional law. Anyone charged with a crime may hire private counsel.²⁷ Those who are at risk of incarceration and are unable to hire counsel are eligible for publicly financed lawyers,²⁸ and those accused of felonies are eligible regardless of the prospect of incarceration.²⁹

The benefit levels of this right, however, are not well defined by constitutional doctrine, so its real content is mostly defined by other players. This Part describes how benefit levels are determined not only in light of defendants' interests, but also in light of competing, systemic goals of adjudication accuracy and law enforcement effectiveness. With those interests at stake, in addition to defendant-oriented fairness, the executive branch has a stronger role, and claim to competence, in regulating counsel. In this view, contrary to much boilerplate language in the case law and scholarly literature, debates regarding defense counsel are not solely about the resources necessary

22. See *infra* notes 123–130 and accompanying text.

23. U.S. CONST. amend. VI.

24. See *id.*

25. *Id.*

26. See David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633 (2004).

27. U.S. CONST. amend. VI.

28. This is true even in the case of a suspended sentence. See *Alabama v. Shelton*, 535 U.S. 654 (2002).

29. *Scott v. Illinois*, 440 U.S. 367 (1979) (holding that there is no right to counsel in misdemeanor cases if the defendant faces no term of imprisonment); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (establishing the right to counsel in misdemeanor cases); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (establishing the right to appointed counsel in felony cases).

for attorneys to serve clients' interests and achieve a fair process—the framework for much right-to-counsel litigation.³⁰

Recall that the Justice Department eavesdrops on communications between lawyers and their federally detained clients, effectively denying some defendants attorney-client privilege.³¹ Lower courts have approved this practice when the Department asserts that the defendant is particularly dangerous—especially if she has suspected ties to terrorism—and the attorney might be a conduit for communication with collaborators.³² Prosecutors bargain case-by-case for broader privilege waivers. That weakens defense counsel by removing a significant information control tool. Under the Thompson Memo, such waivers by corporate defendants are commonly a condition for civil settlement of potentially criminal charges, deferred prosecution agreements, or plea bargain discounts.³³

Legislatures define other components of the entitlement with input from local trial courts and prosecutors. On the indigent side, legislatures set funding levels to define the content of the counsel benefit. Those funding levels are routinely capped, often at inadequate levels.³⁴ Minimal funding for attorneys' fees gives lawyers incentives to invest less effort in cases. Legislatures, together with trial courts, further control appointed lawyers' investigative capacity by limiting funds for expert and investigator assistance and evidence analysis. Under *Ake v. Oklahoma*, defendants who are entitled to appointed counsel are entitled to expert assistance only for "significant factor[s]" in the trial.³⁵ Trial judges make that judgment—though legislatures may provide statutory guidance—and legislatures or local governments allocate funds, but typically leave the distribution of those funds to trial judges.³⁶ Tight budgets force trial judges, whose budget

30. See, e.g., *Gideon*, 372 U.S. 335; *State v. Citizen*, 898 So. 2d 325 (La. 2005); *State v. Peart*, 621 So. 2d 780 (La. 1993).

31. See 28 C.F.R. § 501.3(d) (2005).

32. See Birkhead, *supra* note 1, at 27–43.

33. For a detailed account of prosecutorial pressure for both waiver and nonpayment of legal fees that resulted in a deferred prosecution agreement, see *United States v. Stein (KPMG I)*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

34. Studies of inadequate public defense funding are seemingly perennial and ubiquitous. See The Spangenberg Group, <http://www.spangenberggroup.com/> (last visited Oct. 17, 2007). For simplicity's sake, this Article usually refers to legislatures as the funders of indigent defense. More precisely, however, in many states, legislatures delegate to localities the task of funding appointed counsel, or they designate a locally based funding source, such as revenue from the jurisdiction's criminal fines. See Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045 (2006).

35. 470 U.S. 68, 83 (1985).

36. In *Caldwell v. Mississippi*, the Mississippi Supreme Court approved a statute that required a finding of reasonableness before defendants received funds for assistance to support their at-

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administrations are monitored, to ration scarce resources.³⁷ Therefore, judges often establish norms for permissible defense attorney investigative efforts.³⁸

Interestingly, and more subtly, something similar is true for retained counsel. All defendants can hire counsel, but the government has some means to limit defendants' resources for doing so, to bar choices for particular attorneys, and to restrict attorneys' capabilities—such as the privilege to have confidential communications with clients. The primary example of the last is the regulation permitting the government to monitor client communications while in federal detention, which affects appointed counsel as well.³⁹ Courts can limit choices for a specific lawyer through *pro hac vice* motions, motions to change

torney. 472 U.S. 320, 323 n.1 (1985) (holding that denying an investigator, a fingerprint expert, and a ballistics expert to a defendant under a state law that predicated access to such expert assistance on a finding of reasonableness was constitutional).

37. See, e.g., *Status of Indigent Defense in Georgia: A Study for the Chief Justice's Commission on Indigent Defense*, in SPAGENBERG REPORT 68 (2003), available at <http://www.georgiacourts.org/aoc/press/idc/idchearings/spangenberg.doc> (superior court judge in a large urban county stated that, “[a]s far as experts are concerned, I am as cheap as possible. This is a Chevy operation, not a Mercedes operation. We are under extreme pressure from the county to hold our expenses down.”); *id.* at 70 (a chief superior court judge in a rural circuit reported “that he feels acute pressure from the counties to cut back on expenditures on counsel, experts and investigators”).

38. In Georgia, a 2003 study made these findings:

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

Id. at 66 (judges in one Georgia county openly admitted to unconstitutional rationing, granting experts and investigators only in capital cases, despite the *Ake* doctrine). Sometimes attorneys learn to simply not apply for funds despite having a plausible claim for them. Others continue to apply in the face of likely denial. See, e.g., *id.* at 68 (appointed attorney in one Georgia county reported that “out of the 20 times he has applied for an expert he has never received an expert”). Courts can sometimes gain lawyers' cooperation in efficient adherence to the norm, such as through implicit penalties for defendants who demand *Ake* funds and lose. See Darryl K. Brown, *Criminal Procedure Entitlements, Professionalism, and Lawyering Norms*, 61 OHIO ST. L.J. 801, 828–31 (2000). Comparable signaling to ration other costly rights, such as jury trials, is well documented. See ROY B. FLEMMING ET AL., *THE CRAFT OF JUSTICE: POLITICS AND WORK IN CRIMINAL COURT COMMUNITIES* 110, 118–19 (1992) (providing similar data—documenting trial judges' views of “illegitimate” trials); MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* 143 (1978) (recounting a trial judge insisting that any defendant “deserves to be penalized for the trial” and consuming court resources unless “he has got a reasonable position” for insisting on one); see also *In re Inquiry Concerning Judge Darmon*, 487 So. 2d 1, 3 (Fla. 1985) (removing a judge from office for, among other things, telling defendants on the record that they would incur sentence enhancements for insisting on jury trials or defense attorneys in certain cases).

39. 28 C.F.R. § 501.3(d) (2005).

counsel, and by supervising attorneys' conflicts of interest.⁴⁰ Trial courts enjoy "some discretion to limit the exercise of the right to counsel of choice when insistence upon it would disproportionately disadvantage the government or interfere with the ethical and orderly administration of justice."⁴¹

One of the two most effective tools for limiting resources for private counsel is forfeiture. At Congress's urging, prosecutors use broad forfeiture statutes to gain pretrial restraint of assets that defendants need to pay defense lawyers.⁴² Those assets must stem from criminal proceeds, although prosecutors have convinced courts to encumber even fee payments that firms contractually owe to officers on the theory that the officers' fraud on the firm led to that fee indemnification entitlement.⁴³ The newer tool to reduce private defense funding is the Thompson Memo policy, under which prosecutors bargain to cut off lawfully acquired sources of payment for private defense counsel by giving corporate firms strong incentives to not indemnify attorneys' fees for individual firm officers who face separate risks of indictment.⁴⁴

Note the parallel between these practices on the one hand and the *Ake* doctrine and indigent defense funding on the other. In each, the government attempts to regulate the amount of resources a defendant can devote to a case based on an implicit conclusion about the amount of resources necessary for an appropriate adjudication. There are im-

40. See *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006) (describing permissible limits on defendants' preference for private attorneys); *Wheat v. United States*, 486 U.S. 153 (1988) (addressing defendants' waivers of attorney conflict of interest). See also *Glasser v. United States*, 315 U.S. 60, 70 (1942) (holding that the right to counsel includes the right to be represented by counsel of one's choice and the right to a preparation period sufficient to insure a minimal level of quality of counsel).

41. *United States v. Diozzi*, 807 F.2d 10, 12 (1st Cir. 1986); accord *Wheat*, 486 U.S. at 163 (holding that trial courts must be accorded "broad latitude" in deciding defendants' motions for substitution of counsel).

42. See, e.g., 21 U.S.C. § 853 (2000). All three branches play a role in this policy: Congress enacted forfeiture statutes; the Supreme Court approved their use to deny defendants resources for counsel; and trial courts decide forfeiture actions, while prosecutors decide whether to implement forfeiture statutes in particular cases.

43. Prosecutors briefly succeeded with this argument last year in the prosecution of Westar corporation officers, although the district court later allowed the firm to pay the attorney-fee funds into an escrow account pending the outcome of the forfeiture action. See *United States v. Wittig*, No. 03-40142-JAR, 2004 WL 1490406 (D. Kan. June 30, 2004) (allowing a firm to give defendant-officers funds for attorneys' fees but enjoining defendants from transferring those funds to their attorneys), modified, 333 F. Supp. 2d 1048 (D. Kan. 2004), reinstated, 2005 WL 1227914 (D. Kan. May 23, 2005); Morvillo & Anello, *supra* note 9 (describing the Westar litigation).

44. One federal court recently held this practice unconstitutional. See *United States v. Stein (KPMG II)*, 495 F. Supp. 2d 390 (S.D.N.Y. 2007).

portant differences, to be sure. In particular, prosecutors strive to limit defense resources in the private counsel context, while courts and legislatures strive to limit indigent defendants' resources. Still, these practices, as well as other government limitations on defense counsel, share a common motivation to address an unavoidable problem: defendants have incentives to overlitigate cases. The minority of innocent defendants *should* make every effort to prove their innocence. But the system does not permit this, because guilty defendants—whether street-crime offenders or corporations—would frequently overlitigate as well in efforts to postpone the day of reckoning or to generate a “false negative,” an acquittal, or a dismissal despite their factual guilt.

In the context of public defense, legislatures' dilemmas are clear. They must allocate enough funds to support a fair process that generates accurate results. But they cannot give defendants all they would like—both because legislatures work within budget limits and because the resulting overlitigation would hinder prosecutors' conviction of the guilty. Indigent defense funding inevitably depends on a calculus that determines how much money is needed for fairness and accuracy in the form of preventing “false positives”—meaning wrongful convictions—as opposed to an amount so high that it generates wrongful acquittals or otherwise hinders law enforcement. No government actor is well positioned to make that judgment, yet the judgment is inevitable. Additionally, prosecutors try to further refine these cost savings case-by-case, through incentives for quicker pleas based on less pretrial litigation.⁴⁵

This balancing act is also necessary in the context of private counsel. The government cannot set pay rates for private counsel, but it has other means to limit their resources and capabilities. Furthermore, it aims to limit those resources for the same reasons. Wealthy defendants are fully capable of overlitigating to forestall enforcement efforts. Corporate cases are expensive for prosecutors to pursue in the first place. Investigations require great commitments of time and expertise. Unlike typical street crimes, defense lawyers are involved early in the investigative stage and have a real ability to slow investigations, in part because defendants control most of the relevant information.

45. See, e.g., *United States v. Ruiz*, 536 U.S. 622 (2002). In *Ruiz*, the Court approved a key component of “fast track” plea bargaining—waiver of the constitutional right to impeachment evidence on government witnesses. *Id.* at 633. In this fast track setting, which courts developed to handle high volumes of illegal immigration cases in border districts, prosecutors strive for larger cost savings by convincing defendants to plead guilty quickly, with a minimum of pretrial investigation or litigation. *Id.* at 622.

Sometimes a defendant's wealth leads to a well-litigated case and thereby avoids wrongful or excessive conviction.⁴⁶ Other times, a defendant's wealth allows her to hinder enforcement and force an unmerited acquittal, a decision to not prosecute, or an overly favorable settlement.⁴⁷

With these concerns in mind—and motivated by a litigant's natural tendency to seek advantage over an adversary—prosecutors often seek to restrict defendants' legal resources. They use forfeiture to cut defendant resources⁴⁸ and seek waivers of privileges, attorney-fee payments, or other entitlements, such as discovery needed to litigate thoroughly.⁴⁹ Prosecutors are tempted to use those tools, because they often have enough information—or think they do—about defendants' conduct to make confident judgments on wrongdoing; they know what efficiencies will be gained from defendants' cooperation and have some sense of the risks of “false negatives” from zealous defense litigation. Nonetheless, a party adversary is poorly situated to determine how much ability her opponent should have to fight back or make unchecked judgments about guilt.⁵⁰ Prosecutors may seek these incentives to lower costs in well-grounded cases or to gain tactical advantages regardless of the case's merits.

In the abstract, defense resources should be scant when they hurt accuracy and ample when they aid it. Yet, just as legislatures cannot sort innocent defendants from guilty ones and generously fund only

46. Wrongful convictions are a plausible problem in complex crimes, due to the fuzzy lines between criminal conduct, civil wrongs, and permissible action. *See, e.g.*, Lynnley Browning, *KPMG Defendants' Unity Starts to Fray at the Edges*, N.Y. TIMES, June 30, 2006, at C3 (“[T]he KPMG case . . . [hinges] on the complicated and vague tax code, . . . is dauntingly complex, and no court has ever ruled the tax shelters in question illegal.”).

47. For a study describing recent deferred-prosecution and nonprosecution agreements in corporate cases, see CORPORATE CRIME REPORTER, CRIME WITHOUT CONVICTION: THE RISE OF DEFERRED AND NON PROSECUTION AGREEMENTS (Dec. 28, 2005), available at <http://corporatecrimereporter.com/deferredreport.htm>.

48. *Cf.* Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 710 (1992) (arguing that whether reducing defendants' funds to pay attorneys through forfeiture is a good idea depends “on whether it increases or decreases accuracy”).

49. *See, e.g.*, *Ruiz*, 536 U.S. 622.

50. Difficult questions of guilt are an oft-expressed concern in complex cases, such as the Enron and KPMG prosecutions, in which prosecution theories of liability may be novel. *See, e.g.*, Browning, *supra* note 46. But even routine criminal cases with relatively simple bodies of evidence, such as eyewitness accounts, can nonetheless present levels of uncertainty that make prosecutors' conclusions about facts contestable. *See* Robert P. Burns, *Fallacies on Fallacies: A Reply*, 3 INT'L COMMENTARY ON EVIDENCE art. 4, at 3 (2006), <http://www.bepress.com/ice/vol3/iss1/art4> (discussing criminal evidence that is “simple and powerful and much too often unreliable,” leaving defendants to “undermine this simple and strong evidence by an accumulation of circumstantial and, sometimes, expert evidence”).

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the former, prosecutors and judges cannot sort rich defendants—especially at the early stages of investigations when facts are limited—in order to apply their range of defense-constraining strategies only to the guilty. Nonetheless, calibrating defense attorneys’ resources in order to balance interests in accuracy, fairness, and effective enforcement is inevitable. In some forms, it is normatively appropriate. But legislatures and prosecutors both have reasons to get the balance wrong, independent of the information deficit about guilt or innocence. Legislatures face political pressure to fund indigent defense at levels lower than needed for accuracy, in part because wrongful convictions can go undetected. Prosecutors make their judgments through the lens of a partisan adversary seeking a tactical advantage. As things stand, prosecutors enjoy at least as much freedom from judicial supervision as legislatures. This Article does not consider whether legislatures’ deficiencies can be solved. But, despite the Supreme Court’s grant of broad bargaining powers to prosecutors, there are means to check the most worrisome efforts of prosecutors to constrain defense counsel.

III. PROBLEMATIC LIMITS ON PRIVATELY FUNDED DEFENSE COUNSEL

When the Supreme Court has defined some components of the benefits that the right to counsel entails, it has limited that right in notable ways. As this Part explains, the Court’s decisions on conflict-of-interest and forfeiture of funds necessary to pay private counsel limit defendants’ abilities to hire particular counsel and strengthen prosecutors’ abilities to regulate defense counsel. But those doctrines, at least, require judicial approval and legislative authorization, so that the executive branch is not unchecked or unsupervised in its efforts to interfere with defense counsel. Demands for privilege waivers, following the Thompson Memo policy, fit a different model: the only check on prosecutors in that case is defense counsel, who can choose not to waive those entitlements.⁵¹ Prosecutors can make nonwaiver extremely—probably unfairly—costly by threats of charging severity. Courts do not supervise this bargaining process. The problem is worse with the other Thompson Memo policy: incentives for nonpayment of corporate employees’ individual legal expenses.⁵² Prosecutors impose those incentives without meaningful court or legislative supervision, and nonpayment of attorneys’ fees eliminates the remaining check of

51. See Thompson Memo, *supra* note 3.

52. See *id.*

capable defense counsel. Despite a recent district court decision in the KPMG case finding that prosecutorial tactic unconstitutional, the Supreme Court has left little doctrinal basis for restricting prosecutors' bargaining incentives for defendant cooperation.⁵³

The traditional approach underlying early counsel cases provides observers with a strong basis to criticize many of these defense-limiting policies. The premise of the adversarial process is that the competitive marshalling, inspection, and interpretation of evidence produce the truth.⁵⁴ When both parties gather relevant evidence and scrutinize their opponents' evidence, the factfinder will have a solid basis for making an accurate decision. In this view, stronger defense counsel is better, for the most part; it is rare that the defense would so overwhelm government resources as to skew outcomes.⁵⁵ Put this way, the issue is setting the *minimum* in defense resources to assure fairness and accuracy.

This was the premise of the early right-to-appointed-counsel cases, starting with *Powell v. Alabama*, which first justified rights to appointed counsel on grounds that defense attorneys are necessary for accurate adjudication.⁵⁶ Without defense lawyers, "though he be not guilty, [a defendant] faces the danger of conviction," perhaps from "irrelevant" or "incompetent evidence" or the inability to present his "perfect" defense.⁵⁷ In *Powell, Gideon v. Wainwright*,⁵⁸ and later counsel cases, systemic and defendant interests did not conflict: both were served by the presence of counsel. In this view, the sorts of infringements on a counsel's capabilities described above appear suspicious; they look like risks to public interests in accurate fact finding, as well as the defendants' self-interest.

But more counsel does not always mean greater accuracy, despite defense attorneys' tactics of impeaching reliable evidence or otherwise misleading to serve a client's interest. The classic right-to-coun-

53. *United States v. Stein (KPMG II)*, 495 F. Supp. 2d 390 (S.D.N.Y. 2007); *see infra* notes 94–97 and accompanying text.

54. *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately assist the public interest in truth and fairness."); *Herring v. New York*, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

55. David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993). The one context in which the defense might overwhelm government resources is in corporate crime cases—cases that were not on the Court's mind in deciding the early right-to-counsel cases, but cases that the Thompson Memo exclusively targets.

56. 287 U.S. 45 (1932).

57. *Id.* at 68–69 (describing prosecutors' resource advantage and its effect on outcomes).

58. 372 U.S. 335 (1963).

sel cases, like *Powell* and *Gideon*, were characterized by two features that courts and prosecutors did not have to address until decades later when criminal law became a common tool to address complex organized and corporate crime. First, granting counsel in these cases presented no prospect that the defense team would be so capable as to unduly hinder the prosecution—state resources would still exceed the defendant's. Second, these early cases did not present the challenge of counsel's involvement in the preindictment, investigative stage of criminal law enforcement. The Sixth Amendment right to counsel does not attach until charging, at which point investigation is well under way, if not complete.⁵⁹ When these two factors change, defendant and systemic interests diverge. The story of regulating right to counsel in recent decades can be told as one of adjusting features of defense representation to minimize their impact on adjudicative accuracy and effective law enforcement.

Defense counsel play a different and more potent role in complex criminal cases, whether the target is a legitimate corporate firm or organized criminal group. Investigations of complex crimes often occur over substantial periods of time, and attorneys usually require significant information from the defendants. Corporations typically possess the documents, employee testimony, and other evidence the government needs to build a case for indictment. Thus, the government usually needs the cooperation of insiders. What makes these sorts of cases different from *Powell* and *Gideon* is not just that critical information is controlled by defendants. It is that defendants often—and in corporate crime cases, virtually always—have preexisting, ongoing

59. The Sixth Amendment counsel right does not clearly attach until the filing of formal criminal charges or another initiation of formal adversarial proceedings. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (holding that the right to counsel attaches at the initiation of adversarial proceedings, normally marked by “formal charge, preliminary hearing, indictment, information, or arraignment”); *see also* *Moore v. Illinois*, 434 U.S. 220, 231–32 (1977) (holding that the right to counsel attaches at the defendant's initial appearance before a magistrate). Prior to *Moore* and *Kirby*, the Court defined the Sixth Amendment counsel right as attaching at all “critical stages” of criminal proceedings, meaning “at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.” *Mempa v. Rhay*, 389 U.S. 128, 134 (1967); *see also* *Escobedo v. Illinois*, 378 U.S. 478, 490–91 (1964). The brighter lines of *Moore* and *Kirby* probably supplant the more general standard of *Escobedo*, which defined the Sixth Amendment right to counsel as attaching when an “investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect.” *Escobedo, supra*, at 490; *see also* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE* § 16.03, at 365 (2d ed. 1986); *id.* § 16.08, at 409 (suggesting that *Escobedo* was supplanted by *Miranda v. Arizona*, 384 U.S. 436 (1966)). *Cf.* *United States v. Gouveia*, 467 U.S. 180, 189 (1984) (stating that the right to counsel attaches at the “critical” stage when “the accused [is] confronted . . . by the procedural system, or by his expert adversary . . . in a situation where the results of the confrontation might well settle the accused's fate” (internal quotation marks omitted)).

relationships with legal counsel. Sometimes, defense counsel can even match the government's litigation resources. Represented defendants present much greater information barriers to law enforcement. Unlike unrepresented street-crime suspects, who often make incriminating statements after arrest, white-collar suspects with counsel more frequently frustrate prosecutions through noncooperation and are much less likely to cooperate without extracting some compensation in the form of nonprosecution agreements, plea deals, immunity, or other favorable settlement terms.

Fifteen years ago, Pamela Karlan described a series of doctrines that diminish the advantages of defendants with ongoing counsel relationships—what she called “relational representation.”⁶⁰ Nearly all corporate crime suspects and many organized crime offenders have ongoing representation during investigations and, even earlier, during their wrongful conduct.⁶¹ That differs from typical street-crime defendants, who mostly have “discrete representation”—lawyers who are hired or appointed only for a specific case, usually after the government files charges. This expanded representation in complex cases, through private ordering, prompted the Court to tailor some counsel doctrines in ways that give the government a greater capacity to limit defendants' advantages from early, sophisticated representation.

One defense advantage in this setting is a greater ability to frustrate government efforts to win the defendant's cooperation, often through a variation of the Prisoner's Dilemma—the scenario in which any suspect gains an advantage in being the first to confess.⁶² When counsel represents multiple suspects, defendants can better avoid yielding to a disadvantageous Prisoner's Dilemma. Common counsel can help suspects share information and coordinate strategies, increasing the odds that nobody cooperates to the detriment of others. If effective, this coordination, together with other defendant strategies, stymies prose-

60. Karlan, *supra* note 48, at 672–73.

61. See Bruce A. Green, *Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest*, 16 AM. J. CRIM. L. 323, 358 n.119 (1989) (describing how some attorneys become virtual “house counsel” for criminal enterprises); Bruce A. Green, “Through a Glass, Darkly”: *How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 COLUM. L. REV. 1201, 1227 n.116 (1989) (discussing how both organized crime families and corporations may retain attorneys to represent their employees).

62. Karlan, *supra* note 48, at 691, 694–96; William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 797–801 (1989) (discussing *Wheat* and common counsel as a way for defendants to avoid Prisoner's Dilemmas).

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cutions; suspects win the dilemma game, and the guilty may go unpunished.⁶³

Some doctrines give the government tools to disrupt defendants' relationships with particular attorneys. *Wheat v. United States* helps prosecutors disrupt the coordination role of attorneys who represent two or more defendants in the same enterprise.⁶⁴ Attorneys in that setting face conflicts of interest. But clients might nonetheless consent to those conflicts if they want the attorney for other reasons—either because she is exceptionally skilled or because she helps defendants coordinate strategies in their common interest. *Wheat* effectively gives prosecutors a veto over defendants' decisions to waive such conflicts of interest and thus limits their ability to share a lawyer.⁶⁵ The government thereby blocks a defendant's choice to retain a specific attorney.

In corporate cases, different parties rarely share the same lawyer. They do, however, often share the same benefactor. The firm pays for its own counsel, as well as attorneys for its employees. Especially when firms have discretion to make those payments for others' legal representation, they gain an ability to coordinate and even coerce cooperation among defendants to frustrate—or aid—government investigators and to closely monitor their behavior in the process. A firm may, for example, pay for attorneys only for agents who cooperate with the government, because the firm thereby gains an advantage—the government may then prosecute those individuals instead of the firm and reward the firm's cooperation.⁶⁶ Alternatively, a firm could pay legal fees only for agents who support the firm's strategy of non-cooperation in an effort to “circle the wagons” and deny the govern-

63. It bears emphasis that, in reality, firms as entities often cooperate early and extensively against individual officers; there seem to be few efforts to maintain “prisoner” coordination once government investigations commence. The firm's agents typically state that they simply want to do the right thing. It may also be, however, that firms, as entities, seek advantages by “shift[ing] liability downward” onto individual officers. William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 *VAND. L. REV.* 1343, 1406 n.267 (1999). Another possible reason is that those speaking for the firm at this stage—frequently, directors and attorneys—have little personally at risk and so have little reason not to offer the firm's cooperation against individual agents in exchange for lenient treatment of the entity.

64. *Wheat v. United States*, 486 U.S. 153 (1988).

65. *Id.* at 159–60.

66. Again, KPMG was typical in this regard. It used payment of employees' legal fees to encourage their cooperation with the government, then convinced the government not to indict the firm. *United States v. Stein (KPMG I)*, 435 F. Supp. 2d 330, 347–49 (S.D.N.Y. 2006); see also Thompson Memo, *supra* note 3 (describing factors that prosecutors consider when they decide to charge individuals versus firms).

ment sufficient evidence to build a case.⁶⁷ Whatever the choice, firms as benefactors create the same problem for the government that a shared attorney among co-defendants does: they improve and provide an enforcement mechanism for coordination among defendants.

KPMG, the focus of a recent complex tax fraud case, is representative of a firm with an arrangement for payment of employees' attorneys' fees that gives the firm this type of coordinating power.⁶⁸ At the government's urging, KPMG leveraged its power as a benefactor. It agreed to pay fees only for employees who cooperated with the government.⁶⁹ KPMG monitored its agents' legal strategies and, when some tried to act in their own self-interest, threatened payment cut-offs for noncooperators.⁷⁰

By encouraging firms to leverage their benefactor status for the government's advantage, the Thompson Memo policy seeks to disrupt defendants' coordination advantage to resist Prisoner's Dilemmas. It also generally undercuts the advantage of well-funded counsel.⁷¹ Even without the power to coordinate defendants and witnesses, good attorneys aim to control information disclosure.⁷² They seek to keep incriminating evidence from the government unless it can be traded

67. Corporate noncooperation is not unheard of. In March 2006, the Securities and Exchange Commission (SEC) fined Merrill Lynch \$2.5 million for obstructing an SEC investigation by, among other things, withholding email records. Kevin Burke, *SEC Fines Merrill \$2.5 Million in Settlement Over Obstruction Charges*, REGISTERED REP., Mar. 15, 2006, available at <http://registeredrep.com/news/sec-fines-merrill/index.html>; Deni Connor, *Merrill Lynch Fine for Unrecoverable E-mails*, NETWORKWORLD.COM, Mar. 17, 2006, <http://www.networkworld.com/weblogs/storage/011527.html>.

68. Technically, KPMG is a partnership rather than a corporation, and some whose fees it covered were partners rather than employees. *KPMG I*, 435 F. Supp. 2d at 340. However, for simplicity's sake, this Article often ignores this distinction, which is irrelevant for present purposes.

69. *Id.* at 340, 345, 347 (recounting KPMG's policy to pay legal fees only for partners and employees who cooperated with the government).

70. *Id.* at 347 (describing how, when the government notified KPMG of an agent's noncooperation, KPMG would notify an agent's counsel that legal fee payments would cease in ten days unless the agent resumed cooperation with prosecutors).

71. It is hard to generalize about corporate defendants' actual behavior in Prisoner's Dilemmas. Prosecutors cite "circling the wagons" behavior in some cases, meaning parties try to resist the investigation by coordinating their noncooperation. But clearly, firms often cooperate. That may be a function of the professional culture among lawyers and officers who view their conduct as law-abiding, at least in ambiguous cases; it may be that firms routinely see advantages for the firm in cooperating by disclosing evidence that strengthens the government's cases against individual defendants; or it may occur mostly in cases in which firms recognize that the government likely already has evidence for a successful prosecution, and so they cooperate to seek leniency, the best among poor options.

72. See KENNETH MANN, *DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 103-80 (1985) (describing corporate defendants' strategies of information control during criminal litigation).

for some advantage—leniency or nonprosecution. The job, and effect, of good defense lawyering is often to frustrate investigations or shape them toward favorable outcomes for their clients.

The government also targets well-funded defense counsel by restraining or confiscating defendants' assets under forfeiture statutes—if those assets derive from criminal proceeds.⁷³ In *Caplin & Drysdale*, the Supreme Court found no Sixth Amendment problem with forfeiture of funds needed to pay counsel.⁷⁴ The Court recognized the difference that the quality of defense counsel can make, but implied that diminishing defendants' legal resources was a public good.⁷⁵ The Court endorsed the lower court's recognition of a "compelling public interest in stripping criminals . . . of their undeserved economic power . . . [including] the ability to command high-priced legal talent."⁷⁶

That language is telling. The Court recognized not only that counsel fees correlate with counsel quality and that counsel quality makes a difference in outcomes, but also that high-quality counsel sometimes hinders the systemic goals of accuracy and effective law enforcement. Lower courts now routinely approve forfeitures that deny defendants funds to hire their counsel of choice or that seize funds already paid to attorneys.⁷⁷ Courts, prosecutors, and members of Congress recognize that a well-funded defense can conflict with enforcement interests. Forfeiture regulates funding for privately retained counsel in the same manner in which legislatures and trial courts calibrate allocation of public funds for publicly funded counsel. The recent fraud prosecutions of two Westar executives are illustrative. Using criminal forfeiture statutes, the government repeatedly sought, and eventually won, restraint of attorneys' fees that the corporation owed the individual defendants.⁷⁸

73. See *United States v. Monsanto*, 491 U.S. 600 (1989); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989).

74. 491 U.S. at 631.

75. *Id.* at 630 ("[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. This includes the *use of such economic power to retain private counsel.*" (emphasis added)).

76. *Id.* (quoting *In re Forfeiture Hearing* as to *Caplin & Drysdale, Chartered*, 837 F.2d 637, 649 (4th Cir. 1988)).

77. For a recent survey of such cases, see Brian Fork, *The Federal Seizure of Attorneys' Fees in Criminal Forfeiture Actions and the Threat to the American System of Criminal Defense*, 83 N.C. L. REV. 205 (2004).

78. See *supra* note 9 and accompanying text. Prosecutors also restrained the assets of Enron defendants, though with little apparent effect on their abilities to obtain elite defense representation. See Carrie Johnson, *After the Enron Trial, Defense Team is Stuck with the Tab*, WASH. POST, June 16, 2006, at D1 (describing the assets of Jeffrey Skilling restrained by government forfeiture efforts).

The rationale of undue economic power is convenient for justifying forfeitures where defendants' wealth is ill-gotten. But that rationale is hard to limit to *ill-gotten* wealth. Any economic power poses the same challenge to the public goals of accuracy and enforcement. It is not the illegal origin of the economic power that frustrates those goals; it is the economic power itself. Zealous defense counsel can always hinder or help accuracy. Thus, courts, legislatures, and prosecutors seek to calibrate counsel resources so that defense attorneys aid accuracy without excessively frustrating enforcement.

In this light, two policies expressed in the Thompson Memo become clear.⁷⁹ The first gives corporate defendants strong incentives to waive attorney-client and work-product privileges for both the firm and, to the extent possible, individual agents. Those waivers significantly limit firms' twin advantages: well-financed, early-stage representation and control of critical evidence that the government needs for an effective investigation. The policy is directed at precisely those goals. The government asks for privilege waivers only to the degree needed to investigate the suspected conduct, and prosecutors do not, under the Thompson Memo policy, demand waiver of the privileges with respect to attorneys' work representing their clients in the pending charges.

The second policy is more hotly disputed. Federal prosecutors threaten to pursue harsh charges for firms that protect "culpable employees and agents . . . through the advancing of attorneys fees."⁸⁰ The Supreme Court has impliedly endorsed this strategic purpose, limiting advantages that economic power gives to criminal defendants, especially in contexts in which that power is likely to frustrate public goals of accuracy and effective enforcement.⁸¹ But prosecutors pursue this strategy without legislative authorization or judicial supervision, and it can effectively remove defense-counsel opposition to prosecutors.

In *United States v. Stein*, the U.S. District Court for the Southern District of New York recently held that prosecutors' pressure on KPMG to deny attorneys' fees to employees was unconstitutional.⁸²

79. See Thompson Memo, *supra* note 3.

80. *Id.*

81. Associate Attorney General Thompson made this point surprisingly clear by defending the policy that bears his name in language that echoes the *Caplin & Drysdale* rationale. He argued that suspects "don't need fancy legal representation" if they believe they did not act with criminal intent. Laurie P. Cohen, *In the Crossfire: Prosecutors' Tough New Tactics Turn Firms Against Employees*, WALL. ST. J., June 4, 2004, at A1.

82. *United States v. Stein (KPMG II)*, 495 F. Supp. 2d 390, 420 (S.D.N.Y. 2007) ("The constitutional violation here was the government's improper interference with the payment of the

Its rationale was that prosecutorial bargaining was unconstitutional “government interference” with a defendant’s right to obtain “defense resources lawfully available to him” and thus violated due process rights to fairness and the Sixth Amendment right to counsel.⁸³ Despite broad language throughout the Supreme Court’s case law about the importance of defense counsel to fundamental fairness, the KPMG decision is on shaky constitutional ground. The Supreme Court has never limited prosecutors’ power to offer harsh incentives in the form of lawful charging decisions. The district court’s sweeping due process analysis⁸⁴ found that the government’s pressure on KPMG was “not justified by any governmental interest” and its “deliberate interference with the defendants’ rights was outrageous and shocking in the constitutional sense, because it was fundamentally at odds with two of our most basic constitutional values—the right to counsel and the right to fair criminal proceedings.”⁸⁵ Yet that reasoning contradicts the Supreme Court doctrine that both endorses prosecutors’ tactics to limit wealthy defendants’ counsel resources and gives prosecutors unfettered bargaining discretion—a shift that is probably advisable as a policy matter, but not now supported by the Court’s Fifth and Sixth Amendment case law.⁸⁶

However, appellate courts, as well as firms, may be receptive to another way to limit this powerful prosecutorial tool to diminish defense counsel. Part of their motivation should be courts’ desire for a role in the calibration that prosecutors now make, and which the *Stein* court properly examined: what level of resources do defendants need to make a prosecution a reliable and fair adjudication?⁸⁷ Prosecutors

KPMG Defendants’ defense costs.”); *United States v. Stein (KPMG I)*, 435 F. Supp. 2d 330, 361–62, 365–66 (S.D.N.Y. 2006).

83. *KPMG I*, 435 F. Supp. 2d at 361.

84. As one example of the court’s broad rationale, it found that the constitutional “right to fairness” means that “the government may not both prosecute a defendant and then seek to influence the manner in which he or she defends the case.” *Id.* at 357. This is a generalization in some tension with the government’s approval of forfeiture of attorneys’ fees, defendants’ inability to waive an attorney’s conflict of interest, and prosecutorial pressure to waive constitutional rights to discovery. The court’s rationale that “the government’s interference . . . limited what the KPMG Defendants can pay their lawyers to do” is also in some tension with rationales behind forfeiture of attorneys’ fees. *Id.* at 371.

85. *KPMG II*, 495 F. Supp. 2d at 414.

86. For one argument it should, see William J. Stuntz, *Bordenkircher v. Hayes: Plea Bargaining and the Decline of the Rule of Law*, in *CRIMINAL PROCEDURE STORIES* 351 (Carol S. Steiker ed., 2006).

87. See *KPMG I*, 435 F. Supp. 2d at 362 (noting that preparing and trying a case with six million document pages and trial expected to last several months “requires substantial resources,” and cutting off legal fees “would impact defendants’ ability to present the defense”). See also *infra* notes 90–122 and accompanying text.

make a similar judgment in seeking attorney fee forfeiture, but with legislative and judicial input. Here, by bargaining for legal fee cut-offs, prosecutors do much the same without another branch's input. Another part of the court's motivation to limit prosecutors' bargaining power should come from recognizing that defense lawyers provide the only remaining structural check to prosecutors formerly provided by trials.⁸⁸ Regardless of what courts do, firms certainly want to limit prosecutors' ability to bargain over fee indemnification. As explained in Part IV, private contract is an effective tool for firms to stop this prosecutorial pressure.⁸⁹ Courts could easily support those contractual responses with a narrow constitutional rule that does not imply wider limits on well-established bargaining power.

IV. A CONTRACT SOLUTION TO PROSECUTORIAL OVERREACHING

The Supreme Court has stated both that plea bargaining is "not only an essential part of the process but a highly desirable part" and that it presumes prosecutors bargain for proper reasons.⁹⁰ With this view, the Court has done all it can to facilitate bargaining. Prosecutors can threaten any charge or sentence, no matter how severe or unusual, in order to induce defendants to waive their rights.⁹¹ In *Bordenkircher v. Hayes*, the Court found that no threat of harsh prosecution, no matter how disproportionate to defendants' wrongdoing or how vindictively imposed in response to defendants' insistence on constitutional rights, will make a prosecutor's bargaining tactics unconstitutional.⁹² There, when Paul Hayes declined a plea offer for a five-year sentence for stealing an \$88 check when he had two prior felonies on his record, the prosecutor charged and convicted him under a three-strikes law that sent him to prison for life without parole.⁹³

88. See generally Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

89. See *infra* notes 90–122 and accompanying text.

90. *Santobello v. New York*, 404 U.S. 257, 261 (1971). With America's expansive criminal codes and the industrialized world's most severe set of sentencing laws, legal-but-harsh threats are easy to make.

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

92. 434 U.S. 357 (1978).

93. *Id.* at 358. For a detailed account of *Bordenkircher*, see Stuntz, *supra* note 86.

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On the other side, the Court has given defendants bargaining chips—constitutional and statutory rights.⁹⁴ The Court has never held a constitutional right nonwaivable by defendants, though some lower courts occasionally have with regard to a select few entitlements.⁹⁵ Defendants can waive all trial rights and are also permitted to waive most other entitlements, including constitutional rights to appeal and to receive discovery from the government.⁹⁶ Defendants can also respond to government incentives with cooperation, such as information disclosure that often entails a waiver of a right not to disclose. Finally, defendants might also respond with testimony or more elaborate acts, such as undercover contact with other suspects.

Plea bargaining doctrine leaves little basis for courts to bar Thompson Memo tactics. Aggressive prosecutorial bargaining for either privilege waivers or cooperation, often in the form of refusing to pay counsel fees for others, looks more like typical—if harsh—bargaining than unconstitutional denial of counsel. Neither tactic denies defendants representation. Privilege waivers allow firms to retain counsel, but without the advantage of confidentiality in their communications and work product. Convincing a firm to not pay officers' legal fees merely denies other suspects ample private resources for hiring their preferred counsel and litigation support.⁹⁷ When prosecutors coerce

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

95. See, e.g., *Lanier v. State*, 635 So. 2d 813 (Miss. 1994) (holding that defendants cannot waive their rights not to be sentenced above the statutory maximum punishment). See generally Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113 (1999). More often, it seems, courts will approve bargains even with illegal or unauthorized terms. See Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695 (2001) (describing courts' widespread approval of bargains with unethical, or even illegal, terms).

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

97. This latter agreement offers a twist without analogy in other plea bargaining exchanges: the defendants who lose counsel resources are not the ones yielding to government incentives. The firm agrees to cooperate by ending payments, but the officers suffer diminished counsel resources. Individual defendants are not waiving counsel funds. The better analogy is that one suspect suffers because another cooperates with the government, although the cooperation takes

that nonpayment, they disrupt the primary form of private ordering that funds white-collar cases. Those are cases in which expenses will be especially high, and so suspects may face the unpleasant choice of either exhausting personal wealth or reaching a plea deal after little defense-side litigation.

Nonetheless, parties still have some counsel, and the limits on counsel were achieved by party agreement, albeit under harsh—though common—bargaining incentives. That is the larger problem for any constitutional argument against Thompson Memo tactics. Limits on counsel are achieved by negotiated agreements. To bar the Thompson Memo incentives, a court would have to hold, for the first time, that prosecutors' threats to pursue lawful charges are unconstitutional. The district court's decision in the KPMG case notwithstanding, there is little in the way of constitutional doctrine to restrain prosecutors' hardball tactics to force waivers and pleas from defendants. Hard bargaining is problematic, but the problem is not unique to the Thompson Memo policy. It is a defining feature of the law of plea bargaining.

The problem is that prosecutors' threats can be so severe as to convince rational, innocent defendants to enter a plea or guilty defendants to plead to more than they should. If a defendant thinks she is not guilty, but estimates she has a one-in-four chance of being convicted and sentenced to life without parole, a plea for five years—Hayes's choice in *Bordenkircher*—may look like the lesser of two injustices.⁹⁸ For corporations and their agents, the choices can be comparably stark: firms lose their commercial viability when merely indicted on certain forms of white-collar charges;⁹⁹ witness accounting firm Arthur Andersen's demise before its trial, which yielded a conviction that was later overturned.¹⁰⁰ Officers face personal financial ruin through bearing the costs of defending a federal corporate crime charge, holding aside any sentencing consequences.¹⁰¹

Prosecutors can induce rational defendants not only to waive rights they would prefer to exercise, but also to waive them in the face of

a novel form—cutting another suspect's legal resources rather than providing evidence against him.

98. Stuntz, *supra* note 86, at 372. For a fuller development of this point, see Oren Bar-Gill & Oren Gazal Ayal, *Plea Bargains Only for the Guilty*, 49 J.L. & ECON. 353 (2006). R

99. See *United States v. Stein (KPMG I)*, 435 F. Supp. 2d 330, 337–41 (S.D.N.Y. 2006) (noting KPMG's fear of indictment in light of Arthur Andersen's demise).

100. *Arthur Andersen L.L.P. v. United States*, 544 U.S. 696 (2005).

101. As one example of how high legal fees can be for individual defendants charged in large corporate crime cases, Enron's former CEO ran up an estimated \$40 million in legal fees, \$17 million of which was covered by insurance. See Johnson, *supra* note 78. R

insubstantial charges and processes that may uncover their meritlessness.¹⁰² Further, the process itself—six- or seven-figure defense costs, fatal reputational loss for firms, plus long pretrial detention and other collateral consequences for street-crime suspects—may exact as much pain as formal punishment.¹⁰³ Thus, defendants are sometimes making decisions about waiving procedural rights based on factors other than the merits of the case: collateral consequences, litigation costs, and risk aversion to the odds of high post-trial penalties, all familiar concerns in civil litigation as well.¹⁰⁴

The Supreme Court has two routes to lessen this dynamic, but it has taken neither. Prosecutors face no limits on the severity of their charges or the amount of their plea discounts,¹⁰⁵ and defendants face no limits on what terms they can bargain away.¹⁰⁶ Further, the Court has endorsed forfeiture of defendant assets even when needed to pay attorneys' fees.¹⁰⁷ Thus, it is hard to see the unconstitutionality of the Thompson Memo's pressure for privilege waivers or nonpayment of attorneys' fees: prosecutors are simply threatening to file well-grounded charges if defendants do not waive privileges or stop advancing legal fees to officers. Defendants are still free to hire counsel with whatever other resources they possess.

It therefore seems that, for the Supreme Court to recognize constitutional limits on Thompson Memo tactics, it would have to do the unlikely. It would have to revise much of the doctrine that gives parties broad leeway in plea bargaining. That is the implication of the district court's holding in the KPMG case; the court dismissed indictments when it found prosecutors' bargaining simply unfair under the Due Process Clause.¹⁰⁸

Yet appellate courts have an alternative for a much narrower constitutional rule to limit much of prosecutors' abilities to coerce firms into nonpayment of attorneys' fees. Interestingly, the key is that private

102. The district court in *KPMG I* seemed, like Captain Renault in *Casablanca*, "shocked, shocked" to discover that prosecutors would like to interview witnesses without counsel, that prosecutors insist on closely monitoring defendants' cooperation during the term of a deferred prosecution agreement and that defendants experience prosecutorial charging threats as "the proverbial gun to [the] head." *KPMG I*, 435 F. Supp. 2d at 336.

103. See, e.g., Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994).

104. See generally Bibas, *supra* note 88.

105. For a proposal for such a limit, see Stuntz, *supra* note 86.

106. To put the latter point differently, no features of the adjudicatory process are mandatory.

107. See *supra* note 73 and accompanying text (discussing *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989)).

108. See *United States v. Stein (KPMG II)*, 495 F. Supp. 2d 390, 421, 437–38 (S.D.N.Y. 2007); *United States v. Stein (KPMG I)*, 435 F. Supp. 2d 330, 362–72 (S.D.N.Y. 2006).

firms must first play the primary role in reducing the government's leverage over them. Although it is not explicit in the Thompson Memo, under that policy, prosecutors pressure firms to not make discretionary attorneys' fee payments, but do not demand that firms breach contractual obligations.¹⁰⁹

Not all firms benefit from this distinction, however, because corporations and partnerships currently vary in their contractual arrangements for indemnifying officers' attorneys' fees. Some firms have no explicit contractual obligations to indemnify their employees' attorneys' fees, and so all such payments are at the firms' discretion. That was the case with KPMG, and it was the discretionary nature of its payments to employees that gave prosecutors an opening to bargain over those payments.¹¹⁰

In many firms, however, corporate bylaws require firms to pay officers' attorneys' fees. That was the case with the Westar corporation, which had to advance even the legal fees of officers accused of defrauding the corporation.¹¹¹ In still other cases, firms take on an obligation to pay legal fees in employment contracts. Further, some states impose a statutory duty on firms to pay officers' attorneys' fees—though many, including Delaware, do not.¹¹² Finally, firms often purchase “D&O” insurance, which covers attorneys' fees for directors and officers facing litigation arising from their work for the firm. Through that last arrangement, the firm does not pay legal fees; the insurer does.

When firms have explicit contractual duties to pay, whether through bylaws, employment contracts, or statutes, cutting off fees would require a contractual or statutory breach, something even the most aggressive prosecutors apparently do not demand. Much of what defendants fear in the way of prosecutorial pressure to halt fee pay-

109. This was well documented in the KPMG case. *See KPMG II*, 495 F. Supp. 2d at 402. Furthermore, KPMG's long-standing practice of advancing fees might create an implied contract obligation.

110. *KPMG I*, 435 F. Supp. 2d at 355 n.117.

111. *United States v. Wittig*, No. 03-40142-JAR, 2004 WL 1490406 (D. Kan. June 30, 2004), *modified*, 333 F. Supp. 2d 1048 (D. Kan. 2004), *reinstated*, 2005 WL 1227914 (D. Kan. May 23, 2005).

112. *See* DEL. CODE ANN. tit. 6, § 17-108 (2005) (authorizing partners to agree to indemnify one another); *Morgan v. Grace*, No. Civ.-A.-20430, 2003 WL 22461916, at *2 (Del. Ch. Oct. 29, 2003) (interpreting section 17-108 to permit agreements to advance counsel fees). *See generally* 3A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1344.10 (perm. ed., rev. vol. 2002) (citing and describing different versions of state statutes regarding corporations' and partnerships' indemnification of attorneys' fees for employees or partners).

ments to employees, then, could be solved simply by contract.¹¹³ Moreover, even if prosecutors subsequently grow bold enough to demand that firms breach contracts or corporate bylaws, courts will have an easier way to bar that tactic than they would following the KPMG case and imposing broad-reaching fairness limits on prosecutorial bargaining tactics.

Lower courts, such as the District of Kansas in *United States v. Wittig*, have already taken steps toward this approach by addressing prosecutorial efforts to hinder corporate payment of attorneys' fees through forfeiture.¹¹⁴ Even when funds for attorneys' fees are forfeitable by individual defendants, courts enforce firms' contractual duties to pay them, although defendants must place them in escrow pending the forfeiture judgment.¹¹⁵ Judicial respect for contractual obligations provides a narrow theory for the Supreme Court to restrain prosecutors' demands for fee cutoffs without undermining the wide bargaining discretion it otherwise gives prosecutors. The key is the standard due process analysis, even though the Court has been distinctly un-receptive to due process and Sixth Amendment arguments that forfeiture actions should be limited when defendants need the disputed assets to pay.¹¹⁶

Under due process doctrine, courts typically balance three factors: the private interest, the probable value of the proposed doctrinal safeguard, and the adverse impact upon the government's interests.¹¹⁷ In other due process contexts, lower courts have weighed defendants'

113. To be sure, firms have considerations other than the prospect of facing federal indictment when they decide how to structure contract terms with employees. But concern about prosecutors' practice is not sufficiently widespread that firms are likely to weigh this factor heavily in making those contract choices.

114. In the trial of two executives convicted of defrauding the Westar corporation, the court ordered the firm to pay the attorneys' fees it owed under its bylaws into an escrow account in order to preserve the fees for later forfeiture determination. *See United States v. Wittig*, No. 03-40142-JAR, 2004 WL 1490406 (D. Kan. June 30, 2004), *modified*, 333 F. Supp. 2d 1048 (D. Kan. 2004), *reinstated*, 2005 WL 1227914 (D. Kan. May 23, 2005). The KPMG court barred prosecutorial interference with KPMG's payments to individual defendants without finding it had a contractual duty to do so, although the court stressed that KPMG had statutory authority to cover legal fees and quite possibly an implied contract duty to do so. *KPMG I*, 435 F. Supp. 2d at 356.

115. *See supra* note 114 and accompanying text.

116. *See Caplin & Drysdale, Chartered, v. United States*, 491 U.S. 617, 630 (1989); *United States v. Monsanto*, 491 U.S. 600 (1989). One reason for that deference is that forfeiture has broad legislative authorization.

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

ability to pay counsel of choice as a significant private interest¹¹⁸ in addition to disfavoring firms' breach of their contractual duties to pay. Putting those factors together, courts are more likely to find a weighty private interest when that interest is not only the need to pay counsel, but an obligation arising in a private contract. With the private interest so defined, the due process rule—that prosecutors could not offer incentives for defendants to breach contracts to advance attorneys' fees of other defendants—should have little “adverse impact” on prosecutors' otherwise wide-ranging abilities to offer hard incentives for cooperation and settlement.¹¹⁹

It is unclear whether the Supreme Court would ultimately endorse this analysis. Its well-established record of not regulating prosecutors' bargaining practices, its concern for defendants' economic power frustrating government enforcement objectives, and its lack of concern for defunding counsel through forfeiture all point the other way. But the Court's solicitousness in *United States v. Gonzalez-Lopez*¹²⁰ for a defendant's ability to hire counsel of his choice might indicate a willingness to protect that same interest in other ways, especially when Congress has not provided the means to undercut that interest as it has with forfeiture. Importantly, the contract interest strengthens the argument for a due process restriction, while also limiting such a doctrine to a narrow application—bargaining over obligatory counsel-fee payments. That would leave prosecutors free to continue to bargain for other concessions with draconian, *Bordenkircher*-type threats, as well as to pursue limits on counsel funding through forfeiture actions.

Further, if firms make obligatory, rather than discretionary, payment of attorneys' fees their standard practice, courts would have additional public policy reasons to protect those payments from prosecutorial bargaining pressure. Nondiscretionary duties to pay legal fees reduce firms' powers as benefactors who coordinate all suspects' actions in an effort to resist or direct the government's investigation. By taking on contractual duties to advance fees or arranging for payment through insurance policies, firms lose some power over individual defendants that they could otherwise leverage

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

119. See *Ruiz*, 536 U.S. at 631.

120. 126 S. Ct. 2557 (2006) (reversing the defendant's conviction because the trial court violated the defendant's Sixth Amendment right to counsel when it refused to allow the defendant to retain counsel of his choice by denying the defendant's motion to change counsel and denying the attorney's request for admission to practice *pro hac vice*).

to the government's disadvantage.¹²¹ In this way, prosecutors still gain—defendants have less ability to coordinate resistance to Prisoner's Dilemmas and other investigative strategies—even though they face individual defendants with fully funded counsel.

Finally, the political economy of this approach should give it some *sub rosa* appeal to the Court. Forfeiture is most frequently employed in drug and organized-crime cases, while insurance and other contract agreements for attorneys' fees are overwhelmingly restricted to the context of legitimate firms. By protecting attorneys' fees paid through contracts more than fees paid from forfeitable assets, the Court should recognize that its combined body of law would target the enforcement-frustrating economic power of traditional drug and organized-crime defendants much more than white-collar defendants in legitimate corporations. Even so, the government would continue to possess significant sets of other investigation, litigation, and bargaining options to pursue both the corporation and their employees.¹²²

V. CONCLUSION

Providing corporate defendants a safe harbor for contractually defined defense attorneys' fees keeps executive branch regulation of defense counsel within reasonable parameters. Prosecutors retain powerful tools to adjust defense counsels' capabilities. With legislative mandate, they reduce attorneys' fee funds through forfeiture. With transparent rule-making procedures, they commit limited invasions of detained defendants' attorney-client confidentiality.¹²³ Facing the opposition of fully funded defense counsel, prosecutors can bargain with firms for waivers of attorney-client and work-product privileges just as they have long bargained for other defense waivers to reach plea agreements. Each of those avenues faces a meaningful check—Congress, rule-making procedures, or sophisticated defense-attorney opposition.

121. Recall KPMG, with discretion to pay its partners' legal fees, made payments contingent on the partners' legal strategies and monitored individuals' ongoing interactions with investigators.

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

123. For a description of the rule-making process in the context of this policy, see Birkhead, *supra* note 1, at 28–29.

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

That is important because of the structural role defense attorneys play in contemporary litigation, especially in plea bargaining. Defense counsel is now the only real structural commitment to accurate and fair outcomes. In the early decades of the republic, lack of defense counsel was not unusual, but other familiar features of criminal adjudication were not only common, but mandatory. In particular, trials were much more frequent. While plea bargains grew steadily in the nineteenth century, so did the appearance of defense counsel.¹²⁴ Yet it was not clear even at the end of the century that defendants were constitutionally allowed to waive jury trials.¹²⁵ In a plausible sense, trials substituted for counsel. Both are means to check the government. Instead of defendants having professional lawyers to inspect the government's case and marshal independent arguments or evidence, the government presented its evidence to an independent factfinder, to whom defendants could submit evidence as well.¹²⁶

Through those early decades, juries and judges were often greater checks on the government than defense counsel. But, with the rise of counsel, that changed. In the twentieth century, the Supreme Court made all key procedural components—trials, discovery, and compulsion and confrontation of witnesses—waivable and shifted to explicit encouragement of plea bargaining.¹²⁷ Defendants with counsel were presumed to be capable of protecting systemic interests in accuracy by

124. See GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003).

125. See King, *supra* note 95, at 120–27.

126. This is much like the English criminal trial system through the eighteenth century, when defense counsel were forbidden, but defendants compelled, to speak. See JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* (2003).

127. See, e.g., *United States v. Ruiz*, 536 U.S. 622 (2002) (approving waiver of constitutional discovery rights); *Santobello v. New York*, 404 U.S. 257 (1971); *People v. Seaberg*, 541 N.E.2d 1022 (N.Y. 1989) (waiver of right to appeal).

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acting in their self-interest and consenting to pleas only when the government's evidence would prevail at trial.¹²⁸ Adjudication shifted from a public process to one of private negotiation—more than 90% of cases are now resolved without trial—on the premise that defense counsel provided safeguards for public interests, as well as defendant interests.¹²⁹

The capacity of defense counsel to fulfill that role in the bulk of criminal litigation, which is handled by appointed counsel in state courts, is perennially in question due to legislatures' underfunding of public defenders. Additionally, prosecutors have plausible arguments that, in corporate crime litigation, counsel is effectively too strong to serve public interests in accuracy and effective law enforcement. Forfeiture and privilege waivers are tactical responses to that concern.¹³⁰

Limiting prosecutors' ability to bargain over defense funding only to those cases in which third-party fee payments are not mandated by contract provides a rough but effective rule to keep prosecutors from overreaching in ways that pose risks to public interests, as well as private ones. It gives corporate defendants and their employees a range of options—insurance, contract, corporate bylaws—for providing litigation fees that prosecutors cannot reach. There is an odd implication to this doctrinal choice: courts seem more willing to protect contract obligations from encroachment by public officials than they are the constitutional right to counsel. But it is a path that not only gives firms and officers a means to virtually nullify the most troublesome policy of the Thompson Memo; it also accommodates the Court's doctrines on forfeiture of attorneys' fees and prosecutorial bargaining power that, though controversial and problematic, are unlikely to see revision anytime soon.

128. See generally King, *supra* note 95 (arguing that defendants should be able to waive most rights because they have counsel to negotiate dispositions, replacing the need for mandatory processes). The Court noted in *Patton v. United States*, 281 U.S. 276 (1930), that the absence of counsel was a rationale for making jury trials non-waivable, and, because that rationale has "ceased to exist," defendants could now waive juries. Juries are not "part of the frame of government" but instead were designed "primarily for the protection of the accused . . . which he may forego at his election." *Id.* at 293, 297–98, 307.

129. See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STATE COURT SENTENCING OF CONVICTED FELONS, 2000, at tbls. 4.1, 4.2 (June 2003), available at <http://www.ojp.usdoj.gov/bjs/abstract/scsfst.htm> (estimating that 3% of felony convictions in state courts resulted from jury trials and 95% from plea bargaining in 2000); U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL CRIMINAL CASE PROCESSING, 2001, at 1, tbl. 5 (Jan. 2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fccp01.pdf> (noting that 95% of federal felony convictions in 2001 occurred through plea bargaining).

130. Eavesdropping on client communications largely targets another set of risks—future violence and terrorism rather than investigation obstruction.

