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THE IMPACT OF THE STEIN CASES ON THE PRACTICE OF DEPUTIZING THE CORPORATION

by

Regina M. Robson

The use of prosecutorial discretion in charging decisions has been a potent tool for enlisting cooperation by organizational defendants facing charges of white collar crime. Federal policies have encouraged organizations to demonstrate their cooperation by becoming de facto members of the prosecutor’s team and by pressuring employees to waive their constitutional rights. Recently, a series of rulings in the case of United States v. Stein, has raised issues which may have a significant impact on the way in which federal prosecutors use organizational cooperation to assist them in conducting criminal investigations.

The Stein cases were the first to consider the impact of federal policies designed to encourage organizational cooperation on the constitutional rights of employees under criminal investigation. In attributing the actions of the corporate defendant to the government for Fifth Amendment purposes, the Stein court made the prosecutor liable for the actions of its corporate “deputy,” and suggested possible limits on the utilization of information procured by organizational defendants anxious to avoid prosecution by demonstrating their own cooperation.

I. BACKGROUND: THE DIFFICULTY IN INVESTIGATING WHITE COLLAR CRIME AND THE ARTFUL USE OF PROSECUTORIAL DISCRETION

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The term "white collar crime" is commonly used to refer to the non-violent actions of a person or business for the purpose of wrongfully obtaining property or an illegal advantage. Since white collar crime typically occurs during the course of an otherwise legitimate business, victims may be unaware that a crime has been committed at all, with little ability to identify the perpetrator. Moreover, organizational decision making may be so dispersed that no single individual within an organization may have actual knowledge of the entire range of illegitimate activities. Consequently, the expertise and cooperation of insiders is critical if the prosecutor is to establish a case.

One of the prosecutor's most potent tools in securing timely and meaningful cooperation by insiders is prosecutorial discretion: the prosecutor's right to determine whether to prosecute, whom to prosecute and what charges to bring. Moreover, prosecutorial discretion is not subject to legal review.

For business entities facing criminal charges, there is an overwhelming incentive to convince the prosecutor to exercise discretion in favor of pre-trial diversion. It was in recognition of the value of organizational cooperation in the investigational stage of a proceeding, that the government issued Federal Prosecution of Corporations in 1999 (hereinafter the "Holder Memorandum"), which identified a list of factors to be considered in evaluating corporate cooperation.

The years after the adoption of the Holder Memorandum witnessed the prosecution of a number of well known corporations, and a crisis in confidence in the financial markets. Acting on recommendations of the Corporate Fraud Task Force, in 2003, Assistant Attorney General Larry Thompson issued Principles of Federal Prosecution of Business Organizations, which became known as the Thompson Memorandum. Unlike the Holder Memorandum which functioned only as guidance to prosecutors, the Thompson Memorandum directed prosecutors to consider nine specific factors that evidenced the "authenticity" of an organization's cooperation with a criminal investigation. The most controversial factors included:

[T]he corporation's willingness to identify the culprits within the corporation... to make witnesses available; [and] to disclose the complete results of its internal investigation;

...[A] corporation's promise of support for culpable employees and agents, either through the advancing of attorneys fees, [or] through retaining the employees without sanction for their misconduct ....

The impact of the Thompson Memorandum was to propel corporate "cooperation" from a passive, non-obstructionist attitude, to active participation in the government's investigation. In a speech shortly after the promulgation of the Thompson Memorandum, then Assistant Attorney General Christopher Wray succinctly advised business organizations seeking to avoid prosecution: "[Y]ou have to get all the way on board and do your best to assist the Government." The corporation had to become a "deputy" prosecutor; it had to "help the government catch the crooks."

If the cooperation expected from business organizations was expansive, so too were the rewards. The years following the issuance of the Thompson Memorandum witnessed a significant increase in the number of pre-trial diversions of corporate defendants. At the same time, prosecution of
individual defendants increased, resulting in what Lisa Griffin has described as “inverted entity liability” with individual defendants more likely to be prosecuted than their corporate employers.

Not surprisingly, the Thompson Memorandum sparked widespread criticism with relatively few defenders. The “cooperation” demanded by the Thompson Memorandum has been criticized as an impingement on corporate constitutional protections, a trampling of individuals’ constitutional rights, a seismic shift from an accusatory system to an inquisitorial system of justice, and an impetus to false and unreliable statements. It is the application of these constitutionally sensitive provisions of the Thompson Memorandum which were at the center of the controversy adjudicated in the Stein cases, the first cases to consider the constitutional implications of such policies.

II. ACTION AND REACTION: THE STEIN CASES AND THE McNULTY MEMORANDUM

The Stein cases grew out of a criminal investigation of the firm of KPMG LLP for tax fraud, based on its creation and marketing of certain tax shelters. The hostile tone of the Congressional hearings on tax shelters convinced KPMG that it “intended to cooperate in order to save the firm.” After lengthy negotiation with the United States Attorney’s Office (“USAO”), KPMG ultimately entered into a Deferred Prosecution Agreement (“DPA”) on August 29, 2005. KPMG employees did not fare so well and shortly thereafter the government filed its initial indictment against individual defendants. The individual defendants, all present or former KPMG employees, were the claimants in the Stein cases.

A prosecutor may elect to enter into a DPA if, in the opinion of the USAO, the corporation has demonstrated “cooperation.” What form that “cooperation” took, and its impact on the constitutional rights of the individual defendants was the subject of two separate actions, Stein I and Stein II.

In Stein I, the court held that KPMG’s termination of advancement of attorneys’ fees to the individual defendants violated their Fifth Amendment Due Process rights and Sixth Amendment right to counsel. Although it declined to dismiss the indictments against the individual defendants, the court invited them to bring an action against KPMG for the recovery of their legal expenses. While a detailed analysis of the Due Process and Sixth Amendment right to counsel claims are beyond the scope of this paper, recent cases suggest that with regard to these issues, Stein I may be limited to its somewhat convoluted facts.

In Stein II, nine individual defendants claimed that certain statements made in response to KPMG’s threats were the result of unlawful government coercion in violation of the defendants’ Fifth Amendment right against self-incrimination. Observing that the Fifth Amendment restricts governmental and not private conduct, the Stein court noted that economic pressure exerted by an employer could amount to unconstitutional coercion only if such action could be “fairly attributable” to the government. The court relied on United States ex rel Sanney v. Montanye to illustrate the connection between government action and economic leverage leveled by private actors. Montanye involved a private employer who conducted a polygraph of an employee who was suspected of murder. The employer conducted the polygraph at the request of the police department, and transmitted information directly to it through the use of a hidden transmitter. The employer threatened the employee with
termination if he refused to submit to the polygraph. In attributing the action of the employer to the police, the Montanye court held that “[t]he state had involved itself in the use of a substantial economic threat to coerce a person into furnishing an incriminating statement.” Applying the Montanye standard, the Stein court held that KPMG’s threats to cut off legal fees were attributable to the government. By brandishing a big stick – the threat of indictment – and offering a tempting carrot – the possibility of a deferred prosecution agreement - the government made KPMG a part of its team.

The court also distinguished two second circuit cases which found that actions of stock exchanges in proceedings against member brokers could not be attributed to the SEC for Fifth Amendment purposes, despite the fact that the exchanges routinely communicated the results of their investigation to the SEC. The Stein court noted that while the stock exchanges had commenced an investigation as part of administering their own rules, independent of a government request, the actions of KPMG were not routine self-policing, but were initiated because of a government investigation, aimed squarely at KPMG itself. Although the findings of investigations conducted by the exchanges were routinely reported to the SEC, the SEC had no prior knowledge of the investigations and had not pressured the exchanges to commence an inquiry. In contrast, the Stein court found that the government had “quite deliberately coerced and in any case, significantly encouraged,” KPMG to pressure its employees to cooperate. The court found that both the investigatory policies of the government and the misconduct of the USAO created a clear nexus such that KPMG’s actions could be imputed to the government.

Shortly after the decisions in the Stein cases, criticism of the Thompson Memorandum appeared to reach a tipping point and on December 7, 2006, the Attorney-Client Privilege Protection Act was introduced in the Senate. The Bill prohibited prosecutors from requesting waivers of attorney-client or work product privileges or considering the advancement of an employee’s legal fees in any charging decision or cooperation credit.

Less than five days after introduction of the Senate bill, Deputy Attorney General Paul McNulty reacted by issuing the McNulty Memorandum. While leaving much of the language of the Thompson Memorandum undisturbed, the McNulty Memorandum made two significant changes with respect to the government’s consideration of corporate cooperation: it required explicit approval for prosecutors seeking waivers of attorney client and work product protections; and it prohibited prosecutors from considering a corporation’s advancement of legal fees as a factor weighing against a finding of corporate cooperation, except in “rare” circumstances approved by the Deputy Attorney General.

While the McNulty Memorandum can be said to have increased the transparency of the government’s requests for information, it in no way limited the actions which a business entity could “volunteer” to secure cooperation credit. Moreover, it left undisturbed the fundamental principle guiding the exercise of prosecutorial discretion in charging decisions: “authentic cooperation” requires an organization to help the prosecutor discover and prosecute wrongdoers. After almost five years of experience with the Thompson Memorandum, corporate counsel have a good idea of the type of cooperation that makes a prosecutor smile. If, after the McNulty Memorandum, prosecutors may no longer consider advancement of fees as a failure to cooperate, that does not mean that they cannot consider a voluntary corporate policy which terminates or denies advancement of fees to employees.
who are targets of an investigation. For the employees involved, the outcome is virtually indistinguishable.

III. THE IMPACT OF THE STEIN CASES ON THE PRACTICE OF “DEPUTIZING” THE CORPORATION

Given the limited impact of the McNulty Memorandum in circumscribing the scope of corporate cooperation, the question remains: will Stein have any impact on federal investigational techniques? Part III of this paper considers what impact Stein may have on the federal policy of deputizing business entities to assist in the investigation of white collar crime and the types of actions which signify corporate cooperation.

It is settled law that the Fifth Amendment right against self-incrimination does not apply to private actors, but only to state action. 60 Private employers are free to conduct internal investigations of actual or perceived wrongdoing, and may terminate employees who refuse to cooperate or make statements.

The question of whether a private action can be attributed to the government for state action purposes under the Fifth or Fourteenth Amendments generally arises when state and private actions are blurred, either because the state has delegated to a private actor an action which traditionally has been the prerogative of the state, 61 or because there is such a "close nexus" between a private action and the state as to make the decisions of the private party those of the state. 62 Moreover, the actions of the government do not escape the label of "state action" when the government acts in a quasi-private manner such as an employer 63 or purchaser. 64

Defendants claiming state action based on the actions of private entities face a high hurdle. For example, courts have refused to consider the actions of stock exchanges in investigating their members as state action, despite acknowledging the responsibility of the exchanges for self-policing, arguably a function traditionally reserved to the state. 65 Defendants claiming that pervasive government regulation of an industry is tantamount to state action, have fared no better. 66 The fact that a private entity is highly regulated is not sufficient, without more, to make its actions attributable to the government. 67 In those cases where the courts have attributed the acts of a private actor to the state, they have done so only where the private actor admitted to being an agent of the state, 68 or where there was government knowledge of or acquiescence to actions taken by the private entity. 69

The question of imputing the actions of private entities to the government has become even more critical in light of federal policies which equate cooperation with helping to "catch the crooks." Deputizing corporations to assist in the investigation of white collar crime can have far ranging effects on employees, particularly in light of the trend toward prosecution of "secondary" offenses. 70 Federal statutes impose criminal liability on any person who influences, or obstructs a federal investigation, 71 or who lies to a federal agent, without regard to whether the statement is made under oath. 72 Perhaps the most aggressive instance of deputizing a private party involved an investigation of Computer Associates International, Inc. In that case, an executive pleaded guilty to a charge of obstruction because of false statements made to auditors and an outside law firm which he himself had hired to conduct an internal investigation. 73 Although the statements were not made under oath, the government took the position that the executive was liable because he knew that the results of the investigation were to be shared with the government in an effort by the company to demonstrate its cooperation. 74 In
effect, there was no distinction between lying to the prosecutor and lying to an agent of the corporation.

In its investigation of Computer Associates, the government “benefited” from the actions of its unofficial deputy by being able to bring obstruction charges based on the statements made to its deputy.75 The Stein court expanded this reasoning to its logical conclusion, holding prosecutors responsible when corporate deputies use coercion to secure statements from employees in violation of their Fifth Amendment rights.76

The critical inquiry, the Stein court noted, is whether the government “commands or significantly encourages a private entity to take the specific action.”77 In Stein, the court found that the “encouragement” took two forms: prosecutorial misconduct and the federal policies embodied in the Thompson Memorandum.78 By basing its decision, not only on the actions of the prosecutor but also on the policy itself, the court implied that deputizing private entities to assist in federal investigations may be constitutionally suspect - even without specific requests for cooperation by individual prosecutors.79 The court reasoned that the policies embodied in the Thompson Memorandum were intended to exert enormous pressure on target organizations for the very purpose of encouraging them to coerce statements from employee defendants.80

Taken to its logical conclusion, the Stein court expanded the circumstances in which the actions of a private entity can be imputed to the government for Fifth Amendment purposes. Analogizing to the techniques used in investigating “street crimes,” it is as if the prosecutor accepted “cooperation” from an accused bank robber, knowing full well that the robber will secure admissions from his accomplice by wielding a baseball bat over his head. Stein can be read as imposing a kind of prosecutorial “respondent superior” wherein a prosecutor is strictly liable for actions of a private party trying to demonstrate cooperation - without regard to any overt misconduct by the prosecutor or self-interest of the corporate deputy.

IV. CONCLUSION

The ultimate impact of the decision in Stein will depend on which strand of the court’s holding proves dominant. If Stein is viewed as a prosecutorial misconduct case, the benefits for individual defendants asserting constitutional protections may be short lived. The McNulty Memorandum, while providing more transparency for prosecutors’ requests for corporate cooperation, does little to discourage over-the-top corporate efforts to demonstrate cooperation. Hewlett-Packard Company’s recent use of “pretecting” to track down leaks in its Boardroom suggests that corporations may have innovative techniques for conducting internal investigations - even without the overarching threat of a criminal indictment.81 In the Stein case itself, KPMG demonstrated its creative approach to cooperation by requesting that the government identify those of its employees who were not being fully cooperative. In an effort to curry favor, it then boasted that it had done something “never heard of before” - condition[ing] the payment of attorney’s fees on full cooperation with the investigation.82 Arguably, any policy of conditioning corporate leniency on investigational cooperation is an impetus for organizational actions which could be devastating to individual constitutional rights.

If, however, subsequent courts adopt the second rationale of Stein - the rejection of investigative policies which spur organizations to demonstrate their cooperation at the expense of their employees - individual subjects of criminal investigation may find that their constitutional rights are not
rendered moribund as soon as a corporate prosecution appears likely. Stein lays the groundwork for a ruling that would, at a minimum, suggest that there are some actions which a corporation cannot even “volunteer” and which cannot be considered by prosecutors, even if they have had no role in requesting or encouraging the action.

Unless the challenge laid down by the Stein court is followed by other courts in considering federal prosecutorial policies, then Stein risks being confined to its facts, an interesting, but ultimately minor addition, to the debate on the evolving role of the corporation as a deputy prosecutor in white collar criminal cases.

ENDNOTES


3 Id.

4 Under the collective knowledge doctrine, a corporation can be held liable for a crime even if no single person within the corporation had complete knowledge that a crime had been committed and even if no natural person could be prosecuted for the activity. United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir. 1987).


6 See Leonard Orland, Transformation of Corporate Criminal Law, 1 BROOK. J. CORP. FIN. & COM. L. 45 (2006) for an excellent discussion of all of the options available to a prosecutor who has sufficient evidence to indict.


8 Corporations have been labeled “eggshell defendants” whose vulnerability to adverse market reactions motivates them to avoid indictment at all costs. Preet Bharara, Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants, 44 AM. CRIM. L. REV. 53, 72-74 (2007).

9 Prior to 1993, pre-trial diversions were used primarily for street crime. Orland, supra note 6, at 57. Pre-trial dispositions of cases accelerated after the promulgation of the Thompson Memorandum, (see also infra notes 18-20 and accompanying text) and the Sarbanes Oxyx Act. Orland, supra note 6, at 49-52.


11 Wray & Hur, supra note 5, at 1100-1101.


13 Id. In directing additional attention to a corporation’s “authenticity” while ignoring the “authenticity” or sincerity of individual defendants, the Thompson Memorandum seems to depart from its own requirement that corporations should not be treated more harshly than individual criminal defendants. Id. at II (A). The “authenticity” of corporate cooperation

14 Thompson Memorandum, supra note 12, at VI (A).

15 Id. at VI (B). (footnote omitted). An exception was made in those instances where advancement of attorney’s fees was required by law. Id.


18 Griffin, supra note 5, at 321-36. Griffin suggests that the emphasis on individual liability was in part a response to the public outcry over the investigation of Arthur Andersen which resulted in significant collateral damage to corporate stakeholders, despite the fact that the firm was cleared of wrongdoing. Id at 331-32.


20 Griffin, supra note 5, at 332-33. The Thompson Memorandum included language which suggests that individual defendants would still be prosecuted even if the corporate entity pled guilty. Thompson Memorandum, supra note 12, at 1 (B).


22 Although recognizing its shortcomings, the Thompson Memorandum has been defended by prosecutors, most recently by Deputy Attorney General Paul J. McNulty who noted: “The [Thompson] Memo promotes specific aspects of good corporate governance and presents a rational plan of action to a corporation facing criminal charges….The Thompson Memo is transparent, simple and relies on the common sense prosecutors have been using for years.” Paul J. McNulty, Deputy Attorney General, Let’s Make A Deal: The Question of Privilege, Prepared Remarks before the National Association of Securities Dealers (Sept. 13, 2006) at http://www.usdoj.gov/dag/speech/2006/dag_speech_060913.htm (last visited 2/22/07).


26 Griffin, supra note 5, at 334-47. See also Mary Beth Buchanan, Effective Cooperation by Business Organizations and the Impact of Privilege Waivers, 39 WAKE FOREST L. REV. 587 (2004).

27 In response to the criticism sparked by the Thompson Memorandum, and perhaps in anticipation of the court’s rulings in the Stein cases themselves, Acting Deputy Attorney General, Robert McCallum, Jr. issued a directive (the “McCallum Memorandum”) requiring each district to formulate a written policy designed to make the process or requesting a waiver more transparent. See ABA 2006 Legislative Priorities http://www.abanet.org/poladv/priorities/privilegewaiver.html (last visited January 13, 2008). The McCallum Memorandum was superseded by the McNulty Memorandum on December 12, 2006. See infra note 55 and accompanying text.
continued to represent clients without advancement of fees, United States v. Galante, No. 3:06 CR 161 (EBB), 2006 WL 3826701 at 81 (D. Conn. Nov. 28, 2006) found Stein I was inapplicable where termination of fees was the result of post indictment freeze on corporate assets. In a third case, a Texas jury did award a former Dynegy, Inc. employee legal fees which had been terminated by his employer in an effort to show cooperation in accordance with the Thompson Memorandum. Paul Davies & David Reilly, In KPMG Case, The Thorny Issue of Legal Fees, WALL. ST. J. June 12, 2007 at C5. None of these cases involved an allegation of a violation of the Fifth Amendment right against self-incrimination.

37 440 F. Supp. 2d at 319. The claimants in Stein II had received a letter from KPMG capping the advancement of legal fees at $400,000, and conditioning its advancement of fees on the individual’s cooperation with the government. Id. at 321. Two claimants alleged that they were threatened with termination of employment if they did not cooperate. Id. Each of the claimants ultimately made a statement to the government; however, the court found that all but two of the defendants had failed to establish that they had felt subjectively coerced into making a statement because of KPMG’s threats to terminate advancement of legal fees. Id. at 338.

38 Id. at 333-34 citing D.L. Cromwell Invest, inc., v. NASD Regulation, Inc., 279 F.3d 155 (2d Cir. 2002).

39 Id. at 334 quoting Blum v. Yaretsky, 457 U.S. 911 (1982) (further citations omitted).

40 500 F.2d 411 (2d Cir. 1974).

41 500 F.2d at 414.

42 Id.

43 Id.

44 Id at 415. Although the Montanye court did find that the employer’s actions amounted to state action, it found no violation of the defendant’s constitutional rights, reasoning that the defendant failed to establish that he subjectively felt coerced by the employer’s threats.

45 440 F. Supp. 2d at 334.
attorney

46 Id. at 337-38.

47 United States v. Solomon, 509 F.2d 863 (2d Cir. 1975); D.L. Cromwell Invest., Inc. v. NASD Regulation, Inc., 279 F.3d 155 (2d Cir. 2002).


49 279 F.3d at 163.

50 440 F. Supp. 2d at 337.

51 The "misconduct" cited by the court included reminding KPMG that the USAO would view payment of legal fees "under a microscope" and acceding to KPMG's request that it identify uncooperative employees. Id. at 336-37.

52 Id. at 337 (citations omitted).


54 Id. §3(b)(1)-3(b)(2). As of this writing, the Senate bill has not been reported out of committee. A similar bill has been passed by the House. See, Attorney-Client Privilege Protection Act 2007, H.R. 3013, 110th Cong. (2007).


56 Id. at VII (B) (2). The McNulty Memorandum does not prohibit the government from asking for a waiver of the attorney client and work product protections. Rather it classifies the type of information being sought by the government into two categories and then provides detailed procedures for prosecutors who wish to request waivers. A corporation's response to a request for Category I information ("purely factual information") may be considered in evaluating corporate cooperation while a negative response to a request for Category II information (legal advice or attorney work product) may not be considered in evaluating cooperation. Id. at VII(B)(2) -- VII(B)(3). Moreover, a corporation's voluntary waiver of protection may be favorably considered. Id. at VII(B)(3).

57 Id. at VII (B) (3).

58 Id. at VII (B) (3). The McNulty Memorandum suggests that advancement would have to be part of a larger scheme to impede the investigation. Id.

59 Prosecutors may also consider a corporation's participation in joint defense agreements as indicating a lack of cooperation. McNulty Memorandum, supra note 55, at IV (B) (4).

60 Shelley v. Kraemer, 334 U.S. 1, 13 (1948).


63 Garrity v. New Jersey, 385 U.S. 493 (1967) (statute requiring termination of police officers if they failed to make a statement violated their Fifth Amendment right against self-incrimination).

64 Lefkowitz v. Turley, 414 U.S. 79 (1973) (statute barring an individual from bidding on state contracts unless he waived Fifth Amendment right against self-incrimination held unconstitutional).

65 509 F.2d at 868-69.

66 419 U.S. at 351 (fact that Medicaid program licensed facilities and subsidized the medical expenses of over ninety percent of nursing home patients insufficient to constitute state action).

67 See also Desiderio v. National Ass'n of Securities Dealers, Inc. 191 F.3d 198, 206 (2d Cir.1999), cert. denied, 531 U.S. 1069 (2001).

68 500 F.2d at 414.

69 United States v. Walther, 652 F.2d 788, 793 (9th Cir. 1981) (citations omitted) (government knowledge and acquiescence in search by private party constituted state action). But see Blum v. Yaretsky, 457 U.S. at 1004-
TAX COURT REVERSES COURSE ON DEDUCTION FOR MBA COSTS

by

Martin H. Zern *

I. INTRODUCTION

Anyone considering obtaining a Master of Business Administration degree (MBA) is no doubt acutely aware that the cost of the degree is expensive and, if past is prologue, will continue to increase. Additionally, for a full-time student, cash is needed for everyday expenses, such as, housing, food and utilities, which will have to be paid through borrowing or savings. Moreover, full-time students forego opportunities for advancement and the gaining of experience they could have by working and going to school part time. Obviously, those striving for an MBA anticipate that it will more than compensate for the cost and lost opportunities. Whether the anticipation is likely to become the reality has been questioned. For instance, a professor teaching in a top-tier business school, to the apparent dismay of his colleagues, has posited that MBA holders seemed no more successful than persistent business leaders without the degree. Nevertheless, MBA programs are popular and likely to stay so.

If the cost of the MBA can be taken as a tax deduction, however, the cost is to some extent subsidized by the government, the exact benefit correlated with one's tax bracket.

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05 ("Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible ....").

70 Hasnas, supra note 21, at 602-19.


72 18 U.S.C. §1001 (2006). The language of this statute is so broad that even an "exculpatory no" in response to a question has been held to be a false statement. Brogan v. United States, 522 U.S. 398, 401 (1998).

73 Wray & Hur, supra note 5, at 1147-48.

74 Indictment, §§51-59, 75-79, United States v. Kumar, Cr. No. 04 Cr. 0846 (E. D. N.Y. filed Sept. 20, 2004). See also Alex Berenson, Software Chief Admits to Guilty in Fraud Case, N.Y. TIMES, Apr. 24, 2006 at A1.

75 See Griffin, supra note 5, at 373-374.

76 440 F. Supp. 2d at 337 n. 114.

77 Id. at 334 (citations omitted).

78 Id. at 337-38.

79 In Stein I, the court softened its finding of prosecutorial misconduct, noting that the USAO's actions were consistent with policy and occurred before any court consideration of such policies. 435 F. Supp. 2d at 381.

80 440 F. Supp. 2d at 337-38.

81 Miguel Helft, H.P. Read Instant Messages of Reporter, N.Y. TIMES, Sept. 30, 2006, at C8. Other techniques included twenty-four hour surveillance, procurement of telephone records and background checks. Id.

82 435 F. Supp. 2d at 349 (citation omitted).