United States v. Stein: Unconstitutionality of Prosecutorial Consideration of a Corporation's Advancing Legal Expenses to Employees in Corporate Charging Decisions

*By Robert T. Miller**

In the March issue of *Engage* George J. Terwilliger III and Darryl S. Lew treated at length certain aspects of the Department of Justice's guidelines for prosecuting business organizations.[1] Binding on the various United States Attorneys[2] and embodied in a 2003 memorandum written by Deputy Attorney General Larry D. Thompson entitled *Principles of Federal Prosecution of Business Organizations* (Thompson Memorandum), these guidelines made a business organization's cooperation with federal prosecutors a significant factor in the prosecutor's decision to charge the entity itself and not merely the individual employees or agents responsible. Terwilliger and Lew considered those provisions of the Thompson Memorandum under which prosecutors may demand (and very often receive), as part of a corporation's cooperation with prosecutors, waivers by the corporation of attorney-client and attorney work-product privileges, especially as pertains to documents generated by outside counsel in a special investigation of the underlying wrongdoing.

Related provisions of the Thompson Memorandum state that another factor to be weighed by prosecutors in determining whether a business organization has cooperated with the government is "whether the corporation appears to be protecting its culpable employees and agents," including by its support "to culpable employees and agents . . . through the advancing of attorneys fees."[3] A footnote adds that, when a corporation is legally required to advance such fees, its doing so would not be considered a failure to cooperate.[4] In *United States v. Stein*, Judge Lewis A. Kaplan of the United States District Court for the Southern District of New York held last June that the provisions of the Thompson Memorandum on the advancement and indemnification[5] of legal fees for corporate employees and agents, as well as certain actions by prosecutors in the *Stein* case related thereto, violated the Due Process Clause of the Fifth Amendment and the Right to Counsel Clause of the Sixth Amendment.

I. Factual Background

Stein and his codefendants were partners and employees of KPMG, one of the world's largest accounting firms and a Delaware limited partnership. In 2002, the Internal Revenue Service (IRS) issued summonses to KPMG in connection with its investigation of certain tax shelters that KPGM had designed and marketed. By some accounts, wrongdoing in connection with these shelters amounted to the largest tax fraud in American history,[6] with the United States Treasury having been defrauded of as much as $2.5 billion.[7] KPMG responded to the IRS investigation in part by cleaning its corporate house, including by asking certain senior partners to leave the firm. Stein was one of these partners, and his separation agreement with the firm provided that Stein would be represented, at the firm's expense, in any proceedings against him, KPMG or other KPMG personnel, in connection with KPMG's business. The IRS investigation ultimately led to a federal criminal prosecution of Stein and others by the United States Attorney's Office for the Southern District of New York (USAO).

Prior to the instant case and for as long as KPMG could determine, KPMG had paid the legal fees and expenses, both pre-indictment and post-indictment, without any limitations or conditions, of all its agents and employees in connection with matters within the scope of their employment at KPMG. The court found, however, that even before KPMG's counsel first discussed the matter with the USAO, "the Thompson Memorandum caused KPMG to consider departing from its long-standing policy of paying legal fees and expenses of its personnel in all cases and investigations."[8]

KPMG's desire to satisfy the USAO that it was cooperating with its investigation is easy enough to understand. It had before its eyes the example of Arthur Andersen, LLP, a similar leading accounting firm, which collapsed after being indicted in connection with the Enron scandal (Arthur Andersen's conviction was eventually overturned by the United States Supreme Court).[9] As was the case with Arthur Andersen, any indictment of KPMG would likely trigger additional regulatory investigations, lead to the suspension of licenses, make the firm ineligible to bid for government contracts or participate in many federally funded programs, and scare away key personnel and clients. Indeed, no major financial services firm has ever survived a criminal indictment.[10]

At an early meeting between KPMG's counsel and representatives of the USAO, the USAO representatives "deliberately, and consistent with DOJ policy, reinforced the threat inherent in the Thompson Memorandum," implying that "compliance with legal obligations [to advance legal fees] would be countenanced, but that anything more than compliance with demonstrable legal obligations could be held against the firm"[11] in the USAO's charging decision. After this meeting, KPMG determined that it had no legal obligation to pay legal fees of its agents and employees (a determination that, the court notes, was vitiated by an obvious conflict of interest as between KPMG and its employees and agents), and it decided that it would (a) expressly condition all payment of legal fees for its employees and agents on their cooperation with the

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government to the USAO's satisfaction, including by admitting their own criminal wrongdoing, (b) limit payment of fees and expenses per agent and employee to $400,000, and (c) immediately cut-off all payments of legal fees and expenses to any employee or agent who was indicted. "Absent the Thompson Memorandum and the actions of the USAO," Judge Kaplan concluded, "KPMG would have paid the legal fees and expenses of all its partners and employees both prior to and after indictment, without regard to cost."[12]

Eventually, KPMG convinced the DOJ not to indict the firm, in part because, as KPMG's chief legal officer put it, KPMG was "able to say at the right time with the right audience, [it was] in full compliance with the Thompson Memorandum."[13] Instead, KPMG and the Government entered into a deferred prosecution agreement pursuant to which KPMG agreed to waive indictment, to be charged in a one-count information, admit wrongdoing, pay $456 million in fines, and accept certain restrictions on its practice.[14] For its part, the Government agreed that it would seek dismissal of the information if KPMG abided by the terms of the agreement.[15]

Stein and other indicted former KPMG partners and agents moved to dismiss the indictment and for other relief, alleging that government's pressure on KPMG to cut off advancement and indemnification of their legal fees and expenses violated various provisions of the United States Constitution.

II. The Court's Analysis

Judge Kaplan begins by considering employers' advancement and indemnification of legal fees and expenses generally, noting that it is a common law rule of agency that losses or costs incurred by an agent acting within the scope of employment may be recovered from the agent's principal, including expenses incurred in defending a lawsuit,[16] and observing that all states currently have statutes authorizing, in some form or other, corporations (and, often, other business organizations) to advance legal fees and expenses to their agents and to indemnify them for the same.[17] Although not reaching the question, Judge Kaplan strongly suggests that, whether in contract or under statute, Stein and other defendants in the case would have an enforceable legal right to advancement and indemnification of their legal fees and expenses from KPMG. In any event, he concludes that, based on KPMG's past practice, they had every right to expect that KPMG would advance and indemnify their legal fees and that, as noted above, but for the Thompson Memorandum and the actions of the USAO thereunder, KPMG would have done so.

Judge Kaplan then reviews the Supreme Court's jurisprudence on the right to fairness in criminal process, emphasizing that "the required fairness protects the autonomy of the criminal defendant," including "the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire."[18] A defendant has a right "to use his or her own assets to defend the case, free of government regulation."[19] "The underlying theme," Judge Kaplan says, "is that the government may not both prosecute a defendant and then seek to influence the manner in which he or she defends the case."[20]

A. Fifth Amendment Substantive Due Process Analysis

Judge Kaplan begins his formal analysis by suggesting that a right to fairness in criminal process is a fundamental liberty interest entitled to substantive due process protection, meaning, in particular, that any government encroachment on that right would be subjected to strict judicial scrutiny,[21] and he notes that a right to fairness in criminal process surely meets the *Washington v. Glucksberg* criterion of being among those "fundamental rights and liberties which are deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty."[22]

It will undoubtedly strike many as odd that a right to *fairness in procedure* is guaranteed by *substantive* due process, and the authorities that Judge Kaplan cites for this proposition are rather meager.[23] In fact, it would seem that the weight of authority is rather against such a proposition. In *Albright v. Oliver*,[24] the Supreme Court considered a § 1983 civil rights action in which the plaintiff alleged that his arrest without probable cause violated his substantive due process rights. The Court affirmed dismissal of the case, and Chief Justice Rehnquist, writing for a plurality of the Court, concluded that the plaintiff would have to allege a violation of his rights against unreasonable seizure under the Fourth Amendment, not a violation of his substantive due process rights. "It was through these provisions of the Bill of Rights," the Chief Justice wrote, "that their Framers sought to restrict the exercise of arbitrary authority by the Government in particular situations. Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims."[25] Following *Albright*, it would seem that the defendants in *Stein* would have to allege that the government violated not their substantive due process rights but their right to counsel under the Sixth Amendment. As explained below, however, there were serious obstacles to such an argument in this case. It is thus understandable that Judge Kaplan would want to find another constitutional basis for his ultimate decision, and the analytic framework of strict judicial scrutiny—a determination of the normative importance of the end that government action serves and the closeness of the connection between that end and the means adopted to effect it—provides useful categories with which to approach the facts in the case. Nevertheless, Judge Kaplan does not discuss *Albright*, or even the more general proposition that substantive due process rights may not be invoked when there are specific guarantees in the Bill of Rights relevant to the case, and this is a serious analytic flaw in the opinion.

In any event, having suggested that fairness in criminal process is a fundamental liberty interest entitled to substantive due process protection, Judge Kaplan nevertheless backs away from this sweeping claim and concludes more modestly that "it is not necessary or, in this

Court's view, appropriate, to go that far in order to decide this case."[26] Rather, "courts should decide no more than is necessary. And the only question now before the Court is whether a criminal defendant has a right to obtain and use in order to prepare a defense resources lawfully available to him or her, free of knowing or reckless government interference."[27] It is this right that Judge Kaplan finds is protected by substantive due process. Of course, this compounds the problem of analyzing the case in terms of substantive due process, for, although a right to fairness in criminal process easily meets the *Glucksberg* criterion of being deeply rooted in the nation's history and tradition, the more limited right that Judge Kaplan describes is not one we find often discussed in the nation's history and tradition (the case, after all, is a novel one), and this entails that the more particularized right is not, at least so obviously, among those meeting the *Glucksberg* criterion.

Note too that, since Judge Kaplan did not reach the question of whether the individual defendants had enforceable legal rights to advancement and indemnification of legal fees and expenses from KPMG, the resources referred to in Judge Kaplan's description of the right are not limited to resources to which the defendant has a legal right. In the full context of the case, the relevant resources include any resources that, but for knowing or reckless government action, would have been available to the defendant. Judge Kaplan never puts it in these terms, but we seem to be left with a fundamental right of criminal defendants, protected against knowing or reckless government interference, to obtain and use in preparing their defense resources that, but for the government's action, could reasonably be expected to be obtainable by such defendants.

Since Judge Kaplan holds that the right in question is a fundamental right, he subjects the Government's actions in the case to strict scrutiny, testing whether such actions served compelling governmental interests by narrowly tailored means.[28] He considers three possible such interests: (a) the making of "just charging decisions concerning business entities by focusing on a consideration pertinent to gauging their degrees of cooperation,"[29] (b) strengthening "the government's ability to investigate and prosecute crimes by encouraging companies to pressure their employees to aid government,"[30] and (c) punishing, in the words of the Thompson Memorandum, "culpable employees and agents"[31] by depriving them of aid from their employers or former employers.[32] Judge Kaplan disposes of this last objective, which seems to be the purpose that looms largest in the Thompson Memorandum itself and in the minds of some prosecutors, with particular rapidity and with a sharp reminder to prosecutors that "[p]unishment is imposed by judges subject to statute. The imposition of economic punishment by prosecutors, before anyone has been found guilty of anything, is not a legitimate government interest—it is an abuse of power."[33]

The Government's other asserted interests Judge Kaplan holds are compelling, but he concludes that the means the government has adopted to advance them are not narrowly tailored. He points out that there is no inconsistency between an entity's cooperating with the government and simultaneously paying defense costs of individual employees,[34] and he suggests several rational objectives a business organization may have in making such payments beyond attempting to thwart the government's investigation, including attracting and retaining competent and honest employees and recognizing that employees may have a just claim on the assistance of the entity even in the absence of a legal right.[35] The government's chosen means here—holding it against a corporation that it is advancing and indemnifying legal fees and expenses, in the absence of a legal duty to do so, to individual employees whom the prosecutors deem culpable—are not narrowly tailored to the objective of fairly investigating and prosecuting crimes. The means would be narrowly tailored, Judge Kaplan suggests, if the government were to take payment of legal fees into account in making charging decisions "only where the payments are part of an obstruction scheme."[36] The USAO in fact asserted that such was its working understanding of the Thompson Memorandum, but Judge Kaplan concluded that if this were so, "it would be easy enough [for the Thompson Memorandum] to say so. But that is not what the Thompson Memorandum says."[37]

B. Sixth Amendment Right to Counsel Analysis

Judge Kaplan next turns to the defendants' Sixth Amendment Right to Counsel claims. He begins by disposing of two preliminary arguments from the USAO. First, the USAO argued that since the Sixth Amendment Right to Counsel attaches only upon initiation of a criminal proceeding, such as at arraignment or indictment, and since the adoption of the Thompson Memorandum and other actions by the USAO complained of occurred prior to the indictment of Stein and the other defendants, the Sixth Amendment Right to Counsel is inapplicable. Admitting that the Right to Counsel "typically attaches at the initiation of adversarial proceedings," Judge Kaplan nevertheless concludes that the DOJ adopted the Thompson Memorandum, and the USAO took related actions, either with the intention that they have, or with the knowledge that they were likely to have, "an unconstitutional effect upon indictment."[38] Although this section of the opinion is not entirely clear, the idea seems to be that if the government acts pre-indictment, either knowingly or recklessly, in a way that impairs the defendant's ability to engage counsel of his or her choice with funds that would, but for the government's action, be available to the defendant, the post-indictment effect of such action is sufficient to implicate the Sixth Amendment Right to Counsel. Apparently, the rule is that the government may not act intentionally or recklessly pre-indictment to produce an effect post-indictment such that, if the government acted post-indictment to produce such effect, the government's action would violate the defendant's Sixth Amendment Right to Counsel. The brevity and lack of complete clarity in this part of the opinion is unfortunate, for to the extent that one concludes, following *Albright*, that the case should have been dealt with under the Sixth Amendment, this Sixth Amendment analysis becomes correspondingly more important, and the argument Judge Kaplan gives here is certainly somewhat novel.

The USAO also argued that the individual defendants "have no right to spend . . . 'other people's money' on expensive defense counsel" and thus in particular no rights under the Sixth Amendment that may have been violated by government action.[39] Here too Judge Kaplan's analysis is not especially convincing. After noting that defendants "had at least an expectation that their expenses" would be paid by KPGM, he says that "the law protects such interests from unjustified and improper interference,"[40] which may well be true, but the question, of course, is whether the Thompson Memorandum and related actions by government actors in fact were "unjustified and improper." Not entering into that question, Judge Kaplan concludes, "Thus,"—it is very difficult to see how any conclusion follows here—"both the expectation and any benefits that would have flowed from that expectation—the legal fees at issue—were, in every material sense, [the defendants'] property."[41] This seems to make matters worse, for whatever else the defendants' interest may be in having KPMG pay their legal fees and expenses, Judge Kaplan chose to decide the case without determining whether the defendants had a legal right to such payment, and absent a legal right, it is hard to see how they might have a *property* interest in such payment.

What Judge Kaplan ought perhaps to have said here was that, even assuming that the defendants had no legal right against KPMG to pay their legal fees and expenses, they did have a right against the government not to interfere with KPMG's decision whether to pay those expenses, at least where the government's interference was not based on KPMG's obstructing the government's investigation. It is perfectly possible for someone to have no right to something but also have a right not to be interfered with in his attempt to obtain it. In the famous example given by H.L.A Hart, a man may have no right to a ten dollar bill lying on the sidewalk, but he does have a right not to be tripped as tries to pick it up.[42] Something similar may be the case here, but Judge Kaplan's analysis does not quite make that clear.

Having disposed of these preliminary arguments and having concluded that the government's actions impinged on the defendants' Sixth Amendment rights, Judge Kaplan holds that government "[i]nterference with these rights is improper if the government's actions are wrongfully motivated or without adequate justification."[43] To determine whether such justification exists, Judge Kaplan notes that courts have looked to the common law of torts concerning interference with prospective economic advantages, and, "[m]aking appropriate adjustments for the fact that this analysis involves the public sector, the dispositive question is whether the government's law enforcement interests in taking the specific actions in question sufficiently outweigh the interests of the [defendants] in having the resources needed to defend as they think proper against these charges."[44] As ought be expected in applying this kind of balancing test, Judge Kaplan describes the interests at stake—the individual's interest in obtaining resources to defend the criminal action, the government's interest in thwarting occasional obstruction schemes—and concludes without further analysis that the former outweighs the latter.[45] This is not especially illuminating, but neither are most applications of balancing tests. They generally involve not so much the balancing of ends whose weights are already known but rather a decision as to which end ought outweigh another.

C. Remedies

Having determined that the defendants were not required to establish prejudice (and, if they were, that it would be present in any case),[46] Judge Kaplan next considers the question of remedies. The defendants had requested dismissal of the indictments, or, in the alternative, an order to either the Government or KPMG to advance and indemnify their legal fees and expenses.[47] Holding that dismissal of an indictment is an extreme and drastic remedy that ought not be considered unless there is no other way to restore the criminal defendant to the position he or she would have been in but for violation of a constitutional right,[48] Judge Kaplan concludes that the defendants "can be restored to the position they would have occupied but for the government's constitutional violation if defense costs already incurred and yet to be incurred are paid,"[49] and thus decides that consideration of dismissal would be premature.

As to the monetary remedy, Judge Kaplan holds that monetary relief against the government is precluded by sovereign immunity,[50] but he allows such relief against KPMG, which, although it was not a party to the action, had been afforded an opportunity to be heard.[51] Judge Kaplan suggests that KPMG ought not lack incentives to advance the fees and expenses because the Government, which has great leverage over KPMG under the deferred prosecution agreement, may well want KPMG to advance and indemnify the fees and expenses "to avoid any risk of dismissal of the indictment or other unpalatable relief."[52] In accordance with Judge Kaplan's decision, the individual defendants have initiated a suit against KPMG for advancement and indemnify.[53]

III. Evaluation and Conclusion

Although the conclusion Judge Kaplan reaches is attractive as a matter of public policy, the constitutional arguments he relies on are problematic. Finding a *substantive* due process right, whether to fairness in criminal procedures generally or to obtain and use resources otherwise available to defendants absent government interference, seems to run afoul of *Albright*, a case that Judge Kaplan never discusses. *Albright* had no majority opinion, but the argument in Chief Justice Rehnquist's plurality opinion, seconded in a concurrence by Justice Scalia, seems essentially right: criminal defendants cannot use substantive due process to create new procedural rights not already guaranteed by the Bill of Rights. Because "the guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended,"[54] such defendants must rely on "an explicit textual source of constitutional protection."[55] If we accept that premise, then *Stein* must presumably be understood as a Sixth Amendment Right to Counsel case. As such, the case would surely be novel, but the novelty is unavoidable no matter how the case be understood. Judge Kaplan's inchoate argument that the Government's pre-

indictment actions to deprive the defendants of resources they could have used post-indictment to engage counsel is suggestive, but it is not developed sufficiently in the opinion to justify the result Judge Kaplan reaches in the case.

A factor in this case much more important than appears from Judge Kaplan's opinion was the tremendous power that the USAO had over KPMG. For, if the USAO had indicted KPMG, then KPMG would, in all human probability, have collapsed just as Arthur Andersen had done. Especially for a financial services firm, a criminal indictment is, as many have observed, a corporate death sentence, triggering a virtually unstoppable cascade of regulatory investigations, license suspensions, debarments from bidding on federal contracts or participating in federally funded programs, and defections of key personnel and clients. Such an indictment is, moreover, effectively within the sole discretion of the prosecutor, and from it there is no meaningful appeal. As many people have also noted, this is an anomaly in the law. If the government wants to fine a corporation a trivial amount of money, it must prove its case in court beyond a reasonable doubt, but if the government wants to bankrupt the corporation and permanently end its business, it may do this simply by indicting the firm. The obvious result is that, in extracting deferred prosecution agreements, the bargaining power is almost entirely on the side of the prosecutors. KPMG was thus prepared to do practically anything to avoid indictment.

The issue presented in *Stein* can helpfully be viewed as whether the government ought be allowed to leverage this power over a corporate defendant into additional power over individual defendants in the same case. As Judge Kaplan observed in the decision, defending against charges involving extremely complex financial and tax frauds like those at issue in *Stein* requires prolonged attention from very sophisticated legal counsel, extensive review of documents, participation in exceptionally long trials, and the hiring of expert witnesses.[56] The kinds of firms that engage in activities that may involve such frauds generally have the resources to put on such defenses; with limited exceptions, the individual agents and employees of such firms do not. Since the government's power over the corporate defendant is anomalous and disproportionate in the first place, allowing the government to leverage that power in a way that deprives individual defendants of the only means they likely have to put on a defense adequate to the case seems clearly wrong. It takes an instance in which the imbalance of power between the government and a criminal defendant is already too great and expands the disparity to include other defendants as well. Whatever one may think of the details of Judge Kaplan's reasoning, the result is clearly correct from a policy point of view.

Perhaps the worst aspect of the Government's conduct, first in adopting the Thompson Memorandum and then in implementing it as it did in *Stein*, was a pervasive confusion between, on the one hand, what the interests of justice and the criminal justice system required, and, on the other, what made it easier for prosecutors to obtain convictions and made their individual lives more convenient. The fundamental premise of the Thompson Memorandum was that "a corporation's promise of support to culpable employees and agents . . . through the advancing of attorneys fees" (absent a legal obligation on the part of the corporation to provide such support)[57] tends to imply that the corporation is not cooperating with the government's investigation. But there is an important ambiguity here. Cooperating is always cooperating with respect to some end or other, and the Thompson Memorandum leaves the end unspecified. If the end is merely the attaining of convictions, then by advancing legal fees for its agents and employees, a corporation is indeed not cooperating with the government, for clearly advancing legal fees makes it harder for the government to obtain convictions in the sense that well-represented defendants are harder to convict than poorly-represented or unrepresented ones. Life would be so much easier for prosecutors, of course, if defendants had only cheap and low-quality legal counsel or, better yet, no counsel at all. In this regard, it is telling that prosecutors from the USAO at one point objected to a memorandum KPMG sent to its employees on the basis that the memorandum did not emphasize to the USAO's satisfaction that, in meeting with government investigators, KPMG employees not need to be represented by counsel.[58] If the end that the corporation's cooperation is to serve is the mere attaining of convictions, therefore, its advancing legal fees for its agents and employees amounts to interference with the government, not cooperation.

But the legitimate interest of the government in criminal proceedings "is not that it shall win a case, but that justice shall be done."[59] Hence, if the end towards which the corporation is to be cooperating with the government is doing justice in criminal proceedings, then the corporation's advancing legal fees and expenses for its agents and employees—so far from being a failure to cooperate—is in fact an important act of cooperation towards the relevant end. For, providing criminal defendants with better legal representation makes for a better and sharper adversarial process and so tends to produce more accurate and just results. The provisions of the Thompson Memorandum on a corporation's advancement of legal fees for its agents and employees, therefore, were at best ambiguous. They probably invited prosecutors, who are subject to the same human failings as the rest of us, to confuse the end of doing justice with that of making their own lives more commodious.

Footnotes

[1] George J. Terwilliger III and Darryl S. Lew, *Privilege in Peril: Corporate Cooperation in the New Era of Government Investigations*, 7 Engage: J. Federalist Soc'y's Prac. Groups 25 (2006).

[2] *See* United States v. Stein, 425 F. Supp. 2d 330, 338 (S.D.N.Y. 2006) (citing U.S. Dep't Of Justice, Criminal Justice Manual § 163 (2005)).

[3] Thompson Memorandum, ¶ B.

[4] *Id.* ¶ B, n. 3.

[5] Indemnification is usually distinguished from advancement in that a corporate employee or agent's right to be *indemnified* for legal fees and expenses arising out of the agent's employment depends on whether, and so can only be determined after, the defense of the legal action has been successful. Hence, if an employee or agent had a right only to indemnification, he or she would have to finance the entire defense and hope to recover the amounts in indemnification against the employer at the conclusion thereof. To avoid the obvious problems such a system would occasion, many jurisdictions authorize the corporate employer to *advance* funds for the employee or agent's legal fees and expenses, subject to an obligation on the part of the employee or agent to repay them if it is ultimately determined that the employee or agent was not entitled to indemnity. *See generally* 3A Fletcher § 1344.10 at 560-61.

[6] *Stein*, 425 F. Supp. 2d at 363.

[7] Paul Davies and David Reilly, *Executives on Trial: KPMG Ex-Tax Partner Pleads Guilty*, WALL ST. J., March 28, 2006, at C3.

[8] *Stein*, at 352.

[9] Arthur Andersen LLP v. United States, 544 U.S. 696 (2005). The DOJ subsequently decided not to try the firm. *Won't Retry Andersen; Duncan Withdraws Plea*, PRAC. ACCT., Jan. 1, 2006, at 8.

[10] *See* Ken Brown et al., *Called to Account: Indictment of Andersen in Shredding Case Puts Its Future in Question*, WALL ST. J., March 15, 2002, at A1 cited by court as appearing in brief of *amicus* The Securities Industry Ass'n *et al. Stein* at 7, n. 11.

[11] *Stein* at 353.

[12] *Id*.

[13] *Id.* at 348.

[14] *Id.* at 349.

[15] *Id.*

[16] *Id.* at 353. *See* RESTATEMENT (SECOND) OF AGENCY § 438(2) and cmt. (e) (1958).

[17] *Stein* at 354.

[18] *Id*. at 357 (quoting Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624 (1989)).

[19] *Stein* at 357.

[20] *Id.*

[21] *Id.* at 360.

[22] Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

[23] Judge Kaplan mentions *Quill v. Vacco*, 80 F.3d 716, 724 (2d Cir. 1996), which was reversed on other grounds, 521 U.S. 793 (1997), some district court opinions that he himself says mention the proposition as *dicta*, and "respected commentators," meaning 2 ROTUNDA & NOWAK § 15.7, and a few law review articles.

[24] Albright v. Oliver, 510 U.S. 266 (1994).

[25] *Id.* at 273 (internal quotation marks omitted).

[26] *Stein* at 361 (footnotes omitted).

[27] *Id.*

[28] *Id.* at 360.

[29] *Id.* at 363.

[30] *Id.*

[31] Thompson Memorandum, ¶ B.

[32] *Stein.* at 363.

[33] *Id.*

[34] *Id.* at 364.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* at 366.

[39] *Id.* at 367.

[40] *Id.*

[41] *Id.*

[42] H.L.A. Hart, *Are There Any Natural Rights?*, THE PHIL. REV., Apr. 1955, at 179.

[43] *Stein* at 367 (quoting Via v. Cliff, 470 F.2d 271, 274-75 (3d Cir. 1972)).

[44] *Id.* at 368.

[45] *Id.* at 369.

[46] *Id.* at 369-73.

[47] *Id.* at 373.

[48] *Id.* at 374.

[49] *Id.*

[50] *Id.*

[51] This required some technical maneuvering. After concluding that the court had both subject matter jurisdiction over the defendants' claims against KPMG and personal jurisdiction over KPMG itself, Judge Kaplan implemented the remedy by directing the clerk to open a civil docket number for the claims of the defendants against KPMG and then allowing such defendants to file a complaint against KPMG containing a prayer for declaratory relief in accordance with the decision in the present case. *Id*. at 377-79.

[52] *Id.* at 380.

[53] Paul Davies, *KPMG Ex-Employees Sue for Fees*, WALL ST. J., July 13, 2006, at C5.

[54] *Albright* at 272.

[55] *Id.* at 273.

[56] *Stein* at 362, n.163 (estimating legal fees and expenses as between $500,000 and $1,000,000 per defendant).

[57] Thompson Memorandum ¶ VI.B and n. 4.

[58] *Stein* at 349.

[59] Berger v. United States, 295 U.S. 78, 88 (1935).