S. HRG. 110–280

EXAMINING APPROACHES TO CORPORATE FRAUD PROSECUTIONS AND THE ATTORNEY-CLIENT PRIVILEGE UNDER THE MCNULTY MEMORANDUM

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

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TUESDAY, SEPTEMBER 18, 2007

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 10:35 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Specter, and Sessions.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Today, the Judiciary Committee considers whether the Department of Justice has struck the right balance between robust prosecution of corporate fraud and the bedrock legal principle of fairness protected by the attorney-client privilege. I thank Senator Specter for his leadership on this issue, and I thank the distinguished panel of witnesses for being with us today.

I am deeply concerned about the lawlessness that has affected this Administration's leadership at the Department of Justice. They have shown arrogance and asserted an unprecedented prerogative to rewrite the rules, often in ways that undermine the rule of law and disregard the finest traditions of impartial law enforcement and our justice system.

They have literally sought to rewrite the rules on the prosecution of politically sensitive cases and on the retention and firing of United States Attorneys in ways that impermissibly and dangerously injected politics into our justice system. They have undermined the role of law enforcement by using partisanship in the hiring of career prosecutors, judges and other Justice employees. They have secretly rewritten the rules governing torture and the treatment of detainees in ways that call into question this Nation's commitment to basic human rights and American values. And they have secretly rewritten the rules for government surveillance of Americans, threatening our privacy and basic legal protections.

It is long past time for the Department of Justice to recommit itself to the rule of law and to the principles of our justice system. This Committee has through its oversight begun to seek accountability that I hope will lead to the restoration of law and order

within the Justice Department and throughout the Executive branch.

In the area of corporate fraud prosecutions, this Administration has rewritten the rules. In 2003, the Department of Justice made it easier for prosecutors to pressure corporations to waive the attorney-client privilege, the bedrock of our whole legal system. One judge went so far as to dismiss charges in a prosecution of fraud at the accounting firm KPMG based on Government overreaching and misconduct. Now, it is embarrassing for the Government to lose cases, not because the evidence is insufficient, but because they have pushed beyond the law. And it is unacceptable to steamroll principles that protect fairness.

Senator Specter and I made our concerns clear about Justice Department overreaching in this area in a hearing last fall. And soon after, the Justice Department rewrote the rules again, this time spearheaded by then-Deputy Attorney General Paul McNulty in what has come to be known as the "McNulty Memorandum." And the memo added new safeguards and restrictions, including some that had been called for at this Committee's hearing, on prosecutors' ability to request the waiver of the attorney-client privilege.

I said at the time that it was a step in the right direction. With this hearing we continue our consideration whether or not the Department has, in fact, found and is implementing the proper balance. The McNulty Memorandum has been in place for less than a year. We want to know whether it is working and whether it has reached the right balance between aggressive enforcement of the corporate fraud statute, which all of us want, but also the proper respect for the attorney-client privilege, which we all also want.

With nominations being made to the top positions at the Department of Justice of people who will be responsible for implementing it, we want to make sure it is being done right. We do not know where Judge Mukasey, who the President just announced as his nominee to be Attorney General, stands on this issue. I suspect between Senator Specter and me, we will be asking that question when he is up for confirmation, but we will ask it of other nominees.

We want to make sure the Department strikes the right balance. We do not want to cripple our enforcement efforts to eradicate corporate fraud. We saw that the epidemic of greed, like Enron and Worldcom and many others, left a lot of employees without jobs but also bereft of their life savings, and it devastated the shareholders, the people to whom they owe a fiduciary responsibility.

At the same time, I do not want to overreact to the Department's overreaching. The administration sought to immunize too much misconduct. Corporate misconduct should not be given a safe haven or immunized from accountability. Nor should the corporate bar, and its representatives in the American Bar Association, be allowed to use the legitimate concerns of overreaching we have identified to create favored status for corporate fraud defendants. We do not want to go back to the dark days before Sarbanes-Oxley when we were subject to corporate greed and actions taken in the dark.

So we have to get it right. We demand that corporate fraud be pursued aggressively, but prosecutors have to do it mindful of fair-

ness principles. I hope the Department will work with us to get it right.

Before we go to Karin Immergut, who is the U.S. Attorney for the District of Oregon and also the Chair of the White-Collar Subcommittee for the Attorney General's Advisory Committee, I want to yield to Senator Specter, and I am going to turn the gavel over to Senator Specter, who requested this hearing. I think it is an important one, and, again, as I have many, many other times in many, many other areas, I compliment the senior Senator from Pennsylvania for what he has done in this area.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. [Presiding.] Well, thank you very much. I am not sure whether I should call you "Mr. Chairman" or "Senator Leahy" now that the gavel has been turned over to me.

Chairman LEAHY. You know what to do.

Senator SPECTER. And there was no restriction on the turnover of the gavel, so I will still call you "Mr. Chairman." And thank you for scheduling this hearing. I think it is a very important hearing, and I would like to see us deal with the relevant issues so that our Committee would be in a position to come to a judgment and to mark up a bill and to move forward, to either vote it up or vote it down, but to have it considered by the Senate and ultimately by the House as well.

I start on my thinking on this subject with two very basic propositions: First, that there is a right to counsel in the Constitution, a very fundamental right, and an indispensable part of right to counsel is the privilege to talk to your lawyer about confidential matters without concern that they will be disclosed. And the second very basic proposition is the burden of proof, which is on the Government. And my view, with some experience in the field, has been that you do not prove the case out of the mouth of the defendant. You just do not do that.

Now, when you get involved in the complex standards as to when it is implied, whether the privileged information will benefit the investigation, of course, it is going to benefit the investigation. Whether it can be obtained quickly and completely from other sources, well, what does "quickly" mean? What does "completely" mean? Whether there is a legitimate need, it seems to me that that is totally extraneous to the underlying values that we are dealing with here. And when we have the modifications which Deputy Attorney General McNulty added to the Thompson Memorandum about who gives the approval, if it is a fact matter, the U.S. Attorney asks the Assistant Attorney General, unclear as to whether the consultation means the Assistant Attorney General can overrule the request. I think it probably does mean that. Or if it is a matter of advice, then it goes to the Deputy Attorney General. It is hard for me to conceive of any situation where it is justifiable to ask the lawyer what advice he has given the client. That is just really beyond my comprehension—again, with some experience in the field. So I hope we can flush out the issues and present them to the Committee and come to a decision.

We have been joined by the distinguished former prosecutor who, I suspect, may have a view somewhat different than mine. He occasionally does. Senator Sessions, I will not ask you if you would like to make an opening statement because I know the answer to that. So I will just call on you.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you. I look forward to the witnesses, and if there are problems in the process of obtaining client-attorney investigative materials, I would be willing to listen to that; if there are abuses, I would be. But I am not inclined to believe that a corporation—that a prosecutor cannot discuss with a corporation whether or not they want to waive their right and provide information. I do not want to be in a position in which a board, a corporate board finds out there is wrongdoing in the corporation, conducts an investigation, and cannot be—a discussion cannot be entertained as to whether or not they might benefit from turning that over, that the crooks in the corporation be sent to jail, where they ought to be sent, and the corporation perhaps survive the prosecution. Those are things that to me are pretty realistic and deal with the way the real world is. But if there is a problem here, we need to find out. And if the Department of Justice is not handling this procedure right, perhaps we can make it better.

Thank you, Mr. Chairman. I like you there as Chairman. I enjoyed serving under you, and I am glad to serve under you again.

Senator SPECTER. Well, we will try to make that agreement come true as soon as we can, although not this morning.

[Laughter.]

Senator SPECTER. Our first witness representing the Department of Justice is Ms. Karin Immergut, U.S. Attorney for the District of Oregon, a distinguished academic career from Amherst, her law degree from Boalt School of Law at the University of California, and we will put into the record a very extensive, impressive resume.

I am going to ask you, Ms. Immergut, to stick to the 5-minute time limit, as I will everybody. This is an unusually heavy day. We have Judge Mukasey, whom I have a meeting with later this morning, and we have the D.C. voting rights bill on the floor. So that if the witnesses can limit it to the stipulated time of 5 minutes, that will give us the maximum time for dialog.

Thank you for joining us, and the floor is yours.

STATEMENT OF KARIN IMMERGUT, U.S. ATTORNEY, DISTRICT OF OREGON, U.S. DEPARTMENT OF JUSTICE, AND CHAIR, WHITE COLLAR SUBCOMMITTEE FOR THE ATTORNEY GENERAL'S ADVISORY COMMITTEE, PORTLAND, OREGON

Ms. IMMERGUT. Thank you, Senator. I do not know if I should call you "Mr. Chair" right now, but, Senator Specter, members of the Committee, thank you for the opportunity to appear here today to talk about the McNulty Memorandum and the corporate criminal charging policy at the Department of Justice. Today I hope to give you a career prosecutor's view about three issues: first, how prosecutors use waivers of-attorney-client privilege and work product protections out in the field; second, how the McNulty Memo-

randum is working in practice; and, third, how current policies protect victims and the investing public and could be significantly impeded by legislative efforts to further restrict corporate waivers.

First, waivers generally arise when a corporation faced with criminal liability comes to a Federal prosecutor and says it wants to cooperate; and, further, in exchange for that cooperation, the corporation seeks leniency. At that point, the prosecutor would ordinarily say: Tell us what happened, who did it, and how did they do it. If a corporation can provide that factual information without waiving a privilege, that should typically be enough. However, because corporations generally gather facts through their attorneys, sometimes a corporation must waive its work product or attorney-client privileges in order to cooperate and fully disclose those facts.

Seeking waivers of important rights is not uncommon as part of our work with cooperators. We routinely ask individual cooperators to waive their Fourth and Fifth Amendment rights. Privilege waivers impose no greater burden on a corporation than we ask of individuals every day.

When prosecutors seek waivers, they want the facts. They are not typically seeking legal advice or opinion work product unless there is a claim that the corporation or its employees acted in good-faith reliance on advice of counsel, or that an attorney participated, even unwittingly, in the fraud.

Since 2001, the Department has obtained more than 1,200 corporate fraud convictions and recovered billions of dollars for investors and shareholders. These prosecutions have been governed by a set of principles first established in the 1999 Holder Memorandum, which was then amended by the Thompson and the McNulty Memoranda. Those memoranda established a nine-factor test which requires a prosecutor to evaluate the culpability of a corporation and to distinguish between those corporations which present an ongoing danger to the public and those which are reliable corporate citizens.

Criticism of these principles has focused on one sub-category of those principles: corporate waivers of attorney-client privilege and work product protections. The McNulty Memorandum was issued in December of 2006 in response to concerns about such waivers raised by the business community, defense lawyers, and members of this Committee, among others. For the first time, the McNulty Memorandum imposed express restrictions on when a prosecutor may request corporate waivers and what they might ask for. It also established new and rigorous authorization requirements.

The McNulty Memo creates a clear and simple distinction between requests for factual information, which may be sought upon a showing of need, and requests for legal advice. A request for legal advice is permissible only in extraordinary circumstances, and then only with the permission of the Deputy Attorney General. And even then, if a corporation refuses to provide that legal advice, that refusal may not be held against them.

Since its adoption, the robust client safeguards contained in the McNulty Memorandum have resulted in only four approvals of waiver of privilege for factual information and no approvals of waiver privilege for attorney-client communications from the Deputy Attorney General. We believe that these results show that a

sound policy is in place and should be allowed to work. Our ability to obtain waivers in certain cases has helped victims because it allows cases to proceed more quickly and allows us to preserve assets to help victims recover some of their losses. In addition, the investing public deserves the quickest possible answer to allegations of fraud in the marketplace.

In contrast, we are concerned that efforts to further restrict corporate waivers, such as Senate bill 186, will diminish our efforts to police a broad range of corporate crime and protect victims and the investing public by limiting the information available to us. Furthermore, Senate bill 186 would establish rules for the investigation of corporate suspects which are different from those applicable to every other type of suspect. That simply is not fair.

Mr. Chairman, Senator Specter, over the last several years, the Department of Justice has made huge strides in combating corporate corruption. With the tools Congress has provided, we have made tremendous progress in restoring public confidence in the integrity of American corporate governance and protected shareholders and victims. But there is still work to be done. The rigorous safeguards contained in the McNulty Memorandum have worked and deserve a chance to continue. Our future efforts would be compromised if Congress enacted legislation such as Senate bill 186.

I thank you for this opportunity to appear before this Committee on this important subject, and I would be pleased to answer questions.

[The prepared statement of Ms. Immergut appears as a submission for the record.]

Senator SPECTER. We will now proceed with our customary 5-minute round.

Ms. Immergut, you say that if a corporation seeks leniency, then the issue arises as to the waiver of the privilege. It seems to me that the reality is just the reverse. The prosecutor is using the charging discretion to impose a more difficult prosecution, and that what the prosecution is really looking for is leverage, a blackjack to get the information.

If the issue is waiver, a suspect has a right to waive. No problem about that. The difficulty arises in the context of the prosecutor seeking leverage to extract the attorney-client privilege waiver with using a more severe charge. Isn't that the practicality reality that is involved here?

Ms. IMMERGUT. Senator, if I understand your question, it is whether or not our ability to provide leniency is somehow forcing somebody to waive when they otherwise would not.

Senator SPECTER. The question is: Doesn't the process really focus where the prosecutor has the discretion on charging and the prosecutor initiates the matter and says the charge will be X if you waive your privilege and it will be X plus Y if you do not waive your privilege, as opposed to the suspect coming and saying let me waive the privilege for leniency?

Ms. IMMERGUT. Frankly, the former, in my experience, typically is not how it works, and it is not the required analysis under the McNulty Memo. There are nine factors to consider in our corporate charging decision. Our only point, though, is when a corporation wants leniency, and the other eight factors do not necessarily inure

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to the corporation's benefit with respect to whether or not they should be charged, certainly then corporations would typically say, "We want to cooperate. How can we cooperate?" And, you know, "What do we need to do in order for you not to charge us?" But, again, the charging decision is really based on evidence and as well as the other eight McNulty Memorandum factors.

Senator SPECTER. Ms. Immergut, you say in your opening statement that you are not "seeking advice from counsel." Then you later go into a situation where you are doing precisely that—seeking advice.

It seems to me just totally antithetical, contrary to the basic right to counsel, to under any circumstance ask a lawyer what advice he has given to a client.

Ms. IMMERGUT. Again, the McNulty Memo makes that distinction. The situation you have described is very much of a rarity, and, indeed, since McNulty has been implemented, no single approval for that sort of advice—

Senator SPECTER. Is it really relevant that it is a rarity if you are undercutting the value, the sacrosanct nature of a lawyer's advice?

Ms. IMMERGUT. Senator, if I could give you an example of a time where one might imagine that sort of advice would be pertinent is if there was information that corporate officers had indeed sought advice from general counsel, been advised not to do the conduct that they engaged in, and nevertheless went ahead and did it. That might be a circumstance in which we would ask corporate counsel, if a corporation is cooperating, "Can we get a copy of the memo that you provided to the CEO who committed misconduct?" so that we can show they were on notice that this was illegal conduct—it is evidence of their intent.

Senator SPECTER. I have one final question for you. We have a letter from the former Chief Justice of Delaware, E. Norman Veasey. We will make the full letter a part of the record. But he cites a case that, "When the process required by the McNulty Memorandum was raised by company counsel, the prosecutor's response was, 'I don't give a flying—' about the policy, and further said the burden was on the company to appeal the waiver request up the chain of command to the Department of Justice."

Which raises the concern that, notwithstanding all of the protections which, handily, may not amount to much as I see them, as long as you have this waiver policy in effect, there is a high risk it is going to be disregarded at the operating level. What do you think about that?

Ms. IMMERGUT. I personally in my office have spoken to my Assistant U.S. Attorneys about this issue. They are very well aware of the importance of adhering strictly to the McNulty Memo. I have also been involved in training all of the U.S. Attorneys from around the country. I have spoken with all of them about the issue. And certainly if there is one perhaps overzealous prosecutor who is not adhering, there are, obviously, personnel policies that are implicated. But I know that the U.S. Attorneys have made this very clear to their Assistant U.S. Attorneys how important it is to follow the McNulty Memorandum.

I believe that what you are suggesting is really a management and accountability issue, and I think that the McNulty Memo really reaches the right balance on that and has brought your concerns to the forefront of the Department of Justice, and we are making every effort now to make sure that we recognize the sacrosanct nature of the attorney-client privilege. We take that very seriously, and I can assure you that all of my fellow U.S. Attorneys have made that very clear to individual prosecutors in their offices.

Senator SPECTER. Senator Sessions?

Senator SESSIONS. Corporate fraud is an important thing, and millions of people have lost their whole life savings as a result of fraud by corporate officers. It is the investors and stockholders as well as the general public that suffers when fraud occurs. But it is not easy to prosecute or investigate. They have the best lawyers that you can find, and they utilize all the legitimate tools that they have. And so you get to some difficult circumstances, and you have to be strong, wouldn't you say, Ms. Immergut, that a prosecutor cannot be a weak-kneed person going up against a major corporation in a fraud case.

So I do not think that the phrase you used, "a blackjack against them," is quite a fair thing. Every drug defendant that can be charged with eight different drug offenses and you tell them they will be able to get a reduced sentence and you will only charge them with four if they plead guilty, it could be said they were blackjacked. But you cannot credibly convey to a corporation that you are providing leniency unless they know you know they have committed a crime for which they can be convicted. Isn't that right?

Ms. IMMERGUT. That is correct, Senator, that it is in the context of a corporation facing criminal liability that it wants to cooperate. So just as with an ordinary defendant when we ask them for information or they choose to waive very, very important constitutional rights, they expect some benefit from the Government, and whether that is charging or sentencing—

Senator SESSIONS. Right, the point of which is in every criminal investigation context, particularly complex cases, there are circumstances in which the corporate lawyers know that the corporation has certain vulnerabilities when they have committed certain crimes, and they know, and they know there is proof, or they think maybe there is not proof to establish that. So the first point is that it is just nothing unusual in my view that a prosecutor who has in her hand evidence of corporate guilt on a number of different matters would use that as leverage to find out the full scope of all the criminal activity by providing some sort of leniency of a form in exchange for cooperation by the defendant. Is that correct?

Ms. IMMERGUT. That is absolutely correct. And if I might just add to that, Senator, there have been cases where corporations have come in and said that they should not be charged and they are innocent and explain how something occurred, and we say, "Well, can you show us some documents to prove that?" and it has indeed exonerated a corporation very, very quickly. And that is good for shareholders and good for the investing public.

Senator SESSIONS. Well, the big losers—and I have seen a time or two in which you realize the people that are going to suffer most here are stockholders, who have no idea criminal activity was going

on—and the board represents those, the corporate board. Evidence is brought to a corporate board that criminal wrongdoing is ongoing. They order an investigation. Now, we are not talking about attorney-client advice to the corporation for the most part. What the trend is—and it is perfectly reasonable—a corporation does not ask a private investigation to do the investigation. A corporation asks its counsel to do it. Right? And the reason they do that is because then they control the information that is attorney-client information. And they do not have to give it up unless they choose to give it up. Is that right?

Ms. IMMERGUT. That is absolutely correct.

Senator SESSIONS. So the lawyer goes out and does the investigation, comes back and tells the board, "We have got a real problem." And the Board says, "What is this?" "Well, some of the corporate officers misbehaved." And the board, acting on behalf of the stockholders, says, "Let's throw them overboard. They violated the law. We did not know they were violating the law. Our duty is to our stockholders to try to minimize the damage to this perfectly good corporation. Let's send these guys to the slammer." Right?

Ms. IMMERGUT. That is correct.

Senator SESSIONS. And so what I am curious about, I just do not know how that is different than dealing with a drug defendant or anybody else that you deal with. What I was curious about, it does appear, though, that you have heard complaints about how this plays out in practice, and the Department did, last December, issue a policy that has been complained about, but it really is designed to provide more protection than has ever been given to corporate attorney-client relationships of this kind than ever before. Isn't that right?

Ms. IMMERGUT. That is correct. We have always been able to request waivers, and corporations have always been able to choose whether or not to waive. The Holder Memo in 1999 was the first memo to actually just put that in as one of the guiding principles for charging corporations which provided transparency to the process. But one was always—it did not limit prosecutorial discretion or provide new prosecutorial powers.

Senator SESSIONS. But they do not have to give it up.

Ms. IMMERGUT. Absolutely. It is a choice by the corporation, and also it is the corporation's privilege with the advice of counsel. It is not the individual employees. So that is, as you point out, if the shareholders want to provide information about individual CEOs, for example, other corporate officers, that is their privilege and right to waive it if they so choose.

Senator SESSIONS. My time is up.

Senator SPECTER. Thank you—have you concluded, Senator Sessions?

Senator SESSIONS. Yes. My time is up.

Senator SPECTER. Thank you very much.

Thank you very much, Ms. Immergut, for coming in to testify. Besides being U.S. Attorney for Oregon, you have a position within the Department which has supervision over any U.S. Attorneys or do you have some special status in appearing for the Department today?

Ms. IMMERGUT. I serve as Chair of the Attorney General's Advisory Committee's Subcommittee on White Collar Crime, and in that capacity, I was asked to help draft the McNulty Memo provisions, as well as engage in training with the other U.S. Attorneys, as well as talk to other U.S. Attorneys about cases in their districts.

Senator SPECTER. Well, thank you for coming in. One of the reasons many of us are so anxious to have Judge Mukasey processed through the confirmation procedures is that there are so few ranking confirmed members of the Department of Justice in the upper echelon.

Thank you very much.

Ms. IMMERGUT. Thank you very much.

Senator SPECTER. We will now turn to our panel of Governor Thornburgh, Professor Richman, Professor Seigel, and Mr. Weissmann.

I could refer to Governor Thornburgh as "Attorney General Thornburgh." He has a unique, really spectacular record of public service: a two-term Governor, U.S. Attorney for the Western District of Pennsylvania, Assistant Attorney General in the Criminal Division, Attorney General under two Presidents. He worked in the United Nations. Undergraduate degree from Yale, law degree from the University of Pittsburgh, and became U.S. Attorney in 1969 when I was district attorney of Philadelphia, and we used to chase the criminals into central Pennsylvania because they did not want to be within his jurisdiction or mine. So it was a different world then.

Thank you very much for joining us, Governor, and I look forward to your testimony.

STATEMENT OF DICK THORNBURGH, FORMER ATTORNEY GENERAL OF THE UNITED STATES AND OF COUNSEL, K&L GATES, WASHINGTON, D.C.

Mr. THORNBURGH. Thank you, Senator Specter, and thanks to Chairman Leahy; my former colleague in the Department of Justice, Senator Sessions.

Senator SESSIONS. You were my boss, I think is the right phrase, and I was honored to serve with you.

Mr. THORNBURGH. Well, why quibble?

[Laughter.]

Mr. THORNBURGH. I appreciate the opportunity to speak to you today about the ominous dangers that the Justice Department's McNulty Memorandum poses to the attorney-client privilege, the work product doctrine, and the rights of individuals.

Let me state at the outset that, in my view, the McNulty Memorandum is so inherently problematic that there is nothing to be gained by continuing to wait and see how it may be implemented. To the contrary, Congress should enact legislation such as S. 186 promptly to restore the attorney-client privilege, the work product doctrine, and the constitutional rights of individuals to their proper places in our system of justice.

A year ago, almost to the day, this Committee received extensive oral and written testimony from Mr. Weissmann—who is on this panel with me—former Attorney General Edwin Meese, and my-

self, among others, on the issues at stake today. We emphasized then the fundamental importance of the attorney-client privilege to our legal system generally and to corporate compliance programs in particular. We also explained the corrosive dynamic engendered by Federal cooperation policies that provide credit to organizations when they waive the privilege or work product protection. No matter what its procedural requirements or how reasonably the Department of Justice may promise to implement it, a waiver policy poses overwhelming temptations to target organizations, often desperate to save their very existence. Prosecutors do not need to issue express requests for privileged documents to receive them. The same insidious result arises from policies that offer credit to organizations if they take adverse actions against employees that prosecutors deem culpable.

I do not question then-Deputy Attorney General Paul McNulty's good faith in attempting to remedy the widely recognized flaws of the Thompson Memorandum and its predecessor, the Holder Memorandum. Unfortunately, the McNulty Memorandum is only an incremental improvement and retains most of the basic flaws of its predecessors. I have set forth in detail the particulars of these flaws in my written statement to which I would refer you.

There is no point in "giving the Department a chance" to implement the McNulty Memorandum, as some would suggest. Companies know what actions might win them a reprieve from indictment and, thus, prosecutors do not need to issue any express requests. The fact that companies can get cooperation credit for these actions is the fundamental flaw in the McNulty Memorandum.

S. 186 would forbid Government lawyers from seeking waivers of privilege or work product, and from coercing organizations to take specified adverse actions against their employees. Importantly, S. 186 would also forbid Government lawyers from "condition[ing] treatment" of an organization on whether the organization waived the privilege or penalized its employees, and from otherwise "us[ing such actions] as a factor in determining whether [the] organization...is cooperating with the Government." S. 186 thus addresses the fundamental flaw in the McNulty Memorandum.

Before I close, let me briefly respond to those who argue that legislation like S. 186 improperly or unwisely impinges on the discretion of Federal prosecutors.

As you know, for a large part of my professional career, I either served as a Federal prosecutor myself or supervised other Federal prosecutors. S. 186 does not in any way impair Federal prosecutors from doing their proper jobs. They would remain free to prosecute—or refrain from prosecuting—as warranted by the evidence and the law. In support of such determinations, they could seek any communication or material they reasonably believe is not privileged, and they could accept voluntary submissions by companies of the results of internal investigations. They could also continue to seek other information through grand jury subpoenas, immunity agreements, and all the other tools that prosecutors have historically used. They simply could not seek, directly or indirectly, waivers of privileged information.

In all the years that I served as a U.S. Attorney, as Assistant Attorney General in charge of the Criminal Division, and as Attor-

ney General, requests to organizations we were investigating to hand over privileged information never came to my attention—and I would have rejected such a request if it had. Clearly, in order to be deemed cooperative, an organization under investigation must provide the Government with all relevant factual information and documents in its possession, and it should assist the Government by explaining the relevant facts and identifying individuals with knowledge of them. But in doing so, it should not have to reveal privileged communications or attorney work product. This balance is one I found workable in my years of Federal service, and it should be restored.

The attorney-client privilege dates from Elizabethan times. In defining the privilege in the corporate context, the U.S. Supreme Court in the UPJOHN case concluded that, and I am quoting, "an uncertain privilege...is little better than no privilege at all." Just such uncertainty has been created by the Department of Justice, and the destruction of the privilege is only compounded by the McNulty Memorandum.

Thank you for the opportunity to be here today, and I look forward to your questions.

[The prepared statement of Mr. Thornburgh appears as a submission for the record.]

Senator SPECTER. Thank you very much, Governor.

We now turn to Professor Daniel Richman: clerk to Justice Marshall, previous to that clerk to Chief Judge Weinberg of the Second Circuit; graduate of Harvard, a degree from the Yale Law School, and we will put into the record his distinguished curriculum vitae.

Thank you for joining us, and we look forward to your testimony, Professor.

STATEMENT OF DANIEL RICHMAN, PROFESSOR, COLUMBIA LAW SCHOOL, NEW YORK, NEW YORK

Mr. RICHMAN. Thank you, Senator Specter, and I would also like to thank Chairman Leahy for inviting me, and Senator Sessions as well.

Thank you for this chance to speak to the Committee about the role that Congress should play in limiting negotiations between prosecutors and corporate counsel with respect to the attorney-client privilege. I would first like to highlight what the legislation proposed or what any of the legislation proposed on the table would not do. I really do not think in a broad range of cases it would change very much. The fact is that in a broad range of cases corporate counsel wants to get the Government inquiry off itself as soon as possible, and they will come in and they will speak to the Government, and they will turn over large amounts of information if requested, or perhaps not even if requested, because the quicker this moves on, the better for shareholders, the better for corporate counsel.

I would also like to point out that any of the proposed legislative proposals do nothing in any explicit or, I think, practical way to protect officers and employees who regularly will speak to corporate counsel, will not have the protection of the attorney-client privilege for themselves, and will be subject to whatever corporate counsel wants to do to advance the corporate interests. And in

many cases, as I have said, corporate counsel will waive the privilege. This might well be a problem in significant ways for individual employees. That is something that needs to be considered. That is something that I think courts are beginning to focus on, and appropriately so.

As for cases where counsel will not come in and make the waiver, we should look at those. First, there will be the cases that the Government does pursue. Those will be a lot more expensive and intrusive to pursue. One thing that we really need to consider is what can the Government do if it wants to investigate alleged corporate misconduct. Perhaps it can go through counsel. It would be nice if they could have a textured discussion with counsel. That would involve counsel turning over documents. In the absence of that, should counsel not go forward and cooperate, I guess there will be search warrants, there will be grand jury subpoenas, at some point electronic surveillance. There is a whole range of spectacularly expensive, intrusive measures that can be done, but that the Government generally avoids doing in the corporate context. I would like to say that should this legislation pass Congress, or even without it, frankly, I think Congress should be putting a lot more money into white-collar enforcement.

As I have noted in my written testimony, I am not qualified to really assess the reports coming out about underfunding of white-collar enforcement, but it is of grave concern to a number of people, and to me in particular.

With respect to cases that do go forward, I have got to say that if this legislation passes, this will be really interesting. A pre-trial hearing has got to go into prosecutorial motivation. Every time a corporation is charged, no matter what happened in the U.S. Attorney's Office, corporate counsel will claim that the decision was made, in whole or in part, by improper consideration of their failure to waive. So we will have some interesting hearings. We will get prosecutors on the stand. I have no idea what will happen. I do know that it will be messy. I also know that it will deter prosecutors from moving forward on these cases.

Then we have the classic cases that the legislation will affect and will not be prosecuted. What is that classic like? I do not know, and I really do not think anyone knows. The fact is what we are doing is essentially guessing as to how zealous, how committed, and with what integrity defense attorneys for corporations pursue their job. I know many who have just those qualities. I suspect there are a number who do not.

Then we get to the question of is there a culture of waiver. Well, yes, I suppose there might be a culture of waiver. The Federal criminal justice system is based on a culture of waiver. No one from the Department can say that as clearly at some point as a professor can, but the fact is that is what happens. Defendants waive their rights under threat of severe sanctions. They waive their constitutional rights. They waive privileges. And there is nothing special about the Elizabethan origins of this or the constitutional origins of the Fifth Amendment. Rights get waived regularly to suit the Government's purposes, to suit defense counsel's purposes.

Moving past the rhetoric, the question becomes: Is there a risk of abuse here? Well, yes, there is risk on both sides. I think there are times when U.S. Attorneys will be far too quick to ask for a waiver. One thing I think we can be confident about, though, is where they are, where there is an overly zealous loose cannon that starts being too quick to demand, we will hear corporate counsel arguing up the chain of command and being heard. This Committee and the Justice Department will not hear people from the other side where information was not turned over to the Government and shareholders' or workers' interests were hurt.

So, in closing, I would just—oh, my time is up. I am sorry. I will rely on the rest of my written statement, and I would be happy to answer any questions.

Senator SPECTER. Unlike the Supreme Court, Professor Richman, you may finish your sentence.

Mr. RICHMAN. Oh, this is quite a thrill.

[Laughter.]

Senator SPECTER. As long as it is not too complex-compound.

Mr. RICHMAN. I will keep it very short. I really do think that the fact that you have two professors here as the only people speaking up for the white-collar enforcement side speaks volumes of the odd political economy here. I do think shareholder interests and worker interests are very much affected by this. They do not have the mobilization that white-collar counsel do, and I think this Committee should think that through as well.

Thank you.

[The prepared statement of Mr. Richman appears as a submission for the record.]

Senator SPECTER. Well, I do not want to unduly challenge your impartiality, but I did not note that you served as chief appellate attorney and Assistant U.S. Attorney for the Southern District of New York, notwithstanding your lofty professorial status.

[Laughter.]

Mr. RICHMAN. I am honored by the addition, Senator.

Senator SPECTER. But you did go to the Yale Law School, so that is a countervailing mark.

And Mr. Seigel, who is also a professor at the university of Florida, was the special attorney for the Department of Justice's Organized Crime and Racketeering Section of the Philadelphia Strike Force, and believe me, they had and have a lot of work to do since my days as DA. The professorial status has some counterbalancing factor in you two men who have had prosecution experience, which is really to your credit as experts.

Professor Seigel had the distinction of serving to Chief Judge Becker of the Third Circuit, one of America's greatest jurists; magna cum laude from Princeton and magna cum laude from Harvard School.

The floor is yours, Professor Seigel.

STATEMENT OF MICHAEL L. SEIGEL, PROFESSOR, UNIVERSITY OF FLORIDA FREDRIC G. LEVIN COLLEGE OF LAW, GAINESVILLE, FLORIDA

Mr. SEIGEL. Thank you very much, Senator Specter, Senator Sessions. Governor Thornburgh, I was special attorney prosecuting or-

ganized crime under your administration, among others, so I have worked for you as well.

It is my privilege to testify here today. There can be no doubt—nobody here doubts—that the attorney-client privilege is a central feature in the proper functioning of our system of justice. One of the things I want to point out is that nothing we are talking about here today has any impact on the attorney-client privilege of an individual person. That remains sacrosanct. We are only considering today the privilege of corporations that was created by the Supreme Court in the *Upjohn* case.

Moreover, privilege, even though it may go back to Elizabethan times, is actually the exception. The rule is that the Government, standing in the shoes of the people, is entitled to every man's evidence when attempting to uncover the truth. The question today, then, is whether S. 186, with its categorical prohibition of corporate privilege waiver, strikes the right balance between the protection of client confidences and the need for effective law enforcement. It does not.

Although waiver of privilege should be sought by the Government only as a last resort, sometimes waiver is the only means by which Federal investigators and prosecutors can cut to the heart of the alleged corporate criminality in an efficient and timely manner.

Moreover, the arguments against waiver do not withstand scrutiny. An examination of the issue starts with corporate criminal liability. Such liability provides prosecutors with leverage to encourage corporations to cooperate in administrative and criminal investigations. This is of critical importance.

As a former first assistant overseeing the investigation of the Columbia Health Care case, one of the largest health care fraud cases in the United States, I can personally attest that the prosecution of white-collar crime is slow and resource-intensive. The crime is itself complex. It is characterized often by accounting tricks, fraudulent transactions, and deleted records. Investigators face millions of pages of documents. Now currently many of them are online. And there are sophisticated criminal defense attorneys who are hired by white-collar criminals and corporations to frustrate the prosecution at every turn. As a result, a typical case might take a matter of years to bring to fruition. Corporate cooperation reverses this dramatically. No longer foes, the corporation and the prosecution can team up to unmask the individuals who were at the center of the criminal activity. With corporate cooperation, the successful completion of a complex case can be reduced from a matter of years to a matter of months. This huge efficiency gain represents a significant public good.

One argument against privilege waiver is that it will discourage companies suspecting internal criminality from conducting an investigation in the first place. This is unlikely because of the risks of regulatory and third-party liability. Inaction is simply not an option.

Corporate officials also have a very personal reason to investigate allegations of criminal activity amongst their subordinates. If they do not, they could be open to personal criminal liability and time in jail.

A related argument against waiver is that it causes in-house counsel to generate less paper in the course of an internal investigation. In complicated cases, of course, counsel has no real choice but to retain sufficient records to support her findings. More important, this situation was created by *Upjohn* because corporate counsel can never predict, after *Upjohn*, whether otherwise privileged documents will be released in the future. Thus, if she is prudent, counsel will always attempt to minimize records generated by an internal investigation, regardless of DOJ waiver policy.

The most troubling argument against privilege stems from the impact it is said to have on corporate employees who face questioning. If they are potentially guilty, they have a dismal set of options: silence, and likely termination; cooperation, and likely sanctions; and lying, avoiding potential liability in the short term, but having worse outcome in the future.

Caught in this situation, the employee definitely needs good legal advice. If she is unsophisticated, she may think she is going to get that advice and that her communication with corporate counsel is privileged. Of course, that is not the case. To the extent that the law is lacking here, the culprit is not DOJ waiver policy. Instead, it is with the rules and regulations regarding when and how corporate counsel must advise an employee of her Upjohn rights. In my opinion, that is where the rules need to be examined and the protection strengthened.

The bottom line is this: The attorney-client privilege waiver should be a last resort. I would prefer to see the McNulty Memorandum specifically state that. It comes close. I think it should specifically state that it is effectively a last resort. But it has taken a significant step in that direction, and I think it should be given a chance to work.

Thank you.

[The prepared statement of Mr. Seigel appears as a submission for the record.]

Senator SPECTER. Thank you, Professor Seigel.

Mr. Andrew Weissmann is a partner in the law firm of Jenner & Block. He was the Enron Task Force Director overseeing the prosecution of more than 30 individuals, selected by the Director of the FBI to be his special counsel; bachelor's degree from Princeton and law degree from Columbia.

Thank you very much for joining us today, Mr. Weissmann, and we look forward to your testimony.

STATEMENT OF ANDREW WEISSMANN, PARTNER, JENNER & BLOCK, NEW YORK, NEW YORK

Mr. WEISSMANN. Good morning, Senators Specter and Sessions, members of the Committee, and staff.

The advisability of a statutory solution to the infringement of the attorney-client privilege by DOJ must be examined in the context of the unique nature of corporate criminal law.

First, the mere indictment of a company risks a death sentence as well as severe consequences to hundreds or even thousands of innocent people. Indeed, a criminal indictment carries the risk that the market will impose a death sentence—even before the company can go to trial and have its day in court. One of the lessons cor-

porate America took from the *Arthur Andersen* case, where I served as the lead trial attorney, is to avoid an indictment at all costs.

Second, a corporation of any significant size will inevitably be subject to criminal investigation at some point during its existence. This is so because under the current standard of corporate criminal liability, a company can be found liable based on the actions of a single, low-level employee where only two conditions are met: the employee acted within the scope of her employment, and the employee was motivated, at least in part, to benefit the corporation. If an employee commits such a crime, then no matter how many policies the company has to thwart the criminal conduct, the company can be prosecuted. This standard I note of vicarious liability is not the creation of congressional statute, nor, indeed, of a Supreme Court ruling, which has never addressed this issue. It is the product of a series of appellate rulings that have defined the scope of corporate criminal law.

In light of these precepts, prosecutors have enormous leverage. To avoid indictment, corporations will go to great lengths to be deemed "cooperative" with a Government investigation. KPMG is a prime example, as Judge Kaplan found. The *Bristol Myers* case is another example. There, the company agreed, among other things, to endow a chair at the prosecutor's alma mater in order to resolve an investigation short of indictment.

The pressures on a company are, accordingly, not analogous to those on an individual in our criminal justice system. An individual is subject to liability for conduct that she controls absolutely; not so, a corporation. A company can face indictment based on the conduct of any one of thousands of employees, and regardless of its efforts to detect and deter the conduct at issue. An individual also does not risk a death sentence before she ever stands trial. And the potential collateral consequences to an individual, although they can be severe, can pale in comparison to the scope of such consequences in a corporate setting.

Let me turn to some of the DOJ policies that I believe have been wanting and how the Senate bill will fix those.

The McNulty Memorandum does not require the decision to charge a corporation to be viewed at Main Justice. Such a lack of national oversight is bewildering given the wide array of relatively minor decisions that are overseen by Main Justice and the enormity of the potential consequences of charging a company. It is ironic that one of the key innovations in the McNulty Memorandum was oversight of the decisions regarding requests for waiver. Yet, the ultimate decision regarding whether to charge a company receives no such scrutiny.

Moreover, although the theory of the McNulty Memorandum is a good one, in practice individual prosecutors interpret its factors markedly differently. There is reason to believe that little has been done to train prosecutors on the McNulty Memorandum's dictates and to measure diligently compliance with its provisions. My own experience suggests as much. In one case, I was told that a company would be deemed cooperative by waiving the privilege and disclosing the material without making the prosecutor jump through the McNulty Memorandum hoops.

Further, the McNulty Memorandum leaves intact the Government's ability to penalize a company that does not take punitive action against employees who are invoking the right to remain silent. By contrast, the Senate bill would prohibit the government from considering an employee's assertion of the Fifth Amendment.

Ironically, then, the Government can encourage employers to take the more Draconian corporate measure against its employees—namely, firing them—but not to weigh in on the decision whether to advance legal fees.

Finally, the McNulty Memorandum continues to exert undue pressure on companies to waive the privilege because prosecutors can still penalize a company for refusing to waive. Although refusal to disclose legal advice cannot account against a company, the same does not hold true with respect to "purely factual information." But the McNulty Memorandum's examples of purely factual information illustrates the problem. The memorandum defines as "purely factual" witness statements, interview memoranda, and factual summaries and reports documented by counsel. But those specific matters have been found by numerous courts to be precisely what is protected by the attorney-client and work product doctrines.

My own experience prosecuting corporate crime belies the notion that a prosecutor must have such waivers in order to prosecute successfully such cases. There are myriad ways for a company that seeks to cooperate to provide the Government with valuable information without waiving the privilege. A company can direct the Government to documents and witnesses who will further its investigation. It can also give the Government an attorney proffer of salient facts. None of that requires the company to waive the attorney-client privilege.

Thank you.

[The prepared statement of Mr. Weissmann appears as a submission for the record.]

Senator SPECTER. Thank you very much, Mr. Weissmann.

We will admit, without objection, three statements in support of S. 186 from the American Bar Association, former Delaware Chief Justice Veasey, and from the Coalition to Preserve Attorney-Client Privilege.

Governor Thornburgh, it has been a long time since I was a prosecutor, but you served as Attorney General through 1991. What is the origin, the genesis of all of this activity by the Department of Justice to extract waivers of the privilege?

Mr. THORNBURGH. I do not know. I have been curious about that myself. I would doubt that any of my distinguished colleagues with experience in the Department of Justice, including Senator Sessions, ever had occasion to request waiver of the attorney-client privilege in the course of white-collar crime investigations. As I said, that was not an item on the checklist of prosecutors when I served in the Department of Justice. But somehow or other, during the 1990s and resulting in the Holder and Thompson Memorandums, it became a practice that was frequently indulged in. And to a certain extent, I suppose, regardless of what legislative remedies might be undertaken, the genie is already out of the bottle, and it will be difficult to constrain the far-flung apparatus of Fed-

eral prosecutions totally from sneaking in a request of this kind or making a threat of the type that has been envisioned as time goes on.

As I said, I think that the attorney-client privilege has been upheld for corporations in these types of investigations in very express language in the Supreme Court in the *Upjohn* case, with a notation that it must be clearly understood that that privilege exists, and that if it is rendered uncertain, it vitiates its usefulness.

Senator SPECTER. I think you are right on the genie being out of the bottle. Once it is in use, the tremendous power of the prosecutor arises largely from his charging authority.

Mr. THORNBURGH. Yes.

Senator SPECTER. A judge cannot add charges.

Professor Seigel, you comment about exceptions. The Government is entitled to everyone's evidence. We are all familiar with that. But there are many limitations on that besides the attorney-client privilege, husband-wife privilege, coerced confessions since *Brown* v. *Mississippi* in 1938, *Miranda* we all know about, privilege against self-incrimination. A defendant does not have to testify. No comment about it.

I think that what the Committee may be most interested in, and the Senators, is how tough it would be on the prosecution to convict the guilty without this waiver approach.

Mr. Weissmann prosecuted 30 individuals in the Enron case. Were you able to do that without extracting waivers, Mr. Weissmann?

Mr. WEISSMAN. Well, there were some waivers in connection with the Enron case, but that was under the Thompson Memorandum where it was actually affirmatively encouraged to exact such waivers. But I think the result in those cases would have been exactly the same.

Senator SPECTER. Could you have had the same success? Well, that is the question. Maybe you have already answered. I guess you have already answered. Could you have gotten the success without the waiver?

Mr. WEISSMAN. I believe so.

Senator SPECTER. Professor Richman, you have been very candid in saying that the enactment of S. 186, as you put it, would not change much, that there would be invasive procedures, and you listed search warrants and subpoenas and surveillance. Well, that is all part of the existing process. But what leads you to the conclusion so that I can quote you more elaborately when we have the markup on the bill that, as you put it, the passage of 186 would not change very much?

Mr. RICHMAN. Senator Specter, I think there is a very large range of cases where the Government either comes calling to defense counsel or defense counsel comes to the Government, assuming that there eventually will be Government action, and wants to get this matter moving as soon as possible. There has been—

Senator SPECTER. Well, if the corporation comes or the individuals come and they say, "We want to waive it," that is fine.

Mr. RICHMAN. Yes. That is what I was—the only point I was making is I think that class of cases is very large, and what is more, the class of cases not included, the ones where corporations

do not waive for their own reasons, I am worried about those. I think that is a considerable group of cases. I think those are precisely the ones where defense counsel may either have conducted no investigation or be not very candid with the Government.

I would not want the Government to be very quick to take his word for it, and the problem that this proposal will create is there will be this choice that the Government has of investing massive resources into the investigation or taking his word for it.

Senator SPECTER. There is no duty to be candid with the Government.

Mr. RICHMAN. No, there is not, but there also is exposure to criminal liability. One of the odd things about the Federal system or any criminal justice system, as you know better than anyone, is the threat of prosecution goes far.

Senator SPECTER. Well, you let the chips fall where they may. Our focus is very narrow on the attorney-client privilege.

How about it, Professor Seigel? You have heard Prosecutor Thornburgh testify. You have heard Prosecutor Weissmann testify, Prosecutor Richman testify. Are you going to file a dissent that this bill's enactment would not impede convicting the guilty?

Mr. SEIGEL. Yes, I do disagree with that, for a couple of reasons. First, I think that although right now under the existing dynamic with McNulty, a lot of corporations do come in, and because there has been criminality in their midst at relatively high levels, and they look at the other McNulty factors, they are likely to be charged, and so they have a large incentive to cooperate. And if the only way they can provide the information necessary to cooperate is to waive privilege, that is what they do.

What I think—and I think maybe I disagree here with Professor Richman a little bit—is that the proposed legislation would change that dynamic and that a fair number of those companies would realize that an alternative potentially successful strategy would be to stonewall because without the ability of the Government to say give me more or we need more before we can give you credit for cooperation, the company is going to say we will give you everything that is not privileged, which might be very little, and now that we have fully cooperated you cannot charge us. And when the prosecution goes forward—and I think Professor Richman was referring to this in his testimony. If the prosecutor decides to charge a company—

Senator SPECTER. There is no basis for their saying the prosecutor cannot charge them because they view their cooperation as full.

Mr. SEIGEL. But if they get charged, Senator, they will presumably, if there is any teeth in the legislation, be able to file a motion to dismiss based upon their view that the prosecutor charged them because they refused to turn over attorney-client privilege.

Senator SPECTER. They can say whatever they like, but they cannot necessarily prove it.

Senator Sessions?

Senator SESSIONS. I do not understand what we are doing here. Mr. Seigel, I will ask you, we have got a lot of laws, and maybe this is just one too many. I think Mr. Richman suggested it is going to cause more litigation and hearings and appeals than we can

imagine for not much benefit. But I will ask maybe the two of you here. Whose rights are we talking about being violated?

As you raised, Mr. Seigel, the only question that comes to my mind is that perhaps a corporate employee being interviewed by corporate counsel might not assert privileges that he would otherwise assert if he were being interviewed by the FBI and somehow give up information that incriminates him-or herself. But I do not see this problem with the corporation. It seems to me that the gist of this legislation is to say that if the corporation wants to go to the prosecutor and offer to give up all their material as a good-faith statement that they are determined to eliminate fraud and corruption and the chips fall where they may, which is what we want corporations—

Mr. SEIGEL. All of which is a public good.

Senator SESSIONS. I mean, I do not see how—but this legislation would simply say the prosecutor could not initiate it. The prosecutor could not say let me tell you what you really need to do, because we are heading toward charges against you, is come on forward and tell us—you have done an internal investigation, you give us all that, and we will take that as a good-faith effort and try to consider that as we go forward.

Isn't that the only difference in—do they—

Mr. SEIGEL. The prosecutor could not initiate it, and as I understand the bill, the prosecutor could not take into account the failure of the company not to do that when weighing their cooperation, which is odd because the way—the cooperation is information. So whether they have parted with information, the information the corporation has is likely privileged because the corporation chose to have lawyers do their investigation. So by saying that you cannot weigh whether or not they have given over privileged information I do think shifts the balance of power back to corporations to hold that information and still claim cooperation.

Senator SESSIONS. What if the prosecutor just looked at them with steely eyes and said, I know you have done an investigation, we have got 150 subpoenas ready to issue, we have got a grand jury that is ready to hear that, and that is what our plans are right now?

Mr. SEIGEL. Yes, right. And I think—

Senator SESSIONS. And then you end up with a—this is a threat.

Mr. SEIGEL. Well, I think it could be—

Senator SESSIONS. This was a request for the documents.

Mr. SEIGEL. That is right. It could—

Senator SESSIONS. We could have hearings and appeals of all of that. Is that possible?

Mr. SEIGEL. That is possible. Or either the corporation will get the message and hand this stuff over, anyway, in which case this was all pretty much a waste. Or it will hold tight, and if it gets indicted, we will have to have hearings over the motivation of the prosecution, which seems to be something that we always try to avoid if we can.

Going back to the individual employees, my point is there ought to be—the ABA Rules of Responsibility are not very well written in this area, and there ought to be—if we are worried about the little guy—which is, frankly, who I am worried about, the taxpayer,

the shareholder. If we are worried about the little guy, then we need to look at the rules regarding when corporate counsel advises the individual employee, look, I do not represent you, what you say to me is not held in confidence vis-a-vis you, it is not your choice, it is the corporation's choice; and if you have anything that is going to incriminate yourself, go get yourself a lawyer. That to me is where the rules potentially—

Senator SESSIONS. And that is not required by lawyer ethics clearly at this point in—

Mr. SEIGEL. Not clearly. I think most—

Senator SESSIONS. Mr. Weissmann, I will just give you a chance to respond to any of that, and also the question: In most corporate counsel investigations, do they give those kind of warnings to the employees, that I am not your lawyer, that what you tell me, if the corporation decides, could be given to the authorities?

Mr. WEISSMAN. Yes, that is standard. Those are so-called *Upjohn* warnings and every employee is told that.

I think the issue, though, here is that the Senate bill certainly leaves a company free to voluntarily turn over whatever it wants to the Government on its own. The problem here is that the current status is that even without a request—and certainly there are requests, but even without one, companies read what was the Thompson Memo and now the McNulty Memo, and they know exactly what they have to do. That is precisely what Judge Kaplan, a distinguished jurist, found in the *KPMG* case, which was that KPMG, although it was clearly on notice from the Southern District of New York prosecutor as to what it needs to do, it did not, in fact, need to even be told because it could read the memo and realize that its only way out of the situation, before the Government even said it had a case, was to turn over everything it could.

And so what happened there is Judge Kaplan equated the actions of the company with the actions of Government because it found that the company was merely an amanuensis of the Government and was just doing its bidding.

So what I would say here is that while there has been a lot of talk about the damage to shareholders and to the little guy, that equally weighs in on the other side, which is that there is nothing worse for shareholders and the low-level employee than a baseless civil suit and an unwarranted criminal investigation.

So I think if you are looking out for the small player in this, you can equally view this as a very bad thing that is going on right now.

Senator SESSIONS. Well, I would agree that an overaggressive prosecutor could perhaps utilize an intimidation factor, a threat of an indictment or publication of wrongdoing when there is not sufficient proof of it. That could hurt a corporation. It could hurt stockholders unfairly and unjustly. But my impression is that the McNulty Memo is really designed to deal with that in a real way, requiring approval all the way up the chain of command before anything like this could be done, and it certainly tightened up the procedure. But to deny—to create a statutory right in the middle of a corporate investigation that could cause all kinds of problems for not much benefit I am uneasy about.

Thank you.

Senator SPECTER. Thank you very much, Senator Sessions, and thank you, Governor Thornburgh and Professor Richman and Professor Seigel and Mr. Weissmann. I think the testimony has been very helpful.

Mr. THORNBURGH. Could I add just one comment? I am somewhat puzzled that if the concerns are for all the trouble we are putting the prosecutors to, to make their case, the expense that is involved, the concern for the little guy, why is the Department so timid? Why don't they just come forward with a proposal that would abolish the attorney-client privilege for corporations and get that result?

It seems to me that is really what you are talking about here, is a kind of incremental process of nibbling away at a time-honored and sacrosanct privilege when the real desire is to expedite investigations, make the prosecutor's job easier, and protect in so-called fashion the rights of the little guy, as they have been styled by this panel. I think that is something worth asking Judge Mukasey about when he appears before you.

Senator SPECTER. I am meeting with him in a few minutes.

Mr. THORNBURGH. Maybe he favors the abolishment of the attorney-client privilege for corporations.

Mr. SEIGEL. I would go on the record not favoring that. I think it is in the hands of defense counsel, and that is where it should be.

Senator SPECTER. It would not enhance his chances for confirmation if he adopted the bold Thornburgh approach.

[Laughter.]

Senator SPECTER. If he agreed to rescind the practice, I think it would enhance it.

Mr. THORNBURGH. I quite agree. That is what I was getting at.

[Laughter.]

Mr. RICHMAN. Senator Specter, one note on that. Judge Mukasey is a man of extraordinary judgment, and I really think there are good reasons to wait and see how he runs this Department. It is a long-awaited arrival—at least for those of us hoping for his confirmation.

Senator SPECTER. Well, I am not prepared to wait and see. We have been considering this matter at some length. There was a suggestion made that we defer this hearing until we had a new Attorney General, and that is going to take a long time, and it may not be a question of when but if, where you have a lot of demands made for production of a lot of records on the Terrorist Surveillance Program and the production of White House witnesses and all the records about the U.S. Attorneys. My experience, limited as it is, is not to wait but to try to make an analysis and come to a conclusion and to move ahead.

But I think this hearing today provides us with a sufficient basis to make a judgment. We have had very distinguished witnesses on both sides of this issue. And I understand what Professor Seigel has said, but when Professor Richman testifies as he did and you have Mr. Weissmann's experience on Enron and, candidly, most of all, what a prosecutor like Dick Thornburgh has had to say, with experience at all levels and a sense of wonderment, I have been in the Senate all during the period this program apparently was de-

veloped and had not heard about it until the outcry has come up recently. And I think this is a matter for congressional judgment, and I intend to press it.

Thank you very much—

Mr. RICHMAN. Senator, can I add one thing? I just want to clarify my testimony. I do not think that this measure will have no effect whatsoever. The point is that those who will avail itself of its protection are the guilty ones.

Senator SPECTER. I do not consider your last statement recanting your earlier testimony.

[Laughter.]

Senator SPECTER. Thank you very much.

[Whereupon, at 11:55 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 23, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Please find enclosed a response to questions arising from the appearance of United States Attorney Karin Immergut before the Committee on September 18, 2007, at a hearing entitled "Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum".

We hope that this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Cc: The Honorable Arlen Specter
Ranking Member

"Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum"

September 18, 2007

Questions for the Hearing Record
for
Karin Immergut
United States Attorney
District of Oregon
United States Department of Justice
Chair
White Collar Subcommittee for the Attorney General's Advisory Committee
Portland, Oregon

QUESTION FROM SENATOR SESSIONS:

1. **Concerns have arisen regarding the Department's handling of corporate investigations. Specifically, there is a concern that prosecutors will simply seek waiver in order to expedite their investigation, as opposed to a request in the interest of justice. Under the McNulty Memorandum, then, if a waiver by a corporation will save the government a significant amount of investigation, may the government request a waiver on that basis alone?**

RESPONSE:

No. The McNulty Memorandum clearly states that a prosecutor may not seek a waiver merely because it is "desirable or convenient to obtain privileged information." Instead, prosecutors may only request a waiver when they can establish "a legitimate need for the privileged information to fulfill their law enforcement obligations." This test requires a careful balancing of important policy considerations underlying the attorney-client privilege and the work product doctrine and the law enforcement needs of the government's investigation. The McNulty Memorandum sets out four factors which must be considered in determining whether a legitimate need has been shown. Those factors are:

(1) The likelihood and degree to which the information will benefit the government's investigation;
(2) Whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;
(3) The completeness of the voluntary disclosure already provided; and
(4) The collateral consequences to a corporation of the waiver.

The McNulty Memorandum also requires that prosecutors take the least intrusive approach necessary to request the information and to use a step-by-step approach. This is a substantial test which ensures that prosecutors must carefully evaluate the necessity for

requesting the information and the type and scope of the request. Moreover, the approval process requiring prosecutors to justify the need for the request prevents prosecutors from requesting privilege waiver solely to expedite an investigation.

2. Communication between parties in litigation is a fundamental principle of our legal system. Supporters of S. 186 contend, however, that the McNulty Memorandum creates too great of incentives for corporate counsel to just provide all information to the prosecution in order to be viewed as cooperative. Explain what impact, if any, S. 186 would have on future communications between prosecutors and corporate counsel if passed.

RESPONSE:

The Attorney-Client Privilege Protection Act of 2007 (S. 186) is likely to chill and impede routine communications between prosecutors and corporate representatives. Basic fact-finding with corporate counsel routinely assists the government in determining whether to open an investigation. Given the broad prohibitions of S. 186, however, prosecutors will hesitate to engage in such fact-finding because of the litigation risks that could occur in asking for that information. The potential inability to broach vital topics with counsel prevents the United States from making an assessment of whether opposing counsel's assertion of privilege is even valid. Furthermore, the prohibition on seeking privileged information lengthens the government's investigations, resulting in delayed justice for victims of corporate fraud or further dissipation of victim assets prior to recovery. This result would not occur with the McNulty Memorandum because prosecutors are able to make the request, as long as they seek approval from their supervisors and establish a legitimate need for the information before the request is made.

To illustrate, imagine a publicly held corporation has identified a fraud within the corporation committed by the Chief Financial Officer (CFO) affecting the accuracy of the company's financial statements. The public company has obligations to the Securities and Exchange Commission (SEC) and to the investing public to disclose that there is an inaccuracy. When questions must be answered with information obtained by counsel in the internal investigation about the matter, *i.e.*, protected by attorney-client privilege or work product, the legislation would prohibit asking these questions. If S. 186 is passed, the following simple questions by the SEC or the Department of Justice could be stymied if the corporation retained counsel to look into the matter: How did you learn of the fraud? What remedial actions did you take? Can you disclose what happened? What were the processes put in place to prevent this? What is the breadth of the fraud? What did the officers know about the fraud?

Subsection (c) of S. 186 entitled "Inapplicability" does not remedy this problem. That section provides that "Nothing in this Act shall prohibit an agent or attorney of the United States from requesting or seeking any communication or material that such agent or attorney reasonably believes is not entitled to protection under the attorney-client privilege or attorney work product doctrine." To invoke this provision, a federal prosecutor would have to hold a "reasonable belief" that the information is not privileged. In cases where a prosecutor can establish that the legal advice was communicated in furtherance of a crime or fraud ("the crime-fraud exception"), the prosecutor will be entitled to ask for that information. However, in most investigations, the

prosecutor will be hesitant to take advantage of this section because of the potential for adverse rulings from a court if the matter is later litigated and the court sets an unexpectedly high threshold for finding "reasonable belief" that the materials are not entitled to protection. Certainly, when the attorney is providing information directly from the internal investigation that he or she conducted, a federal prosecutor would be reluctant to argue that attorney-client and work product productions are not implicated. As a result, a prosecutor investigating corporate fraud may not be able to ask the most basic questions of corporate counsel.

3. **The purpose of S. 186 is to protect a corporation's attorney-client and work product privilege. One thing that has not been discussed is the fact that there are various types of corporations. While large corporations involved in corporate fraud come to mind, Enron and WorldCom, as those that would claim protection under S. 186, there are numerous other shades of corporations that will also seek refuge under S. 186. Discuss what effect this legislation will have on these non-traditional corporations that do not seem to be the intended beneficiaries of S. 186.**

RESPONSE:

In today's increasingly sophisticated criminal environment, many criminals use corporate shells to insulate themselves from law enforcement scrutiny: drug dealers launder money through corporate entities; Ponzi schemes almost always employ corporate shells for fleecing investors; sham charities can be used for terrorist financing. The broad language of S. 186 will have the unintended consequence of imposing new rules on how prosecutors handle all these cases. The proposed statute applies to any inquiry by a prosecutor made either to a corporation or a person affiliated with a corporation which might implicate privileged information. Furthermore, S. 186 forbids the government from conditioning a charging decision regarding such a person on whether that person agrees to a waiver. S. 186 also prohibits using the disclosed information as a factor in determining whether the person is cooperating.

The literal terms of this statute thus would impede a prosecutor from seeking privilege waivers from a drug money launderer who happened to be using a corporate front, and also prevent the prosecutor from providing the normal incentives, *e.g.*, an offer to plead to reduced charges, that such cooperation could bring.

4. **In virtually every kind of a criminal prosecution, an individual is free to waive certain rights, including constitutional rights and waiver of the attorney client privilege. What effect, then, will S. 186 have on individual corporate employees who are personally involved in wrongdoing and subsequently wish to cooperate with the government?**

RESPONSE:

The broad language of S. 186 states that the government cannot "condition treatment" on the disclosure of protected information of a "person affiliated with that organization" or use [the disclosed information as a factor" in determining whether a "person affiliated with an organization" is cooperating with the government. If the plain language is read literally, the

legislation extends the shield to individual employees, agents or affiliates of the organization. Thus, S. 186 would effectively prohibit individuals from waiving their personal attorney-client privilege (as opposed to the corporation's privilege) and from receiving any benefit for this waiver. In the context of dealing with individuals who have retained counsel, such as whistleblowers or individuals who may be involved in criminal conduct, the legislation prohibits the United States from conferring any benefit on those individuals when they disclose wrongdoing inside the organization and waive their individual privilege. This practice would conflict with what occurs in nearly every other criminal prosecution. The United States is free to confer, and usually does confer, a benefit upon individuals who provide information, even when providing that information means waiving certain rights, including attorney-client privilege. Such benefits are extended every day in criminal cases across the United States. This exchange of benefits allows the criminal justice system to work more efficiently and rewards those individuals (and entities) who choose to cooperate with the government in solving crime.

5. Critics of the McNulty Memorandum assert that some of the language is vague and arbitrary. Specifically, the language requiring that a United States Attorney consult with the Assistant Attorney General for the Criminal Division before seeking a waiver of Category I information. Should a dispute or disagreement arise as to a Category I waiver request, what happens? Whose decision prevails?

RESPONSE:

The language of the McNulty Memorandum is neither vague nor arbitrary. Quite the contrary, the language is the end product of a process that began with the Holder memorandum in 1999 and continued with the Thompson Memorandum in 2003. With each iteration of the corporate charging policy, the Department has responded to concerns raised by the private sector and members of Congress. The resulting memorandum imposes clear guidelines and restrictions on the ability of prosecutors in the field to seek waivers. In addition, for the first time, the McNulty Memorandum established recordkeeping and consultation processes that would both memorialize requests for waivers and promote uniform application. First, a record must now be kept of every corporate privilege waiver, regardless whether it is entirely voluntary or requested by the government. When the government requests a waiver, that record will document how the "legitimate need" test has been met. This information base will assist the Department in responding to future questions about the actual implementation of corporate waiver practices. Second, the McNulty Memorandum requires that United States Attorneys consult with the Assistant Attorney General for the Criminal Division before permitting a prosecutor to seek a waiver. This provides the United States Attorneys with a single, centralized source for expertise in implementing the McNulty Memorandum, which will ensure that it is administered consistently and uniformly nationwide. Consultation requirements are common in the relationship between Main Justice and the United States Attorney's offices. They work effectively in numerous contexts, from money laundering to terrorism. Consultation with the Criminal Division before seeking a waiver of Category I information has proven to be a meaningful and rigorous process. The Criminal Division has provided significant input regarding the scope and substance of the request based on that Division's experience with waiver requests around the country.

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October 11, 2007

Senator Patrick Leahy
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Senate Judiciary Committee
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Washington, D.C. 20510

***Hearing on "Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum* – Response to Written Question of Senator Leahy**

Dear Senator Leahy:

As I noted in my testimony on September 18, 2007, I expect that, even were Congress to bar federal prosecutors from requesting corporate privilege waivers and from considering a corporation's willingness to waive in charging decisions, many corporations would continue to conduct internal investigations and would, in a broad range of cases, readily disclose materials thereby obtained to prosecutors. Corporations often have nothing to hide, and the matters in which the government has expressed an interest may involve an isolated case of employee misconduct or no misconduct at all. Moreover, the sooner corporate counsel can satisfy the government's interest in a matter and persuade prosecutors to move on to other cases, the better for the corporation.

That this dynamic will continue in many cases, irrespective of legislative intervention, does *not* mean that the proposed legislation would not affect *other* cases. It would indeed, and the cases that it would make harder to prosecute would include many that the government very much ought to be pursing, i.e. cases against corporations that – to use Senator Specter's dichotomy – are "guilty."

Were the proposed legislation enacted, there would undoubtedly be a class of corporations that would not waive privileges and would avail themselves of the protection the legislation offers. That, after all, is the whole point of the bill. Some corporations within this class would have legitimate reasons for not wanting to make their workings transparent to the government. Others would simply be hoping to escape further investigation with bland

assurances that no misconduct has occurred, even though corporate counsel never bothered to look very hard, or did look and is misrepresenting what was found.

In the face of such bland assurances, prosecutors might well move on, leaving these cases uninvestigated and any misconduct unpursued. Should prosecutors not move on, the investigation would be far more resource-intensive, and possibly more invasive or disruptive than in a waiver regime. Unable to draw on corporate counsel's materials, enforcers would have to rely more on grand jury subpoenae, searches, consensual tape-recordings, search warrants, and other such investigative techniques. The effect that this increased cost (monetary and social) will have on white-collar enforcement is worth considering. Moreover, even when the government is able to bring a case without relying on, or even trying to obtain, corporate privilege waivers, it will have to deal with regular claims that it has acted with an illegal motivation, because defendant's failure to waive affected prosecutorial decisionmaking. Such allegations will be easy to make, and hard to rebut without extensive and disruptive inquiry into prosecutors' calculus, making even the most appropriate cases more difficult to bring.

I appreciate the chance to contribute to the Committee's important work. Please let me know if I can be of further assistance.

Very truly yours,

Daniel Richman

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January 28, 2008

Senator Jeff Sessions
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Washington, D.C. 20510

Hearing on "Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum – Response to Written Questions of Senator Sessions

Dear Senator Sessions:

I apologize for my delay in responding to your written questions, but for some reason I did not receive them until January 24, 2008.

1. Response to Question One

The cooperation dynamic for corporations is, and should be, quite different from that faced by individual defendants. As I noted in my written testimony, when an individual defendant seeks to cooperate with the government, he will generally be required to tell the government everything he knows about the matters being investigated and many peripheral matters. There is no pressing need for the government to inquire into what he told his lawyer about the conduct at issue. It will be enough for the government to focus on what the defendant himself knows.

Corporations ought to be able to cooperate, and indeed should be encouraged to do so. But for the government to obtain and assess a corporation's cooperation will often be extremely difficult in the absence of some degree of privilege waiver on the corporation's part. Corporate counsel can, and probably will, give the government an account of who did what within the corporation – an account that may, perhaps, show that no improprieties occurred, or that any that did occur were the fault of a rogue employee. But unless prosecutors are simply going to take counsel's word, they will need to look at the data on which counsel's account is said to be based. Recognizing the need for some credible demonstration of what the firm actually "knows,"

corporations regularly waive their attorney-client (or work-product) privilege as to the factual materials on which counsel's account is based. When a corporation does not do this, prosecutors might well (under the McNulty Memorandum) ask it to do so. Any measure, like S. 186, that bars the government from making this request will significantly diminish prosecutors' ability to assess a corporation's ostensible cooperation without an expensive and disruptive investigation. What prosecutors would do in the world created by S.186 would obviously vary from case to case. But one would expect cases in which assurances of "cooperation" are accepted in the absence of good faith; decisions to prosecute made in ignorance, and investigations pursued that could have been avoided. None of these is in the public interest.

2. Response to Question Two

As noted above, S. 186 would indeed change the incentive structure in corporate cases by allowing corporate counsel more room to try placating prosecutors with misleading or insufficiently investigated claims of corporate innocence or minimal culpability. Moreover, even were counsel unsuccessful in this effort, the corporation could still defend against a prosecution by claiming that the government was illegally influenced by the corporation's refusal to waive its privilege. Even if these claims ultimately failed, they would still allow firms to impose significant costs on, and perhaps even deter, the prosecution of corporate crime.

One matter of disclosure: It was not the case when I gave my initial testimony to the Committee, but I am currently assisting others in the representation on appeal of several defendants who obtained the dismissal of the federal criminal charges against them in the KPMG case in the Southern District of New York.

I appreciate the chance to contribute to the Committee's important work. Please let me know if I can be of further assistance.

Very truly yours,

Daniel Richman,
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United States Senate
Committee on the Judiciary
Hearing "Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum," September 18, 2007
Professor Michael L. Seigel
University of Florida Fredric G. Levin College of Law

October 18, 2007

Answers to Written Questions

1. Would legislation such as S. 186 produce a positive result for corporate employees who are involved in an internal investigation? That is, as compared to current policy, would the net effect of S. 186 create an environment in which employees possess greater freedom cooperation with in-house counsel?

   No. S. 186 does nothing to help corporate employees caught up in an internal investigation of alleged wrong-doing. Under *Upjohn*, an employee faces the risk that the corporation might voluntarily waive its privilege in the future regardless of DOJ waiver policy. Thus, a sophisticated employee will always seek legal advice prior to cooperating with the internal investigation. Whether an unsophisticated employee does the same depends upon whether corporate counsel administers clear and vigorous *Upjohn* warnings. S. 186 could help corporate employees by mandating *Upjohn* warnings of a particular type, but it does not.

2. Supporters of S. 186 maintain that the current "culture of waiver" at the Department of Justice is chipping away, and ultimately destroying, such long recognized legal principles like the attorney privilege, Explain, then, how the McNulty Memorandum does not in fact destroy this privilege and why S. 186 is not needed at this time.

   This question effectively restates the entire issue and is not easily subject to a short answer. (I would be happy to forward the draft of my forthcoming 50 page BOSTON COLLEGE LAW REVIEW article that fully answers this question upon request.) In short:

   a. The McNulty Memo has absolutely NO IMPACT on the attorney-client privilege of individuals. Individuals are the subject of the vast majority of criminal prosecutions. To say that McNulty would thus "destroy" the attorney-client privilege" is unwarranted hyperbole.

   b. The McNulty Memo does not take away a corporation's right to assert privilege. That decision remains with the corporation and corporate and defense counsel, NOT the government. So, once again, there is no destruction of the attorney-client privilege. The McNulty Memo says, in effect, that IF a corporation decides to cooperate (its decision entirely),

cooperation is measured, in part, by how much information concerning the criminal conduct the corporation provides. This is entirely consistent with the manner in which all other criminal defendants are treated. The McNulty Memorandum then recognizes the reality that corporations often gather information through internal investigations headed by in-house or outside counsel. Thus, in many cases, most useful information is, technically, privileged. In these cases, the corporation can't have it both ways – obtaining credit for "cooperation," but providing no information through the assertion of privilege.

c. The McNulty Memo does respect attorney-client privilege by requiring supervisory approval before privileged materials are requested, and the request must be based on demonstrated need. Thus, if a corporation can cooperate without waiving privilege, it has the full opportunity to do so. S. 186 is not needed to protect against prosecutorial abuse because DOJ has already attended to the potential problem of overaggressive prosecutors.

d. Not only is S. 186 not needed, it would be downright harmful. It states, in effect, that a prosecutor may not weigh a corporation's decision not to waive its attorney-client privilege in making a charging decision. This means that every time a corporation that claims to have cooperated but refused to waive privilege is indicted, it will file a motion to dismiss the charges based on a violation of S. 186. A pretrial hearing would have to be held to determine the motivations of the prosecutors. This would be time consuming and extremely intrusive of the executive function. (In fact, it might violate the Separation of Powers doctrine.) It is simply not necessary.

e. Corporations are powerful entities. When they are faced with a federal investigation, they hire the best, most sophisticated regulatory and criminal defense lawyers to represent them. The resources on each side of the "fight" are pretty even. Corporations do not need S. 186 to protect them.

3. It is claimed that S. 186 will in fact strengthen existing compliance laws which Congress has already promulgated, such as Sarbanes-Oxley. If this is the case then why should Congress allow the McNulty Memorandum to remain in place? It would seem that allowing current procedures to continue to operate would result in an erosion of the current compliance laws.

With all due respect, the argument that S. 186 will strengthen compliance is ridiculous. S. 186 would provide an additional incentive for corporations that discovered internal criminality to cover it up and circle the wagons, hiding behind attorney-client privilege should a federal investigation arise. In the absence of S. 186, on the other hand, corporate insiders know from the outset that a cover up is doubly dangerous because a

future President or Board of Directors will have a strong incentive to turn over internal documents and reports revealing the criminal activity – and the cover-up – to the government as part of a cooperation deal. So, S. 186 would be counter-productive to compliance.

The better way to look at the present landscape is as follows. Despite the risk that internal materials might be disclosed at a later date, corporate higher-ups really have no choice but to conduct relatively complete and thorough internal investigations when they become aware of possible internal criminality. If they don't, they may be subject to PERSONAL criminal liability for "ratifying" the criminal behavior, and they will surely open themselves and their companies up to civil and regulatory liability. Prohibiting DOJ from seeking waivers at a later point in time does nothing to change their calculus, except to make the prospect of a complete and total cover-up more appealing.

* * * * *

1. Some have argued that the Arthur Andersen prosecution shows that a federal indictment is a death knell for corporations and that, consequently, Congress should categorically preclude government attorneys from seeking corporate privilege waivers or considering a corporation's willingness to waive in charging decisions. What is your view of this argument?

The Andersen case has been the poster-child for an overreaching government and the need to restrain the power of prosecutors to "coerce" corporations into cooperating and turning over privileged documents. Allegedly, this power of the federal government is based on its alleged ability to "kill" a corporation – that is, put it out of existence – merely by filing of charges.

In reality, the Andersen case provides little support for this position. The collapse of the firm after indictment was the exception, not the rule. The best evidence of Andersen being an anomaly is the huge number of corporations that have been charged (or have settled charges) over the years and have lived on to produce their wares for another day.[1] Andersen's situation was unique because, as a firm specializing in public accounting, it faced the prospect of losing its ability to conduct public audits upon conviction. Further, the value of an audit to a publicly traded company rests on the reputation of the firm certifying it. Once Andersen was indicted, its clients no longer believed it had the

[1] *See, e.g.*, Russell Mokhiber, *Top 100 Corporate Criminals of the Decade*, CORPORATE CRIME REPORTER, http://www.corporatecrimereporter.com/top100.html (listing top 100 corporate criminals of the 1990s, with many on the list – including Exxon, Archers Daniel Midland, Pfizer, Inc., Rockwell International Corporation, Royal Caribbean Cruise Lines, Teledyne Industries, Inc., Northrop, Warner-Lambert Company, General Electric, Chevron, Tyson Foods, Inc.ALCOA, United States Sugar Corporation, Bristol-Myers Squib, Consolidated Edison Company, Hyundai Motor Company, and Samsung America, Inc. – still being very much in existence today; Penelope Patsuirs, *The Corporate Fraud Scandal Sheet*, FORBES.COM, Aug. 26, 2002, http://www.forbes.com/home/2002/07/25/accountingtracker.html (listing 22 corporate frauds, most involving claims against the corporate entity, that came to light between June 2000 and April 2002; many of the companies on the list – including AOL Time Warner, Halliburton, and Merck – are still in operation).

credibility necessary to do its job – even if it were eventually exonerated. These factors are simply not present in the run-of-the-mill corporate case.

In addition, Andersen suffered because it was a multiple recidivist: it had recently settled with the government in connection with numerous other claims of wrong-doing (e.g., Sunbeam, Waste Management Inc., Qwest Communications, Global Crossing, and Baptist Foundation of America). The Enron debacle was the final straw. Finally, the contention that the firm was exonerated on appeal is incorrect. The Supreme Court held that the trial judge's jury instructions on the criminal intent required for conviction were erroneous, and it remanded the case for a new trial. The Court did NOT enter a judgment of acquittal. Presumably, prosecutors did not retry the case because by the time it came back on remand the firm was more or less defunct.

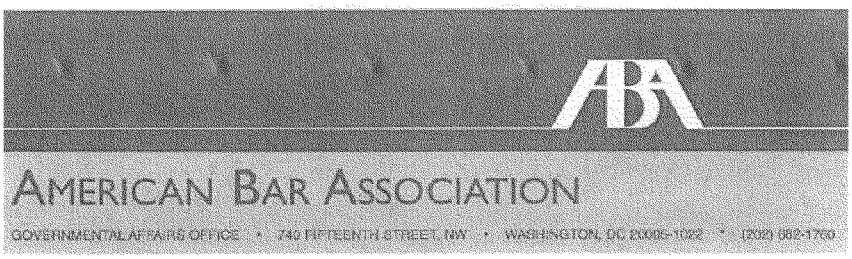
In my view, it is time to retire the myth of Arthur Andersen.

2. Is there a reason why privilege waiver has become more important to government attorneys investigating corporate fraud in recent years given that it was rarely if ever requested in the past?

Yes. One argument heard from former prosecutors, especially "old-timers," is that "in my day we didn't use privilege waiver, so why should it be allowed today?" The answer can be gleaned from the historical record. The vigorous prosecution of white collar crime is a relatively new phenomenon. Watergate and bribery of foreign officials (leading to the Foreign Corrupt Practices Act) started things off in the 1970s. But the intensity of white collar prosecution did not pick up until the Savings and Loan crisis of the early 1990s. It continued with Attorney General Janet Reno's focus on health care fraud during her administration in the mid to late 1990s. Then it exploded after the bursting of the stock market "tech bubble" in 2000. With more and more potential cases to deal with, prosecutors began seeking ways to cut down on the usually long and resource-intensive nature of white collar investigations. New methods included using wiretaps and wired-up cooperating witnesses to gather admissions on tape – procedures formally reserved for drug and other blue-collar crime. Another new method was to seek corporate cooperation, including privilege waiver, to cut to the heart of a case.

These new methods have permitted the prosecution of far more white collar cases than ever before. DOJ reports some 1200 convictions from approximately 2002-06, a huge number compare to the historical record. S. 186 would be a step in the wrong direction in the on-going battle against white collar crime.

SUBMISSIONS FOR THE RECORD



STATEMENT OF

THE AMERICAN BAR ASSOCIATION

to the

COMMITTEE ON JUDICIARY

of the

UNITED STATES SENATE

concerning its hearing on

"EXAMINING APPROACHES TO CORPORATE FRAUD PROSECUTIONS AND THE ATTORNEY-CLIENT PRIVILEGE UNDER THE MCNULTY MEMORANDUM"

SEPTEMBER 18, 2007

Mr. Chairman, Ranking Member Specter, and Members of the Committee:

The American Bar Association, with more than 410,000 members nationwide, appreciates the opportunity to present this statement to the Committee regarding the critical issues surrounding today's hearing titled "Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum."

The ABA strongly supports the preservation of the attorney-client privilege, the work product doctrine and employee legal rights, and we have become concerned in recent years about various federal agency polices and practices that are eroding these fundamental protections. Those governmental policies, which arose in response to Enron and other similar corporate scandals, have created a "culture of waiver" that is seriously undermining the confidential attorney-client relationship in the corporate community.

Although all of the federal agency waiver policies raise concerns, the ABA has become especially concerned about language in the Department of Justice's 2006 "McNulty Memorandum" and 2003 "Thompson Memorandum"—and other similar federal governmental policies and practices—that pressure companies and other organizations to waive their privileges as a condition for receiving cooperation credit during investigations.[1] The ABA also opposes the separate—but related—provisions in many of these federal policies that erode employees' constitutional and other legal rights by pressuring companies to forgo paying their employees' legal fees during

[1] On August 9, 2005, the ABA adopted a resolution, sponsored by the ABA Task Force on Attorney-Client Privilege, supporting the preservation of the attorney-client privilege and work product doctrine, opposing governmental actions that erode these protections, and opposing the routine practice by government officials of seeking the waiver of these protections through the granting or denial of any benefit or advantage. Previously, in August 2004, the ABA adopted a resolution supporting five specific changes to the then-proposed amendments to the Federal Sentencing Guidelines for Organizations, including amending the Commentary to Section 8C2.5 to state affirmatively that waiver of attorney-client and work product protections "should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government." Both ABA resolutions and detailed background reports discussing the history and importance of the attorney-client privilege and work product doctrine and recent governmental assaults on these protections, are available at http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html.

investigations or to take other punitive actions against them long before any guilt has been established.

Because of the serious and inherent problems with the McNulty Memorandum and other similar federal agency policies, we urge members of the Committee to support legislation like S. 186, the "Attorney-Client Privilege Protection Act of 2007," that would reverse these policies.

The Importance of the Attorney-Client Privilege and the Work Product Doctrine

The attorney-client privilege—which belongs not to the lawyer but to the client—historically has enabled both individual and corporate clients to communicate with their lawyer in confidence. As such, it is the bedrock of the client's rights to effective counsel and confidentiality in seeking legal advice. From a practical standpoint, the privilege also plays a key role in helping companies to act legally and properly by permitting corporate clients to seek out and obtain guidance in how to conform conduct to the law. In addition, the privilege facilitates self-investigation into past conduct to identify shortcomings and remedy problems as soon as possible, to the benefit of corporate institutions, the investing community and society-at-large. The work product doctrine underpins our adversarial justice system and allows attorneys to prepare for litigation without fear that their work product and mental impressions will be revealed to adversaries.

Justice Department and Other Federal Policies that Erode the Attorney-Client Privilege, the Work Product Doctrine and Employee Constitutional Rights in the Corporate Context

The Justice Department's original privilege waiver and employee rights policies, set forth in the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum,"[2] instructed federal

[2] *See* Memorandum from Eric Holder, Deputy Attorney General, Department of Justice, to Component Heads and United States Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999), available at http://www.abanet.org/poladv/priorities/privilegewaiver/1999jun16_privwaiv_dojholder.pdf. *See also* Memorandum from Larry D. Thompson, Deputy Attorney General, Department of Justice, to Heads of Department Components, U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (January 20, 2003), at p. 7, http://www.abanet.org/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.pdf.

prosecutors to consider certain factors in determining whether corporations and other organizations should receive cooperation credit—and hence leniency—during government investigations. One of the key factors cited in these Justice Department policies—and in similar federal policies adopted by the Securities and Exchange Commission (SEC)[3], the Commodity Futures Trading Commission (CFTC)[4], the Department of Housing and Urban Development (HUD)[5], the Environmental Protection Agency (EPA)[6], and others—is the organization's willingness to waive attorney-client privilege and work product protections and provide this confidential information to government investigators. The Thompson Memorandum stated in pertinent part that:

> One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects and targets, without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and

[3] The SEC's privilege waiver policy is set forth in its 2001 "Seaboard Report," which is formally known as the "Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions," issued on October 23, 2001 as Releases 44969 and 1470. A copy of the Seaboard Report is available at http://www.sec.gov/litigation/investreport/34-44969.htm. In that report, the SEC set forth the criteria that it will consider in determining whether, and to what extent, companies and other organizations should be granted credit for seeking out, self-reporting, and rectifying illegal conduct and otherwise cooperating with the agency's staff as the SEC decides whether and how to take enforcement action. Like the corresponding policies adopted by the Justice Department, the Seaboard Report encourages companies to waive their attorney-client privilege, work product, and other legal protections as a sign of full cooperation. *See* Seaboard Report at paragraph 8, criteria no. 11, and footnote 3.

[4] The CFTC's privilege waiver and employee rights policy was contained in an August 11, 2004 Enforcement Advisory titled "Cooperation Factors in Enforcement Division Sanction Recommendations" issued by the agency's Division of Enforcement, but the Commission issued a revised Enforcement Advisory eliminating the waiver language on March 1, 2007. The Commission's original 2004 policy, the ABA's July 7, 2006 letter recommending changes in the policy, and the Commission's new March 1, 2007 policy are available at http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html.

[5] HUD's privilege waiver policy is contained in a February 3, 2006 formal Notice to public housing authorities urging them to include an addendum in all contracts with legal counsel that would restrict their attorneys' ability to assert the attorney-client privilege on behalf of these clients in regard to HUD investigations and enforcement proceedings. HUD's 2006 Notice is available at http://www.abanet.org/poladv/priorities/privilegewaiver/2006feb02_privwaiv_hud.pdf.

[6] The EPA's privilege waiver policy is contained in its May 11, 2000 cooperation standards titled "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations." The text of the EPA's standards is available at http://www.abanet.org/poladv/priorities/privilegewaiver/epaprivwaiverpolicy05112000.pdf.

> cooperation. Prosecutors may, therefore, request a waiver in appropriate circumstances. The Department does not, however, consider waiver of a corporation's attorney-client and work product protection an absolute requirement, and prosecutors should consider the willingness of a corporation to waive such protection when necessary to provide timely and complete information as one factor in evaluating the corporation's cooperation.

See Thompson Memorandum at pg. 7. Although the Thompson Memorandum, like the earlier Holder Memorandum, stated that waiver is not an absolute requirement, it nevertheless made it clear that waiver was a key factor for prosecutors to consider in evaluating an entity's cooperation.

In addition to its privilege waiver provisions, the Justice Department's policy also contained language directing prosecutors, in determining cooperation, to consider a company's willingness to take certain punitive actions against its own employees and agents during investigations. In particular, the Thompson Memorandum encouraged prosecutors to deny cooperation credit to companies and other organizations that assist or support their so-called "culpable employees and agents" who are the subject of investigations by (1) providing or paying for their legal counsel, (2) participating in joint defense and information sharing agreements with them, (3) sharing corporate records and historical information about the conduct under investigation with them, or (4) declining to fire or otherwise sanction them for exercising their Fifth Amendment rights in response to government requests for information.[7] A number of other federal agencies, including the SEC[8] and HUD[9], have adopted similar policies or practices as well.

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[7] The Thompson Memorandum provided in pertinent part that:

> ...a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.

See Thompson Memorandum, note 2 *supra*, at pgs. 7-8. The Thompson Memorandum did not provide any measure by which an organization is expected to determine whether an employee or agent is "culpable" for purposes of the government's assessment of cooperation and, in part as a consequence, an organization felt compelled either to defer to the government investigators' initial judgment or to err on the side of caution.

[8] The SEC's Seaboard Report contains language in the last sentence of its cooperation criteria no. 11 that encourages companies to "make all reasonable efforts to secure" their employees' cooperation with Commission staff during investigations. *See* note 3, *supra* Although this language is not as explicit as the corresponding language in the Justice

The ABA's and the Coalition's Response to the Privilege Waiver Problem

In 2004, the ABA created its Task Force on Attorney-Client Privilege to study and address the various federal agency policies and practices that have eroded attorney-client privilege and work product protections. The Task Force held a series of public hearings on the privilege waiver issue and received testimony from numerous legal, business, and public policy groups. The Task Force also crafted new ABA policy in August 2005—unanimously adopted by the ABA House of Delegates—supporting the attorney-client privilege and work product doctrine and opposing government policies that erode these protections.[10] Subsequently, the ABA adopted a separate resolution in August 2006 opposing those related federal agency policies that erode employees' constitutional and other legal rights.[11] All of these ABA policies and other useful resources on this topic are available on our Task Force website at http://www.abanet.org/buslaw/attorneyclient/. These and other related materials also are posted on the ABA Governmental Affairs Office website at http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html.

Department's policies, the ABA is concerned that it could result in the erosion of employees' constitutional and other legal rights to the extent that companies are asked to not advance the employees' legal fees or to terminate employees unless they agree to waive their Fifth Amendment rights against self-incrimination.

[9] Officials in HUD's Enforcement Center have been accused of threatening to take enforcement action against the directors of state and local government entities that administer federal awards because they covered the costs of legal assistance for their employees from program funds. While HUD does not appear to have a formal, written policy forbidding payment of these employees' legal fees, the agency's threats to take enforcement action have eroded employees' constitutional and other legal rights in much the same way as the more formal Justice Department and SEC policies. The ABA's December 8, 2006 letter to HUD expressing concerns over this practice is available online at: http://www.abanet.org/poladv/letters/attyclient/2006dec08_hudattyfees_l.pdf.

[10] *See* ABA resolution regarding privilege waiver approved in August 2005, discussed in note 1, *supra*.

[11] On August 8, 2006, the ABA approved a resolution, sponsored by the ABA Task Force on Attorney-Client Privilege and the New York State Bar Association, opposing government policies, practices and procedures that erode employees' constitutional and other legal rights by requiring, encouraging, or permitting prosecutors to consider certain factors in determining whether a company or other organization has been cooperative during an investigation. These factors include whether the organization (1) provided or funded legal representation for an employee, (2) participated in a joint defense and information sharing agreement with an employee, (3) shared its records or historical information about the conduct under investigation with an employee, or (4) declined to fire or otherwise sanction an employee who exercised his or her Fifth Amendment rights in response to government requests for information. The ABA resolution and a detailed background report are available at http://www.abanet.org/buslaw/attorneyclient/.

The ABA and its Task Force also have been working in close cooperation with a broad and diverse coalition of influential legal and business groups[12] and numerous state and local bars[13] in an effort to raise awareness of these harmful government policies and craft effective remedies. Towards that end, the ABA and various representatives of the coalition testified before the Senate and House Judiciary Committees in September 2006 and March 2007, respectively, and expressed their concerns over these policies. In addition, the ABA sent letters to the Justice Department (May 2006), the U.S. Sentencing Commission (March 2006), the Commodity Futures Trading Commission (July 2006), the Department of Housing and Urban Development (December 2006), and the Securities and Exchange Commission (February 2007) urging them to reverse their relevant policies.[14] The ABA's May 2, 2006 letter to Attorney General Alberto Gonzales regarding the Justice Department's waiver policies is attached to this written statement as Appendix A.

Former Senior Justice Department Officials Speak Out Against Privilege Waiver Policies

In addition to the ABA and the coalition, a prominent group of former senior Justice Department officials—including former Attorneys General, Deputy Attorneys General, and Solicitors General from both political parties—submitted letters to the Sentencing Commission and

[12] The Coalition to Preserve the Attorney-Client Privilege consists of the following entities: American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, The Financial Services Roundtable, Frontiers of Freedom, National Association of Criminal Defense Lawyers, National Association of Manufacturers, National Defense Industrial Association, Retail Industry Leaders Association, U.S. Chamber of Commerce, and Washington Legal Foundation.

[13] In recognition of the nationwide implications of the harmful governmental policies eroding the privilege and employee rights, the ABA has reached out to state and local bar associations and other organizations throughout the country on these issues. As of August 2007, a number of state bars – including those in Florida, Illinois, Maryland, Missouri, Utah and Vermont – had formally endorsed S. 186. In addition, a number of major local bars have endorsed the legislation as well, including the Boston, Chicago, and New York City bars. As more and more bars around the country become aware of the serious erosion of the privilege and employee constitutional rights caused by the federal waiver policies, many of them are expected to join the growing chorus calling for corrective legislation as well.

[14] The ABA's various letters and comments to the Justice Department, the Sentencing Commission, the CFTC, HUD, and the SEC, as well as the coalition's letters and comments to the Sentencing Commission, are available at http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html.

the Justice Department on August 15, 2005 and September 5, 2006, respectively.[15] In their letter to Attorney General Gonzales, a copy of which is attached to this statement as Appendix B, the former officials voiced many of the same concerns previously raised by the ABA and the coalition and urged the Department to amend the Thompson Memorandum "...to state affirmatively that waiver of attorney-client privilege and work product protections should not be a factor in determining whether an organization has cooperated with the government in an investigation."

This remarkable letter, coming from the very people who ran the Department of Justice a few short years ago, demonstrates just how widespread the concerns over the Department's privilege waiver policy have become. The fact that these individuals previously served as the nation's top law enforcement officials—and were able to convict wrongdoers without demanding the wholesale production of privileged materials—makes their comments even more credible.

Congressional Reaction to the Department's Waiver Policy

In addition to the ABA, the coalition, and former Department of Justice officials, many congressional leaders also have raised concerns over the privilege waiver provisions in the Department's Thompson Memorandum. On March 7, 2006, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on the privilege waiver issue.[16] The Justice Department and several representatives of the coalition appeared and testified, while the ABA submitted a written statement for the record.[17] During the hearing, virtually all of the Subcommittee members from both political parties expressed strong support for preserving the attorney-client privilege and serious concerns regarding the Department's waiver policy.

[15] The former Justice Department officials' letters to the Sentencing Commission and to Attorney General Gonzales are available at http://www.abanet.org/poladv/documents/acpriv_formerdojofficialstletter8-15-05.pdf and http://www.abanet.org/poladv/priorities/privilegewaiver/2006sep05_privwaiv_frmrdojltr.pdf, respectively.

[16] An unofficial transcript of the March 7, 2006 hearing before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security is available at http://www.abanet.org/poladv/documents/attyp_transcript5706.pdf.

[17] The written statements of the ABA and the witnesses appearing at the hearing are available at http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html.

Subsequently, during a Senate Judiciary Committee hearing on September 12, 2006, at which the ABA and various coalition representatives testified[18], the Committee's then-Chairman and Ranking Member, Senators Arlen Specter and Patrick Leahy, both expressed deep skepticism over the Department's policies and urged Deputy Attorney General McNulty and the Department to reverse them or face possible legislative action.

DOJ's McNulty Memorandum and Other Recent Federal Agency Actions

After considering the concerns raised by the ABA, the coalition, former Justice Department officials, congressional leaders, and others, the Sentencing Commission voted unanimously in April 2006 to remove the privilege waiver provisions from the Federal Sentencing Guidelines, and that change became effective last November. In addition, the CFTC voted to reverse its privilege waiver policy in March 2007, though its harmful employee rights policies remain in place. Unfortunately, the Justice Department, the SEC, and the other federal agencies have refused to reverse or fundamentally change their harmful privilege waiver or employee rights policies.

Although the Justice Department reluctantly issued new cooperation standards on December 12, 2006 in the form of the "McNulty Memorandum,"[19] the new policy falls far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product and employee legal protections. While the new policy requires prosecutors to obtain high-level Departmental approval before they can formally demand waiver of a company's privileges, it fails to end the practice and continues to encourage routine waiver by rewarding companies for their "unsolicited" offers to waive these protections. The McNulty Memorandum provides in pertinent part as follows:

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[18] The written statements of the ABA and the other witnesses appearing at the Senate Judiciary Committee hearing on September 12, 2006 are available at http://www.abanet.org/poladv/letters/attyclient/060912testimony_hrgsjud.pdf.

[19] *See* Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (December 12, 2006), at pgs. 4, 8, and 11, available at http://www.abanet.org/poladv/priorities/privilegewaiver/2006dec12_privwaiv_dojmcnulty.pdf.

> In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors must consider the following factors in reaching a decision as to the proper treatment of a corporate target: ...4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents (see section VII, infra);...Waiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation. However, a company's disclosure of privileged information may permit the government to expedite its investigation. In addition, the disclosure of privileged information may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure. Prosecutors may only request waiver of attorney-client or work product protections when there is a legitimate need for the privileged information to fulfill their law enforcement obligations...Federal prosecutors are not required to obtain authorization if the corporation voluntarily offers privileged documents without a request by the government.[20]

In addition, while the McNulty Memorandum generally bars prosecutors from requiring companies to not pay their employees' attorney fees in most cases, it continues to allow this practice in some situations.[21] The new memorandum also continues to allow prosecutors to force companies to take the other three types of punitive action against employees outlined in the previous Thompson Memorandum in return for cooperation credit long before any guilt is established.[22]

The McNulty Memorandum and Other Federal Privilege Waiver Policies Continue to Cause Negative Consequences

The American Bar Association is concerned that the Department of Justice's new privilege waiver policy outlined in the McNulty Memorandum—like the previous Thompson Memorandum

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[20] *See* McNulty Memorandum referenced in note 19, *supra*, at pgs. 4, 8, and 11. The McNulty Memorandum also outlines four factors for determining whether prosecutors have a "legitimate need" to request privileged materials and requires prosecutors to obtain various types of high level Departmental approval before demanding either factual attorney-work product ("Category I") material or attorney-client communications or non-factual attorney work product ("Category II") material. *Id* at pgs. 8-11.

[21] The McNulty Memorandum states that "prosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment...(but) in extremely rare cases, the advancement of attorneys' fees may be taken into account when the totality of the circumstances show that it was intended to impede a criminal investigation." *See* McNulty Memorandum at p. 11.

[22] The McNulty Memorandum states that "a corporation's promise of support to culpable employees and agents, *e.g.*, through retaining the employees without sanction for their misconduct or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation." *See* McNulty Memorandum at p. 11. *See also* Thompson Memorandum, notes 2 and 7, *supra*, at pgs. 7-8.

and similar policies adopted by other federal agencies—continues to cause a number of profoundly negative consequences.

First, the McNulty Memorandum and the other similar federal policies continue to lead to the routine compelled waiver of attorney-client privilege and work product protections. Instead of eliminating the improper practice forcing companies and other entities to waive in return for cooperation credit, the McNulty Memorandum still allows prosecutors to demand waiver after receiving high level Department approval. Equally important, the new DOJ policy continues to encourage routine waiver by granting companies credit if they "voluntarily" waive without being asked. Because companies still feel extreme pressure to waive in virtually every case, the "culture of waiver" created by the Thompson Memorandum is continuing under the McNulty Memorandum.[23] As a result, the applicability of the privilege remains highly uncertain in the corporate context. This is unacceptable, because as the U.S. Supreme Court noted in the case of *Upjohn Co. v. United States,* 449 U.S. 383, 393 (1981), "an uncertain privilege...is little better than no privilege at all."

Second, the McNulty Memorandum—like the previous Thompson Memorandum and the other similar federal policies—continues to seriously weaken the confidential attorney-client relationship between companies and their lawyers, resulting in great harm both to companies and the investing public. Lawyers for companies and other organizations play a key role in helping these entities and their officials comply with the law and act in the entity's best interests. To fulfill this role, lawyers must enjoy the trust and confidence of the company's officers, directors, and

[23] According to a March 2006 survey of over 1,200 corporate counsels, almost 75% of the respondents believe that a "culture of waiver" has evolved in which agencies—including the Justice Department, the SEC, and others—believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections. The survey results are available at http://www.acc.com/Surveys/attyclient2.pdf. After the McNulty Memorandum was issued in December 2006, prosecutor demands for waiver have continued unabated, though most are now *informal,* so as not to trigger the procedural requirements of the new memorandum. For numerous specific examples of these informal waiver demands that are occurring post-McNulty, *see* the September 13, 2007 Report of former Delaware Chief Justice Norman Veasey, available at http://www.abanet.org/poladv/priorities/privilegewaiver_acprivilege.html.

employees, and must be provided with all relevant information necessary to properly represent the entity. By pressuring companies to waive these fundamental protections in order to receive maximum cooperation credit, the McNulty Memorandum and the other similar federal policies discourage company personnel from consulting with the company lawyers. This, in turn, impedes the lawyers' ability to effectively counsel compliance with the law, resulting in harm not only to companies, but to employees and investors as well.

Third, while the McNulty Memorandum and the other similar federal policies were intended to aid government prosecution of corporate criminals, they continue to make detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures. These mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, are one of the most effective tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act in 2002. Because the effectiveness of these internal mechanisms depends in large part on the ability of the individuals with knowledge to speak candidly and confidentially with lawyers, policies such as the McNulty Memorandum that pressure companies to waive their attorney-client and work product protections seriously undermine systems that are crucial to compliance and have worked well.

For all these reasons, the ABA believes that the Department of Justice's new privilege waiver policy contained in the McNulty Memorandum and the other similar federal agency policies are counterproductive. They undermine rather than enhance compliance with the law, as well as the many other societal benefits that are advanced by the confidential attorney-client relationship.

The McNulty Memorandum and Other Federal Employee Policies Continue to Erode Employees' Constitutional and Other Legal Rights

While preserving the attorney-client privilege and the work product doctrine is critical to promoting effective corporate governance and compliance with the law, it is equally important to

protect employees' constitutional and other legal rights—including the right to effective counsel and the right against self-incrimination—when a company or other organization is under investigation. Unfortunately, the McNulty Memorandum and the other similar federal policies continue to erode employees' constitutional and other legal rights by pressuring companies to take unfair punitive action against them during investigations.

While the McNulty Memorandum bars prosecutors from requiring companies to forego paying their employees' legal fees in many cases, it continues to allow this practice in some situations.[24] In addition, the new memorandum and the similar policies adopted by other federal agencies continue to deny credit to companies that choose to assist their employees with their legal defenses or decline to fire them for exercising their Fifth Amendment rights against self incrimination.[25] The ABA strongly opposes the Department's employee rights policy contained in the McNulty Memorandum, and the other similar federal policies, for a number of reasons.[26]

First, these governmental policies are inconsistent with the fundamental legal principle that all prospective defendants—including an organization's current and former employees, officers, directors and agents—are presumed to be innocent. When implementing the directives in the

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[24] The McNulty Memorandum states that "prosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment...(but) in extremely rare cases, the advancement of attorneys' fees may be taken into account when the totality of the circumstances show that it was intended to impede a criminal investigation." *See* McNulty Memorandum at p. 11 and footnote 3.

[25] The McNulty Memorandum states that "a corporation's promise of support to culpable employees and agents, *e.g.*, through retaining the employees without sanction for their misconduct or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation." *See* McNulty Memorandum at p. 11. *See also* Thompson Memorandum, notes 2 and 7, *supra*, at pgs. 7-8. *See also* notes 4, 8, and 9 regarding the relevant CFTC, SEC, and HUD employee rights policies, respectively.

[26] On August 8, 2006, the ABA approved a resolution, sponsored by the ABA Task Force on Attorney-Client Privilege and the New York State Bar Association, opposing government policies, practices and procedures that erode employees' constitutional and other legal rights by requiring, encouraging, or permitting prosecutors to consider certain factors in determining whether a company or other organization has been cooperative during an investigation. These factors include whether the organization (1) provided or funded legal representation for an employee, (2) participated in a joint defense and information sharing agreement with an employee, (3) shared its records or historical information about the conduct under investigation with an employee, or (4) declined to fire or otherwise sanction an employee who exercised his or her Fifth Amendment rights in response to government requests for information. The ABA resolution and a detailed background report are available at http://www.abanet.org/buslaw/attorneyclient/.

McNulty Memorandum and the other similar federal policies, prosecutors take the position that certain employees and other agents suspected of wrongdoing are "culpable" long before their guilt has been proven or the company has had an opportunity to complete its own internal investigation. In those cases, the prosecutors often pressure the company to fire the employees in question or refuse to provide them with legal representation or otherwise assist them with their legal defense as a condition for receiving cooperation credit. These policies stand the presumption of innocence principle on its head. In addition, they overturn well-established corporate governance practices by forcing companies in certain cases to abandon the traditional practice of indemnifying their employees and agents or otherwise assisting them with their legal defense for employment-related conduct until it has been determined that the employee or agent somehow acted improperly.

Second, it should be the prerogative of a company to make an independent decision as to whether an employee should be provided defense or not, and the government should not be able to make this determination, even in the "extremely rare cases" referenced in footnote 3 of the McNulty Memorandum. The fiduciary duties of the directors in making such decisions are clear, and they—not government officials—are in the best position to decide what is in the best interest of the shareholders.

Third, these governmental policies improperly weaken the entity's ability to help its employees to defend themselves in criminal actions. It is essential that employees, officers, directors and other agents of organizations have access to competent representation in criminal cases and in all other legal matters. In addition, competent representation in a criminal case requires that counsel investigate and uncover relevant information.[27] The McNulty Memorandum and the other similar federal policies undermine the ability of employees and other personnel to

[27] *See, e.g.*, ABA Standards Relating to the Administration of Criminal Justice, The Defense Function, Standard 4-4.1(a) (3d ed. 1992) ("Defense counsel should conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.").

defend themselves by pressuring companies not to share records and other relevant information with them and their lawyers. However, subject to limited exceptions, lawyers should not interfere with an opposing party's access to such information.[28] The federal agency policies undermine these rights by encouraging prosecutors to penalize companies that provide information or, in some cases, legal counsel to their employees and agents during investigations.

The costs associated with defending a government investigation involving complex corporate and financial transactions can often run into the hundreds of thousands of dollars. Therefore when government prosecutors—citing the directives in footnote 3 of the McNulty Memorandum or the other similar federal agency policies—succeed in pressuring a company not to pay for the employee's legal defense, the employee typically will be unable to afford effective legal representation. In addition, when prosecutors demand and receive a company's agreement to not assist employees with other aspects of their legal defense—such as participating in joint defense and information sharing agreements with the employees or by providing them with corporate records or other information that they need to prepare their defense—the employees' rights are undermined.

Fourth, several of these employee-related provisions of the Justice Department's policy have been declared to be constitutionally suspect by the federal judge presiding over the pending case of *U.S. v. Stein,* also known as the "KPMG case." On June 26, 2006, U.S. District Court Judge Lewis A. Kaplan issued an extensive opinion suggesting that the provisions in the Thompson Memorandum making a company's advancement of attorneys' fees to employees a factor in assessing cooperation violated the employees' Fifth Amendment right to substantive due process

[28] *See, e g* , ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function, Standard 3-3.1(d) (3d ed. 1992) ("A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any person to be advised to decline to give to the defense information which such person has a right to give."); *id* , The Defense Function, Standard 4-4.3(d) ("Defense counsel should not discourage or obstruct communication between prospective witnesses and the prosecutor. It is unprofessional conduct to advise any person other than a client, or cause such person to decline to give to the prosecutor or defense counsel for codefendants information which such person has a right to give."); ABA Model Rules of Professional Conduct, Rule 3..4(g) (providing that a lawyer may not "request a person other than the client [or a relative or employee of the client] to refrain from voluntarily giving relevant information to another party.").

and their Sixth Amendment right to counsel.[29] In addition, Judge Kaplan subsequently determined that certain KPMG employees' statements were improperly coerced in violation of their Fifth Amendment rights against self-incrimination as a result of the pressure that the government and KPMG placed on the employees to cooperate as a condition of continued employment and payment of legal fees.[30] Because the McNulty Memorandum continues to permit these same practices in some instances, it remains constitutionally suspect as well.

Former Senior Justice Department Officials Endorse S. 186

On July 30, 2007, the same basic group of nine former Justice Department officials who previously sent letters to the Sentencing Commission and Attorney General Gonzales in August 2005 and September 2006, respectively,[31] sent a new letter to Congress expressing their concerns over the McNulty Memorandum and endorsing S. 186 and H.R. 3013. The July 30 letter to all the members of the Senate and House Judiciary Committees is attached to this statement as Appendix C.[32] After concluding that "the McNulty Memorandum maintains the fundamental flaws of the prior regime," the former officials encouraged the congressional leaders to "support the prompt enactment of the Attorney-Client Privilege Protection Act of 2007 [i.e., S. 186 and H.R. 3013] or other similar legislation." This remarkable letter reflects the growing consensus emerging in the legal and business communities—and among many top former law enforcement officials—that a legislative remedy is needed to reverse the growing "culture of waiver" caused by the McNulty Memorandum and the other similar federal policies.

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[29] *United States v Stein*, 435 F. Supp. 2d 330 (S.D.N.Y., June 26, 2006). For a more detailed discussion of Judge Kaplan's rulings in the case, please see the background report accompanying the ABA's August 2006 resolution referenced in note 11, *supra*. The background report is available at http://www.abanet.org/buslaw/attorneyclient/materials/hod/emprights_report_adopted.pdf.

[30] *See United States v. Stein*, July 25, 2006, Memorandum Opinion and Order at 36-37.

[31] See note 15, *supra*.

[32] The July 30, 2007 letter from the former DOJ leaders to Congress is also available at http://www.abanet.org/poladv/priorities/privilegewaiver/2007jul30_privwaiv_frmrdojb_l.pdf.

Conclusion

In sum, the American Bar Association believes that the Justice Department's McNulty Memorandum and the other similar federal policies are fundamentally flawed and must be reversed. Therefore, the ABA strongly supports legislation like S. 186 and H.R. 3013 that would bar the Department and other federal agencies from pressuring companies to waive their privileges or take unfair punitive actions against their employees as conditions for receiving cooperation credit. In our view, S. 186 and H.R. 3013 would strike the proper balance between effective law enforcement and the preservation of essential attorney-client, work product and employee legal protections, and we urge Congress to enact the legislation as soon as possible.

Thank you for considering the views of the American Bar Association. If you have any questions regarding the ABA's views on these issues or need more information, please feel free to contact R. Larson Frisby of the ABA Governmental Affairs Office at 202-662-1098 or at frisbyr@staff.abanet.org.

- APPENDIX A -

Defending Liberty
Pursuing Justice

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President

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May 2, 2006

The Honorable Alberto Gonzales
Attorney General
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re: Proposal for Revising Department of Justice Attorney-Client Privilege and Work Product Doctrine Waiver Policy

Dear Mr. Attorney General:

On behalf of the American Bar Association and its more than 400,000 members, I write to enlist your help and support in preserving the attorney-client privilege and work product doctrine and protecting them from Departmental policy and practices that seriously threaten to erode these fundamental rights. Towards that end, we urge you to consider modifying the Justice Department's internal waiver policy to stop the increasingly common practice of federal prosecutors requiring organizations to waive their attorney-client and work product protections as a condition for receiving cooperation credit during investigations. Enclosed is specific proposed language that we believe would accomplish this goal without impairing the Department's ability to gather the information it needs to enforce federal laws.

As you know, the attorney-client privilege enables both individual and organizational clients to communicate with their lawyers in confidence, and it encourages clients to seek out and obtain guidance in how to conform their conduct to the law. The privilege facilitates self-investigation into past conduct to identify shortcomings and remedy problems, to the benefit of corporate institutions, the investing community and society-at-large. The work product doctrine underpins our adversarial justice system and allows attorneys to prepare for litigation without fear that their work product and mental impressions will be revealed to adversaries.

The ABA strongly supports the preservation of the attorney-client privilege and work product doctrine and opposes governmental policies, practices and procedures that have the effect of eroding the privilege or doctrine. Unfortunately, the Department of Justice has adopted—and is now following—a policy that has led many of its prosecutors to routinely pressure organizations to waive the protections of the attorney-client privilege and/or work product doctrine as a condition for receiving cooperation credit during investigations. While this policy was formally established by the Department's 1999 "Holder Memorandum" and 2003 "Thompson Memorandum," the incidence of coerced waiver was exacerbated in 2004 when the U.S. Sentencing Commission added language to Section 8C2.5 of the Federal Sentencing Guidelines that authorizes and encourages the government to seek waiver as a condition for cooperation.

In an attempt to address the growing concern being expressed about government-coerced waiver, then-Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Component Heads last October instructing each of them to adopt "a written waiver review process for your district or component," and it is our understanding that U.S. Attorneys are now in the process of implementing this directive. Though well-intentioned, the McCallum Memorandum likely will result in numerous different waiver policies throughout the country, many of which may impose only token restraints on the ability of federal prosecutors to demand waiver. More importantly, it fails to acknowledge and address the many problems arising from the specter of forced waiver.

According to a recent survey of over 1,200 in-house and outside corporate counsel, which is available at http://www.acca.com/Surveys/attyclient2.pdf, almost 75% of the respondents believe that a "culture of waiver" has evolved in which governmental agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client or work product protections. Corporate counsel also indicated that when prosecutors give a reason for requesting privilege waiver, the Holder/Thompson/McCallum Memoranda and the amendment to the Sentencing Guidelines were among the reasons most frequently cited.

The ABA is concerned that government waiver policies weaken the attorney-client privilege and work product doctrine and undermine companies' internal compliance programs. Unfortunately, the government's waiver policies discourage entities both from consulting with their lawyers—thereby impeding the lawyers' ability to effectively counsel compliance with the law—and conducting internal investigations designed to quickly detect and remedy misconduct. The ABA believes that prosecutors can obtain the information they most frequently seek and need from a cooperating organization without resorting to requests for waiver of the privilege or doctrine.

The ABA and a broad and diverse coalition of business and legal groups—ranging from the U.S. Chamber of Commerce to the American Civil Liberties Union—previously expressed these and other similar concerns to Congress and the Sentencing Commission. In addition, a prominent group of nine former senior Justice Department officials—including three former Attorneys General from both parties—submitted similar comments to the Sentencing Commission last August. These statements and other useful resources on the topic of privilege waiver are available at http://www.abanet.org/poladv/acprivilege.htm and on the website of the ABA Task Force on Attorney-Client Privilege at http://www.abanet.org/buslaw/attorneyclient/.

After considering the concerns raised by the ABA, the coalition, former Justice Department officials, and others, as well as the results of the new survey of corporate counsel that documented the severe negative consequences of the 2004 privilege waiver amendment to the Sentencing Guidelines, the Commission voted unanimously on April 5, 2006 to remove the privilege waiver language from the Guidelines. Unless Congress affirmatively takes action to modify or disapprove of the Commission's proposal, it will become effective on November 1, 2006. While we are extremely gratified by the Commission's action, the Justice Department's waiver policy continues to be problematic and needs to be addressed.

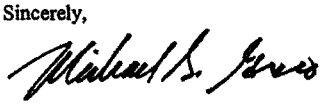
The ABA Task Force on Attorney-Client Privilege and the coalition have prepared suggested revisions to the Holder/Thompson/McCallum Memoranda that would remedy the problem of government-coerced waiver while preserving the ability of prosecutors to obtain the important factual information

that they need to effectively enforce the law. The revised memorandum enclosed herewith would accomplish these objectives by (1) preventing prosecutors from seeking privilege waiver during investigations, (2) specifying the types of factual, non-privileged information that prosecutors may request from companies as a sign of cooperation, and (3) clarifying that any voluntary waiver of privilege shall not be considered when assessing whether the entity provided effective cooperation. We believe that this proposal, if adopted by the Department, would strike the proper balance between effective law enforcement and the preservation of essential attorney-client and work product protections, and we urge you to consider it.

If you or your staff have any questions or need additional information about this vital issue, please ask your staff to contact Bill Ide, the Chair of the ABA Task Force on Attorney-Client Privilege, at (404) 527-4650 or Larson Frisby of the ABA Governmental Affairs Office at (202) 662-1098.

Thank you for considering the views of the American Bar Association on this subject, which is of such vital importance to our system of justice.

Sincerely,



Michael S. Greco

enclosure

SUGGESTED REVISIONS TO DEPARTMENT OF JUSTICE POLICY CONCERNING WAIVER OF CORPORATE ATTORNEY-CLIENT AND WORK PRODUCT PROTECTIONS

PREPARED BY THE AMERICAN BAR ASSOCIATION TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE

FEBRUARY 10, 2006

MEMORANDUM

TO: Heads of Department Components
United States Attorneys

FROM:

DATE:

RE: Guidelines for Determining "Timely and Voluntary Disclosure of Wrongdoing and Willingness to Cooperate"

This Memorandum amends and supplements the October 21, 2005 memorandum issued by Acting Deputy Attorney General Robert D. McCallum, Jr. (*"McCallum Memorandum"*) concerning Waiver of the Corporate Attorney-Client and Work Product Protections. In general, the *McCallum Memorandum* requires establishment of a review process for federal prosecutors to follow before seeking waivers of these protections. The *McCallum Memorandum* also notes the Department of Justice that "places significant emphasis on prosecution of corporate crimes."

This Memorandum also amends and supplements the Department's policy on charging business organizations set forth in the memorandum issued by Deputy Attorney General Larry D. Thompson to Heads of Department Components and United States Attorneys, *Re: Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003) (hereinafter *"Thompson Memorandum"*), reprinted in *United States Attorneys' Manual*, tit. 9, Crim. Resource Manual, §§ 161-62. As noted in the *McCallum Memorandum*, one of the nine (9) factors that was identified for federal prosecutors to consider under the *Thompson Memorandum* (§ II.A.4.) is "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection."

In particular, this Memorandum amends the *Thompson Memorandum* by striking the following portion of § II.A.4.: "...including, if necessary, the waiver of corporate attorney-client and work product protection." As amended, § II.A.4. directs that federal prosecutors consider "...the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents."

This Memorandum also amends § VI.A. of the *Thompson Memorandum* by striking the last clause: "...and to waive attorney-client and work product protection;" and by striking the word "complete" from the third clause preceding "results of its internal investigation." As amended, that sentence of § VI.A. states: "In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; and to disclose the results of its internal investigation."

This Memorandum also amends § VI.B. by striking the fourth paragraph and adding language in its place that recognizes the importance of the attorney-client and work product protections and the adverse consequences that may occur when attorneys within the Department of Justice seek the waiver of these protections. As amended, the fourth paragraph of § VI.B. states:

> "The Department of Justice recognizes that the attorney-client privilege and the work-product doctrine are fundamental to the American legal system and the administration of justice. These rights are no less important for an organizational entity than for an individual. The Department further recognizes that an attorney may be an effective advocate for a client, and best promote the client's compliance with the law, only when the client is confident that its communications with counsel are protected from unwanted disclosure and when the attorney can prepare for litigation knowing that materials prepared in anticipation of litigation will be protected from disclosure to the client's adversaries. *See Upjohn Co. v. United States*, 449 U.S. 383, 392-393 (1981). The Department further recognizes that seeking waiver of the attorney-client privilege or work-product doctrine in the context of an ongoing Department investigation may have adverse consequences for the organizational entity. A waiver might impede communications between the entity's counsel and its employees and unfairly prejudice the entity in private civil litigation or parallel administrative or regulatory proceedings and thereby bring unwarranted harm to its innocent public shareholders and employees. *See also* § IX (Collateral Consequences). Attorneys within the Department shall not take any action or assert any position that directly or indirectly demands, requests or encourages an organizational entity or its attorneys to waive its attorney-client privilege or the protections of the work product doctrine. Also, in assessing an entity's cooperation, attorneys within the Department shall not draw any inference from the entity's preservation of its attorney-client privilege and the protections of the work product doctrine. At the same time, the voluntary decision by an organizational entity to waive the attorney-client privilege and the work product doctrine shall not be considered when assessing whether the entity provided effective cooperation."[1]

---

[1] Notwithstanding the general rule set forth herein, attorneys within the Department may, after obtaining in advance the approval of the Assistant Attorney General of the Criminal Division or his designee, seek materials otherwise

(footnote continued on next page)

Section VI. of the *Thompson Memorandum* is further amended and supplemented by adding new subpart C. that states:

> "C. In assessing whether an organizational entity has been cooperative under § II.A.4. and § VI.B., attorneys within the Department should take into account the following factors:
>
> "1. Whether the entity has identified for and provided to attorneys within the Department all relevant data and documents created during and bearing upon the events under investigation other than those entitled to protection under the attorney-client privilege or work product doctrine.
>
> "2. Whether the entity has in good faith assisted attorneys within the Department in gaining an understanding of the data, documents and facts relating to, arising from and bearing upon the matter under investigation, in a manner that does not require disclosure of materials protected by the attorney-client privilege or work product doctrine.
>
> "3. Whether the entity has identified for attorneys within the Department the individuals with knowledge bearing on the events under investigation.
>
> "4. Whether the entity has used its best efforts to make such individuals available to attorneys within the Department for interview or other appropriate investigative steps.[2]
>
> "5. Whether the entity has conducted a thorough internal investigation of the matter, as appropriate to the circumstances, reported on the investigation to the Board of Directors or appropriate committee of the Board, or to the appropriate governing body within the entity, and has made the results of the investigation available to attorneys within the Department in a manner that does not result in a waiver of the attorney-client privilege or work product doctrine.

(footnote continued from previous page)

protected from disclosure by the attorney-client privilege or the work product doctrine if the organization asserts, or indicates that it will assert an advice of counsel defense with respect to the matters under investigation. Moreover, attorneys within the Department also may seek materials respecting which there is a final judicial determination that the privilege or doctrine does not apply for any reason, such as the crime/fraud exception or a waiver. In circumstances described in this paragraph, the attorneys within the Department shall limit their requests for disclosure only to those otherwise protected materials reasonably necessary and which are within the scope of the particular exception.

[2] Actions by an entity recognizing the rights of such individuals are not inconsistent with this factor.

"6. Whether the entity has taken appropriate steps to terminate any improper conduct of which it has knowledge; to discipline or terminate culpable employees; to remediate the effects of any improper conduct; and to ensure that the organization has safeguards in place to prevent and detect a recurrence of the events giving rise to the investigation."

- APPENDIX B -

September 5, 2006

The Honorable Alberto Gonzales
Attorney General
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re: Proposed Revisions to Department of Justice Policy Regarding Waiver of the Attorney-Client Privilege and Work-Product Doctrine

Dear Mr. Attorney General:

We, the undersigned former senior Justice Department officials, write to enlist your support in preserving the attorney-client privilege and work-product doctrine. We believe that current Departmental policies and practices are seriously eroding these protections, and we urge you to take steps to change these policies and stop the practice of federal prosecutors requiring organizations to waive attorney-client privilege and work-product protections as a condition of receiving credit for cooperating during investigations.

As former Department officials, we appreciate and support your ongoing efforts to fight corporate crime. Unfortunately, we believe that the Department's current policy embodied in the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum," which encourages individual federal prosecutors to demand waiver of the attorney-client privilege and the work-product doctrine in return for cooperation credit, is undermining rather than strengthening compliance in a number of ways. In practice, companies who are all aware of the policies outlined in the Thompson Memorandum have no choice but to waive these protections. The threat of being labeled "uncooperative" simply poses too great a risk of indictment to do otherwise.

The Department's carrot-and-stick approach to waiving attorney-client privilege and work-product protections gravely weakens the attorney-client relationship between companies and their lawyers by discouraging corporate personnel at all levels from consulting with counsel on close issues. Lawyers are indispensable in helping companies and their officials understand and comply with complex laws and act in the entity's best interests. In order to fulfill this important function, lawyers must enjoy the trust and confidence of the board, management, and line operating personnel, so that they may represent the entity effectively and ensure that compliance is maintained (or that noncompliance is quickly remedied). By making waiver of privilege and work-product protections nearly assured, the Department's policies discourage personnel within companies and other organizations from consulting with their lawyers, thereby impeding the lawyers' ability effectively to counsel compliance with the law. This, in turn, harms not only the corporate client, but the investing public as well.

The Department's policies also make detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures. These mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, have become one of the most effective tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act in 2002. Because the effectiveness of internal investigations depends on the ability of employees to speak candidly and confidentially with the lawyer conducting the investigation, any uncertainty as to whether attorney-client privilege and work-product protections will be honored makes it harder for companies to detect and remedy wrongdoing early. As a result, we believe that the Department's consideration of waiver as an element of cooperation undermines, rather than promotes, good compliance practices.

Finally, we believe that the Department's position with regard to privilege waiver encourages excessive "follow-on" civil litigation. In virtually all jurisdictions, waiver of attorney-client privilege or work-product protections for one party constitutes waiver to all parties, including subsequent civil litigants. Forcing companies and other entities routinely to waive their privileges during criminal investigations provides plaintiffs' lawyers with a great deal of sensitive – and sometimes confidential – information that can be used against the entities in class action, derivative, and similar suits, to the detriment of the entity's employees and shareholders. This risk of future litigation and all its related costs unfairly penalizes organizations that choose to cooperate on the government's terms. Those who determine that they cannot do so – in order to preserve their defenses for subsequent actions that appear to involve great financial risk – instead face the government's wrath.

We are not alone in voicing these concerns. According to a survey conducted earlier this year of over 1,200 in-house and outside corporate counsel, which is available at http://www.acca.com/Surveys/attyclient2.pdf, almost 75 percent of the respondents agreed with the statement that a "culture of waiver" has evolved in which governmental agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client or work-product protections. Corporate counsel also indicated that when prosecutors give a reason for requesting privilege waiver, the policy contained in the Holder/Thompson memoranda was most frequently cited.

We recognize that, in an attempt to address the growing concern being expressed about government-induced waiver, then-Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Component Heads last October instructing each of them to adopt a "written waiver review process for your district or component." It is our understanding that U.S. Attorneys are now in the process of implementing this directive. Though well-intentioned, the McCallum Memorandum likely will result in numerous different waiver policies being established throughout the country, many of which may impose only token restraints on the ability of prosecutors to demand waiver. More importantly, it fails to acknowledge and address the many problems arising from the specter of forced waiver.

As you probably know, these views were expressed forcefully to Mr. McCallum on March 7 at a hearing of the House Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland Security. The U.S. Sentencing Commission also validated these concerns when it voted on April 5, over the Department's objection, to rescind the "waiver as cooperation" amendment it had made only two years earlier to the commentary on its Organizational Sentencing Guidelines.

We agree with the position taken by the American Bar Association, as well as by the members of a broad coalition to preserve the attorney-client privilege representing virtually every business and legal organization in this country: Prosecutors can obtain needed information in ways that do not impinge upon the attorney-client relationship -- for example, through corporate counsel identifying relevant data and documents and assisting prosecutors in understanding them, making available witnesses with knowledge of the events under investigation, and conveying the results of internal investigations in ways that do not implicate privileged material.

In sum, we believe that the Thompson Memorandum is seriously flawed and undermines, rather than enhances, compliance with the law and the many other societal benefits that arise from the confidential attorney-client relationship. Therefore, we urge the Department to revise its policy to state affirmatively that waiver of attorney-client privilege and work-product protections should not be a factor in determining whether an organization has cooperated with the government in an investigation.

Thank you for considering our views on this subject, which is of such vital importance to our adversarial system of justice.

Sincerely,

Griffin B. Bell
Attorney General
(1977-1979)

Stuart M. Gerson
Acting Attorney General
(1993)
Assistant Attorney General,
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Solicitor General
(1997-2001)

ATTACHMENT

September 5, 2006

The Honorable Alberto Gonzales
Attorney General
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re: Proposed Revisions to Department of Justice Policy Regarding Waiver of the Attorney-Client Privilege and Work-Product Doctrine

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As former Department officials, we appreciate and support your ongoing efforts to fight corporate crime. Unfortunately, we believe that the Department's current policy embodied in the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum," which encourages individual federal prosecutors to demand waiver of the attorney-client privilege and the work-product doctrine in return for cooperation credit, is undermining rather than strengthening compliance in a number of ways. In practice, companies who are all aware of the policies outlined in the Thompson Memorandum have no choice but to waive these protections. The threat of being labeled "uncooperative" simply poses too great a risk of indictment to do otherwise.

The Department's carrot-and-stick approach to waiving attorney-client privilege and work-product protections gravely weakens the attorney-client relationship between companies and their lawyers by discouraging corporate personnel at all levels from consulting with counsel on close issues. Lawyers are indispensable in helping companies and their officials understand and comply with complex laws and act in the entity's best interests. In order to fulfill this important function, lawyers must enjoy the trust and confidence of the board, management, and line operating personnel, so that they may represent the entity effectively and ensure that compliance is maintained (or that noncompliance is quickly remedied). By making waiver of privilege and work-product protections nearly assured, the Department's policies discourage personnel within companies and other organizations from consulting with their lawyers, thereby impeding the lawyers' ability effectively to counsel compliance with the law. This, in turn, harms not only the corporate client, but the investing public as well.

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Finally, we believe that the Department's position with regard to privilege waiver encourages excessive "follow-on" civil litigation. In virtually all jurisdictions, waiver of attorney-client privilege or work-product protections for one party constitutes waiver to all parties, including subsequent civil litigants. Forcing companies and other entities routinely to waive their privileges during criminal investigations provides plaintiffs' lawyers with a great deal of sensitive – and sometimes confidential – information that can be used against the entities in class action, derivative, and similar suits, to the detriment of the entity's employees and shareholders. This risk of future litigation and all its related costs unfairly penalizes organizations that choose to cooperate on the government's terms. Those who determine that they cannot do so – in order to preserve their defenses for subsequent actions that appear to involve great financial risk – instead face the government's wrath.

We are not alone in voicing these concerns. According to a survey conducted earlier this year of over 1,200 in-house and outside corporate counsel, which is available at http://www.acca.com/Surveys/attyclient2.pdf, almost 75 percent of the respondents agreed with the statement that a "culture of waiver" has evolved in which governmental agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client or work-product protections. Corporate counsel also indicated that when prosecutors give a reason for requesting privilege waiver, the policy contained in the Holder/Thompson memoranda was most frequently cited.

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As you probably know, these views were expressed forcefully to Mr. McCallum on March 7 at a hearing of the House Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland Security. The U.S. Sentencing Commission also validated these concerns when it voted on April 5, over the Department's objection, to rescind the "waiver as cooperation" amendment it had made only two years earlier to the commentary on its Organizational Sentencing Guidelines.

We agree with the position taken by the American Bar Association, as well as by the members of a broad coalition to preserve the attorney-client privilege representing virtually every business and legal organization in this country: Prosecutors can obtain needed information in ways that do not impinge upon the attorney-client relationship – for example, through corporate counsel identifying relevant data and documents and assisting prosecutors in understanding them, making available witnesses with knowledge of the events under investigation, and conveying the results of internal investigations in ways that do not implicate privileged material.

In sum, we believe that the Thompson Memorandum is seriously flawed and undermines, rather than enhances, compliance with the law and the many other societal benefits that arise from the confidential attorney-client relationship. Therefore, we urge the Department to revise its policy to state affirmatively that waiver of attorney-client privilege and work-product protections should not be a factor in determining whether an organization has cooperated with the government in an investigation.

Thank you for considering our views on this subject, which is of such vital importance to our adversarial system of justice.

Sincerely,

Griffin B. Bell
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(2001-2004)

Kenneth W. Starr
Solicitor General
(1989-1993)

Seth P. Waxman
Solicitor General
(1997-2001)

- APPENDIX C -

July 30, 2007

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
433 Russell Senate Office Bldg.
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
711 Hart Senate Office Bldg.
Washington, D.C. 20510

The Honorable John T. Conyers, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
2426 Rayburn House Office Bldg.
Washington, D.C. 20515

The Honorable Lamar S. Smith
Ranking Member
Committee on the Judiciary
United States House of Representatives
2409 Rayburn House Office Building
Washington, D.C. 20515

Re: S. 186 and H.R. 3013, the "Attorney-Client Privilege Protection Act of 2007"

Dear Members of Congress:

We, the undersigned former senior Justice Department officials, write to enlist your support for enacting S. 186 and H.R. 3013—both known as the "Attorney-Client Privilege Protection Act of 2007"—or other similar legislation. These bills provide a measured legislative solution to the continued erosion of the attorney-client privilege, the work-product doctrine, and employee rights caused by the policies of the Department of Justice and other federal agencies regarding evaluation of a business entity's "cooperation" with a government investigation in order to avoid indictment. We share the belief expressed by many in the legal and business communities that congressional involvement is now appropriate.

Last fall, we wrote a letter to Attorney General Alberto Gonzales expressing our appreciation for the Department's efforts to fight corporate crime but explaining that although the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum" that superseded it were well-intentioned, their actual effect has been to "undermin[e] rather than strengthen[]" corporations' efforts to comply with the law—the opposite of what the Department intended. Our letter (a copy of which is attached) explained the reasons for that conclusion.

Thereafter, the Department of Justice issued revised cooperation standards under the auspices of Deputy Attorney General Paul McNulty. We applaud the Department for

its attempt to respond to legitimate criticism. We believe, however, that the McNulty Memorandum maintains the fundamental flaws of the prior regime.

The McNulty Memorandum, for example, does not remove from consideration a company's willingness to punish employees who assert their constitutional rights, or to enter into valid joint-defense or information-sharing agreements with the employees. In addition, although it bars prosecutors from urging companies not to pay their employees' legal fees in cases where such payment is statutorily or contractually required, that bar does not apply when payment is discretionary or in those instances, identified in Footnote 3 of the Memorandum, in which prosecutors believe that "the totality of the circumstances show that it was intended to impede a criminal investigation." In either of those instances, the Memorandum continues to allow prosecutors to reward companies that refuse to pay legal fees.[1]

On the issue of waiver of attorney-client privilege and work-product protections, the McNulty Memorandum also continues to raise concerns. Most important, entities still receive credit for turning over work product (as well as material that may be privileged) labeled "Category I" in the Memorandum, including witness statements, interview memoranda, internal reports, and the like, and may be considered uncooperative for not doing so. Moreover, entities still receive credit for turning over highly sensitive materials labeled "Category II," including their attorney's opinion work product, the contemporaneous advice of counsel, lawyer mental impressions, and other legal advice.[2] Accordingly, at an oversight hearing conducted by the U.S. House of Representatives in March 2007, witnesses from the American Bar Association, the Association of Corporate Counsel, and the defense bar agreed that the expectations of the Department of Justice, as well as the practices of counsel for businesses, have not changed under the new policy.

We encourage Congress to restore the proper balance between the tools that the government needs to fight corporate crime and the rights of individual and corporate citizens. Accordingly, we hope that you and your colleagues will support the prompt enactment of the Attorney-Client Privilege Protection Act of 2007 or other similar legislation.

---

[1] One federal district court has held that practices such as pressuring companies not to pay lawyers' fees and to fire employees who assert their Fifth Amendment rights are unconstitutional. *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006); *United States v. Stein*, 440 F. Supp. 2d 315 (S.D.N.Y. 2006).

[2] The McNulty Memorandum requires approval from the U.S. Attorney in consultation with the Assistant Attorney General for information covered by "Category I" and approval from the Deputy Attorney General for "Category II" material. But because the incentive system remains intact, business organizations are highly likely to conclude that it is still necessary to turn over this material in order to avoid indictment, regardless of whether a formal request is made. *Cf. United States v Stein*, ___ F. Supp. 2d ___, 2007 WL 2050921 at *2-*5 (S.D.N.Y. Jul. 16, 2007) (dismissing indictments against 13 former employees and reaffirming the court's earlier finding that Thompson Memorandum policies on their face improperly pressure companies into taking steps to ensure that their employees cooperate with a criminal investigation).

Sincerely,

Stuart M. Gerson
Acting Attorney General
(1993)
Assistant Attorney General,
Civil Division
(1989-1993)

Edwin Meese III
Attorney General
(1985-1988)

Dick Thornburgh
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Seth P. Waxman
Solicitor General
(1997-2001)

Attachment

cc: All other Members of the Senate Judiciary Committee
All other Members of the House Judiciary Committee

STATEMENT OF THE COALITION TO PRESERVE THE ATTORNEY-CLIENT PRIVILEGE

American Chemistry Council
American Civil Liberties Union
Association of Corporate Counsel
Business Civil Liberties, Inc.
Business Roundtable
The Financial Services Roundtable
Frontiers of Freedom
Lawyers for Civil Justice
National Association of Criminal Defense Lawyers
National Association of Manufacturers
Retail Industry Leaders Association
U.S. Chamber of Commerce

Submitted before the Senate Judiciary Committee
Hearing on:

"Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum"

Tuesday, September 18, 2007
Dirksen Senate Office Building, Room 226

The Coalition to Preserve the Attorney-Client Privilege commends Chairman Leahy, Ranking Member Specter and the members of the Committee for convening today's hearing on the effect of the McNulty Memorandum on the right to counsel in corporate investigations. As we explain below, the McNulty Memorandum does not – indeed, cannot – solve the chronic "culture of waiver" of the attorney-client privilege that its predecessors, and similar governmental policies and practices in other federal agencies, have created. It also does not address challenges to individual employees' rights that result from overly-aggressive prosecutorial and enforcement tactics employed by government investigators during the consideration of the sufficiency of a company's cooperation with the government.

Federal legislation is necessary to solve these fundamental problems. Accordingly, we strongly endorse S. 186 and HR 3013. This legislation simply and clearly prohibits U.S. government employees, directly or indirectly, from pressuring companies or other organizations to waive

their attorney-client privilege or work product protections or to take actions that adversely affect the rights of their employees as an indicator of their cooperation in an investigation.

The Attorney-Client Privilege Protection Act of 2007 is a carefully crafted and judicious tool that is designed solely to address prosecutorial and enforcement practices that have cropped up in the last few years, and does not in any way amend the application of privilege rights or law, or impede government investigations into corporate wrongdoing. The Act does not redefine what is or is not considered privileged. It also does not hinder prosecutors and enforcement agents from deciding who to investigate, from gaining access to all the facts necessary to conduct an investigation, or from making their own decision whether to indict individuals or an organization accused of wrongdoing. It does not alter or remove any of the appropriate tools prosecutors have employed for decades in pursuing corporate crime and punishing corporate criminals. And it specifically provides that the Act does not in any way prevent a company that wishes to voluntarily waive its rights or privileges from doing so. All that this Act does is to reverse DOJ and other agency's enforcement policies and practices adopted in the last few years that erode both the attorney-client privilege as defined by the courts and other fundamental defense rights of individual employees defined by the justice system and Constitution.

Until such legislation is enacted, the government can and will continue to inappropriately abrogate corporate attorney-client privilege and work product protections, as well as individual defense rights, that are undisputed by law. Left unchecked, these federal policies will continue to frustrate corporate compliance efforts by preventing counsel from conducting complete and effective investigations and/or implementing remedial measures in response to an allegation of wrongdoing. Further, these federal policies discourage employee cooperation with an investigation into an allegation, and negate individual employees' constitutional rights by preventing them from mounting a defense to allegations made against them in the corporate context should they become targets (or even witnesses) in the government's investigation.

The Veasey Report

The Honorable E. Norman Veasey, former Chief Justice of the State of Delaware, issued a report delivered to this Committee that strongly supports the case for legislation. Chief Justice Veasey' report verifies detailed stories of abuses of prosecutorial and enforcement authority in the investigation of allegations of corporate wrongdoing. These abuses occurred both before and after the issuance of the Department of Justice's McNulty Memorandum. Chief Justice Veasey's interviews provide a compelling snapshot of the kinds of practices and the devastating fall-out that continues to occur on a much broader scale than can be reported in a single hearing. We have previously provided to Congress[1] with the results of empirical studies that drive these

[1] Empirical survey results documenting widespread problems with privilege waiver abuse and prosecutorial coercion of employee rights to raise a defense to allegations were offered to Congress and the public at past hearings in both the House and Senate on this issue/bill. Please see *Is the Privilege Under Attack?* (2005) at http://www.acc.com/Surveys/attyclient.pdf, and *The Decline of the Attorney-Client Privilege in the Corporate Context* (2006) at http://www.acc.com/Surveys/attyclient2.pdf.

points home on the larger scale, showing that what is offered in the Chief Justice's report as a sampling of real-life events is indicative of a larger pattern of practice.

Chief Justice Veasey's report belies claims by the Department of Justice that the McNulty Memorandum adequately addresses our concerns. In fact, Chief Justice Veasey's report makes it clear that little, if anything, has changed since the Thompson Memo was first issued. Based on Justice Veasey's interviews with the lawyers whose cases appear in this report, and supported by already published and first-hand reports from our members, the Coalition draws the following conclusions:

1. While the Department of Justice issued the McNulty Memorandum with the stated intent of curbing abusive privilege waiver practices of a few errant prosecutors, cases involving such abuses continue unabated post-McNulty, and are clearly not addressed by McNulty's new process for vetting privilege waiver demands. The McNulty Memorandum doesn't address at all a number of problems encountered by employees whose defense rights are abrogated.

2. These cases suggest further that other federal agencies not governed by the McNulty Memorandum (such as the SEC, HUD, IRS, FCC, EPA, DOL, and FERC) continue to engage unabated in privilege waiver and employee coercion modeled on DOJ practices authorized under the Thompson Memorandum; indeed, the attitude of enforcement officials is that they are not similarly encumbered by restraints that DOJ suggests in the McNulty Memo. Legislation that covers all federal agents and agencies is needed to curb these abuses of authority.

3. DOJ maintains that the Thompson and McNulty cooperation criteria are not mandatory checklists, but merely "the kinds of issues that prosecutors in their discretion should consider." Unfortunately, reality suggests that this is simply not the case. The reported cases document how some prosecutors and enforcement officials operate as if the Memoranda's cooperation criteria are a mandatory checklist.

4. Prosecutors and enforcement officials who abuse their powers under the McNulty Memorandum's authority appear to be less interested in what is necessary or sufficient to conduct their investigation, and more interested in ensuring that companies "voluntarily" provide them with privileged material, even when the prosecutor's requests are overly broad and could harm a company and its stakeholders in their efforts to recover from a failure instigated by errant employees.

5. Main Justice in Washington does not have control over local US Attorney practices that are theoretically supposed to be regulated by the McNulty Memorandum. Those prosecutors in the field still requesting privilege waivers (even through more subtle means post-McNulty than they may have employed previously) are able to ignore the McNulty Memorandum with confidence because companies cannot afford to question their authority. As a result, prosecutors' continuing waiver expectations or demands are not reported up to DOJ Headquarters as the Memorandum dictates they must be, and therefore cannot be captured in DOJ's reports of privilege waivers requested.

6. A particularly disturbing trend is the number of respondents who suggested that it is increasingly common for less experienced prosecutors to engage in such coercive practices. This suggests that privilege waiver demands and practices that force companies to act against employees' defense rights – including those now made below radar post-McNulty – are becoming a new norm of future prosecutorial practice. There is also a resulting void emerging in the skill sets of young prosecutors who will never learn how to conduct their own investigations effectively and appropriately, or even assess the relevant information they need to consider when looking into corporate allegations, since so many now prefer to force companies to do all investigative work for them accompanied by a request for blanket waivers over everything.

7. Companies providing proof of their compliance efforts, results of investigations, access to employees, and all the relevant facts aren't seen as doing enough … why should that be? One wonders what is lacking in cooperation if privilege waiver is all that is not offered and all the other information necessary to conduct an inquiry is provided?

8. Since the prosecutor's threat of a mere pronouncement of the consideration of an entity indictment (as opposed to indictment of individuals from the company accused of the actual wrongdoing) is so devastating to a company's long-term survival, corporate leaders have no practical choice but to agree to comply with a prosecutor's Thompson/McNulty demands, *even if the company believes it can successfully address the allegations if given the chance to present their case.* The fate of Arthur Andersen after the announcement of its indictment as an entity (even though eventually exonerated by the courts) teaches companies to pay close attention to the potential impact of this threat on the continued vitality of the company's market value, shareholder and employee relationships, investor confidence and public posture/brand.

9. Further, respondents noted their concerns that since DOJ and enforcement officials, especially from the SEC, often work in tandem on an investigation (a "parallel investigation"), the McNulty Memo's limited protections are meaningless if the enforcement agency can make those demands unfettered and if US Attorneys cooperating in the investigation can share the resulting information without ever making their own "McNulty required" requests. Further, while the McNulty Memo removed one of several criteria from the original Thompson Memo as a result of the *US v. Stein* decision (re interference with payment of defense fees afforded under the company's policies or bylaws), neither the McNulty Memo nor any of the enforcement agency policies recognize that any limits should be placed on coercive and unconstitutional defense interference tactics used against employees who are targets or witnesses in government investigations.

In sum, the McNulty Memo falls short of providing meaningful protections from prosecutorial abuses in the field and does not address enforcement practices in other agencies that are patterned on DOJ policies. The McNulty Memo is not seen as an effective tool in erasing practices that have arisen post-Enron as it was designed to do. Further, respondents are concerned that even the McNulty Memo's limited protections still make it clear that DOJ (as opposed to the courts) has the right to determine when corporations may or may not assert their privileges or choose to defend the rights of their employees, even if applied with greater discretion than some local field prosecutors and enforcement officials currently employ.

Conclusion

Current DOJ and enforcement agency policies and practices continue to erode the attorney-client privilege and place untenable pressure on companies and employees to waive basic constitutional rights guaranteed to every person targeted in a criminal proceeding. They allow prosecutors and enforcement professionals to assume the mantle of a role properly reserved for impartial courts and judges.

As a court-protected doctrine, the attorney-client privilege is the oldest of the evidentiary privileges and is a cornerstone of our justice system. The scope and application of this doctrine, as well as of attorney work-product protections and the application of employee defense rights, are well-settled law that existed long before these recent government policies creating this culture of waiver. To quote from the most recent letter to this Committee from a large number of former senior DOJ officials who are concerned with these practices and policies, "... it is our considered judgment that the time has arrived for Congress to restore the proper balance between the tools that the government needs to fight corporate crime and the rights of both individual and corporate citizens. Indeed, the need for such balance lies at the heart of the separation of powers between the three branches of government. Accordingly, we strongly encourage you and your colleagues on the Senate Judiciary Committee to seek the enactment of balanced legislation like S. 186, the Attorney-Client Privilege Protection Act of 2007, which would reverse the harmful provisions in the McNulty Memorandum and other similar federal policies."[2]

[2] Letter from Stuart M. Gerson (acting Attorney General: 1993; Assistant Attorney General, Civil Division:1989-1993), Carol E. Dinkins (Deputy Attorney General: 1984-1985), Walter E. Dellinger III (acting Solicitor General: 1996-97), Jamie Gorelick (Deputy Attorney General, 1994-1997), Edwin Meese III (Attorney General: 1985-1988), Theodore B. Olson (Solicitor General: 2001-2004), Kenneth W. Starr (Solicitor General: 1989-1993), Dick Thornburgh (Attorney General: 1988-1991) and Seth P. Waxman (Solicitor General: 1997-2001), addressed to the Chairmen and Ranking Members of the Senate and House Judiciary Committees, dated July 30, 2007.

UNITED STATES DEPARTMENT OF JUSTICE

STATEMENT OF

THE HONORABLE KARIN IMMERGUT
UNITED STATES ATTORNEY, DISTRICT OF OREGON

CHAIR
WHITE COLLAR SUBCOMMITTEE FOR THE ATTORNEY GENERAL'S ADVISORY COMMITTEE

UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

"EXAMINING APPROACHES TO CORPORATE FRAUD PROSECUTIONS AND THE ATTORNEY-CLIENT PRIVILEGE UNDER THE MCNULTY MEMORANDUM"

PRESENTED
SEPTEMBER 18, 2007

Chairman Leahy, Senator Specter, and Members of the Committee. Thank you for the opportunity to be here today to talk about the *McNulty Memorandum*, the corporate criminal charging policy at the Department of Justice, and pending legislation that will eviscerate that policy. The Attorney-Client Privilege Protection Act of 2007 will greatly harm our efforts to eradicate corruption in corporate boardrooms and protect our nation's financial markets.

Department of Justice Efforts to Combat Corporate Crime

In the aftermath of corporate scandals like Enron, Worldcom and Adelphia, the Department has worked very hard to bring corporate criminals to justice, protect investors, shareholders and our nation's retirees from the devastating effects of corporate fraud, and return assets to victims of crime. Since 2002, the Corporate Fraud Task Force -- a multi-agency Task Force charged with restoring investor confidence in America's corporations by investigating and prosecuting those who violate the trust of employees and investors -- has utilized enhanced statutory tools provided by Congress to pursue corporate wrongdoing through the dedicated and professional efforts of agents and prosecutors whose effective investigation and prosecution of complex schemes have resulted in more than 1200 corporate fraud convictions and the recovery of billions of dollars for investors and shareholders in criminal and civil proceedings.

Many positive benefits flow from criminal enforcement against corporations, including increased compliance and restoring the confidence of the investing public in the capital markets. At the same time, due to the nature of corporations, certain additional considerations are present.

A corporation can be held vicariously liable for the criminal acts of its employees, but at the same time, charging a corporation criminally may have severe, collateral consequences to innocent employees, shareholders and pension holders.

For this reason, and to ensure consistency in corporate charging decisions, the Department of Justice memorialized the principles governing the Federal Prosecution of Business Organizations in the *Holder Memorandum* issued in 1999. That document, as well as the various iterations that followed - the *Thompson Memorandum* and the *McNulty Memorandum* - established a nine-factor test that prosecutors consider in determining whether to charge a corporation or other business entity. Those nine factors include the nature and severity of the alleged conduct, its pervasiveness, a corporation's history of similar conduct, the adequacy of the corporation's existing compliance program, and whether the corporation cooperated in the course of the government's investigation. A prosecutor must consider and weigh all of the relevant factors in order "to ensure that the general purposes of the criminal law - assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities - are adequately met, taking into account the special nature of the [corporation]."

The *McNulty Memorandum*, in part, was created in response to concerns that prosecutors lacked uniform guidance on what factors to consider when deciding whether to charge a corporation. The *Memorandum* creates greater transparency and predictability in the investigation and prosecution arena. Furthermore, the charging analysis in the *McNulty Memorandum* presents no new concepts; the analysis memorializes what common sense leads a prosecutor to consider when making a charging decision and what prosecutors have been

considering for decades. Indeed, the very concept of corporate liability is well founded in our legal system and is an important tool – both in the criminal and civil law contexts – in holding corporations responsible for their wrongdoing.

Critics of the *McNulty Memorandum* tend to focus solely upon the role that corporate cooperation plays in a prosecutor's decision as to whether to charge a corporation. This focus, however, ignores the other key provisions of the *Memorandum* which provide structure and guidance to this important decision. Cooperation is just one of the nine factors a prosecutor weighs in determining whether to charge a corporation. A prosecutor assesses the adequacy of a company's cooperation by considering the completeness of a company's disclosure, including whether the company identified the culprits, made witnesses available, and, if necessary, waived attorney-client and work product protections to provide information about the criminal violations to the government. Waiver is simply one sub-factor that might come into play in evaluating one of the nine factors in the *McNulty* analysis.

The Mechanics of Corporate Fraud Investigations –
Selective, Voluntary Waiver, and the *McNulty Memorandum*

When the government begins a corporate fraud investigation, it just wants to know the *facts*: How did the fraud occur? When did the fraud occur? Who was responsible for committing it? Occasionally, when a corporation wants to cooperate, it provides these facts by waiving work product and attorney client privileges. The Department does not seek information regarding an attorney's litigation strategy or legal tactics when requesting waiver of privilege. Indeed, an attorney's strategy, tactics, and legal advice regarding the government's investigation

will rarely have a bearing on the outcome of any corporate fraud investigation unless the attorney is providing advice in furtherance of the fraud or to impede the government's investigation.

Waiver of privilege is not requested because the Department seeks to shift its investigatory burden onto companies. Rather, federal prosecutors have an independent obligation to investigate every case and, even if prosecutors are given the results of the corporation's internal investigation, they have to verify those facts. Waiver can streamline an investigation, but prosecutors cannot, and do not, simply rely on waiver to prove their case.

Waiver of privilege is only sought on a limited basis from corporations that wish to cooperate and to receive a benefit for that cooperation. This is not a novel approach. The notion that prosecutors extend leniency in charging or punishment in exchange for cooperation is a concept fundamental to our criminal justice system. *See United States* v. *Singleton*, 165 F.3d 1297, 1301 (10th Cir. 1999) (*en banc*); *see also* United States Sentencing Guidelines §§ 5K1, 8C2.5; 18 U.S.C. § 3553(e). It did not originate in the Department's corporate charging policy. In fact, Congress has long recognized that cooperation should be rewarded in its enactment of statutes authorizing immunity for witnesses and allowing the court to impose a sentence below the mandatory minimum to reflect a defendant's substantial assistance in an investigation or prosecution. *See* 18 U.S.C. § 6003 and 18 U.S.C. § 3553(e).

Even when a company offers its cooperation to the government, federal prosecutors do not request waiver at the outset of the investigation. The *McNulty Memorandum* specifically states that waiver is not a prerequisite to a finding of cooperation. Cooperation is but one factor in the analysis, and waiver is considered in weighing the adequacy of the cooperation, but it is not a litmus test for cooperation. The *Memorandum* requires that prosecutors both initiate an

investigation and show a legitimate need for potentially privileged materials before asking for permission to request a waiver.

When is it appropriate to request waiver? Prosecutors must satisfy a legitimate need test before the request is made. When that test is satisfied and, in certain circumstances, it is appropriate to seek waiver when speed in a complex investigation is important because the statute of limitations may expire, evidence may disappear, assets may dissipate, targets may flee, and victims may have to wait too long to obtain restitution. And fast action matters. Waiver of privilege can facilitate asset recovery for victims.

For instance, in the Southern District of New York, in *United States v. Martin Armstrong*, obtaining a waiver of privilege from the company HSBC/Republic Securities enabled the government to freeze $80 million before the defendant, who had a history of hiding assets, could move it. The case involved a billion dollar Ponzi scheme perpetrated by an American investment adviser on a host of major Japanese corporate victims. At the time of discovery, the government received a waiver of work product privilege for a forensic accounting analysis tracing the flow of money associated with securities trades. The waiver enabled the government to follow the money quickly enough to freeze approximately $80 million within two weeks of the onset of the investigation. The government was able to secure an arrest warrant for Armstrong (based in part on the privileged work product information) the following week. Absent this waiver, it would likely have taken at least six weeks to conduct the same analysis. In the interim, Armstrong would have been able to flee and/or transfer abroad the $80 million in cash. In fact, Armstrong would likely have done so because he was held in contempt, after his arrest, for secreting another $10 million in gold bullion.

In these types of cases, replicating a lengthy and expensive investigation that has already been performed by a cooperating company would burden taxpayers and do significant harm to the interests of the victims of a corporate fraud. In a survey of United States Attorneys' Offices, federal prosecutors have told us that waiver of privilege has expedited prosecution, avoided the necessity for extensive pre-trial litigation, resulted in the production of critical evidence that undermined the credibility of the targets of an investigation, proved a target's defenses were not viable, and, in certain cases, allowed the government to conclude an investigation quickly without bringing charges. Waiver allows the government to act quickly and effectively -- a goal that should be encouraged, not thwarted.

Why do we obtain waiver in certain cases? Obtaining cooperation from a corporation is different than cooperation by individuals. When a corporation approaches the government claiming that it wants to cooperate in an investigation, it makes different decisions to effectuate that cooperation than the individual defendant. With an individual, such as a drug trafficker who wants to cooperate with the government, the prosecutor requests an interview. The individual defendant then sits down with his own attorney, government agents, and a federal prosecutor and explains his role in a drug trafficking organization, the players, how the drugs moved, the quantities of drugs, and the distribution scheme. Unlike an individual defendant, a corporate entity is an artificial construct that does not have personal knowledge of criminal violations. A corporation seeking to cooperate usually conducts fact gathering about the crime through its lawyers. The information that the lawyers gather is the functional equivalent of a person's memory, but since it was collected by lawyers, it is protected by the attorney-client

privilege or work product doctrine.

To obtain the truth regarding the misconduct, the government must ask the corporation what it knows. The corporation may then convey its knowledge through its lawyers and produce reports, interviews, and key documents that explain the scheme. It provides this information *voluntarily*, as does every other criminal defendant who seeks to cooperate with the government. Occasionally, in order to provide facts about how a fraud occurred, when it occurred, and who was responsible, the corporation may waive attorney-client or work product protections by producing the report of its own internal investigation. On the other hand, where a corporation can provide facts without waiving privilege -- by identifying documents or making employees available for interviews -- waiver may not be necessary. A corporation may still receive a cooperation benefit by providing facts without waiving privilege.

The *McNulty Memorandum* Addresses the Concerns About a "Culture of Coercion" that Legislative Proposals Purport to Address

The Department published the principles of charging corporations – which are the factors that prosecutors have always informally considered – to ensure consistency and transparency. We at the Department are aware that, despite the Department's successes, some in the business community and criminal defense bar have expressed dissatisfaction arising out of a perception that federal prosecutors were "coercing" corporations to provide privileged materials in criminal investigations. The Department held numerous meetings with individuals representing this point of view and reviewed the materials submitted in support of their position, but no concrete information was provided to the Department to substantiate these claims.

Nevertheless, Department officials, led by the Deputy Attorney General, undertook an extensive and thorough review of our corporate charging policy. The Deputy Attorney General's Office sought input from members of the business community, bar associations, associations of corporate counsel, and our own prosecutors. The *McNulty Memorandum* was the result of this dialogue. The revisions that the Department made to the *McNulty Memorandum* preserve the transparency of our charging decisions while addressing and dispelling negative perceptions in very significant ways.

There has been no empirical evidence to suggest that prosecutors were routinely coercing privilege waivers in corporate criminal investigations and that a "culture of waiver" had developed. Even so, threshold requirements and approvals now contained in the *McNulty Memorandum* prohibit federal prosecutors from requesting waivers of privilege in corporate fraud investigations absent a demonstrated legitimate need and approval by a senior Department official. The *Memorandum* adopts a tiered approach as to when prosecutors may request that a corporation provide protected materials.

In order to address the perception that routine waivers were being sought, the new policy now makes clear that legal advice, mental impressions and conclusions and legal determinations by counsel are protected and should only be sought in rare circumstances. Any request for such materials must be in writing and "seek the least intrusive waiver necessary to conduct a complete and thorough investigation." When prosecutors wish to seek privileged attorney-client communications – the materials generally considered to be the most sensitive of all protected materials – the United States Attorney must now obtain written approval directly from the second highest official in the Department – the Deputy Attorney General – before making the

request.

There is another category of information, facts obtained and documented by corporate counsel, that is subject to a different approval requirement. A prosecutor's request for facts most often comes up in the context of an internal investigation by the corporation. Corporate lawyers or outside counsel will interview witnesses and gather together key documents to determine whether wrongdoing has occurred. This may happen before or during the government's criminal investigation. When the corporation comes in asking to cooperate, the government needs to know what happened. Attorneys may assert privilege relating to this information. If there is a legitimate need, and subject to the process discussed below, the government may ask for a waiver of the privilege to obtain the facts attorneys for the corporation have collected.

Asking for this type of information is much less intrusive to the privilege than asking for legal advice. Most experienced corporate counsels recognize that if the corporation wants the benefits of cooperation, it should produce the facts that it has learned during the course of its own investigation. In fact, in our discussions with corporate counsel, they have acknowledged the benefits of proceeding quickly. Rather than facing additional delay while the government duplicates its efforts, the company will often offer the results of its internal investigation so that the government's investigation can move faster. This allows the government to make a charging decision within months, rather than years, which saves the company money and employee time and protects the value of its stock.

Even with this non-controversial request for facts, under the *McNulty Memorandum* prosecutors must submit a written request for approval to the United States Attorney. The request must be narrowly tailored. The United States Attorney considers that request in

consultation with the Assistant Attorney General of the Criminal Division. The request and approval must be in writing and those records must be maintained. If after receipt of this factual information the prosecutors still believe that they need more information which may implicate attorney-client communications and legal advice, then they can request that the Deputy Attorney General approve their written request for that information. These process requirements address the concerns that have been raised by legal and business associations. They make sense, while still preserving the Department's right to obtain needed information quickly.

The divide is between legal advice and facts. To be clear, a prosecutor must take an incremental approach, first establishing a legitimate need and then submitting a narrowly-tailored written request. The United States Attorney, in consultation with the Assistant Attorney General of the Criminal Division approves a request for factual information; the Deputy Attorney General approves requests for legal advice, subject to two exceptions (when the company is asserting an advice of counsel defense or when the crime-fraud exception applies).

But the Department did more than just establish an approval process. Before prosecutors can even make a request of the Deputy Attorney General or their United States Attorney, they must establish a legitimate need for the information. "A legitimate need for the information is not established by concluding that it is merely desirable or convenient to obtain privileged information." To meet the legitimate need test, prosecutors must show: (1) the likelihood and degree to which the privileged information will benefit the government's investigation; (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver; (3) the completeness of the voluntary disclosure already provided; and (4) collateral consequences to a corporation of a waiver.

This test ensures that evaluating the need for waiver is a thoughtful process and that prosecutors are not requesting it without examining the quantum of evidence already in their possession and determining whether there is real need to request privileged information. Prosecutors cannot even undertake this test until they take preliminary investigative steps to determine whether a corporation and its employees have engaged in criminal activity before seeking waiver, thereby ensuring that prosecutors cannot seek waiver at the outset of the investigation.

The privilege is fully protected in this approval process. Even if the prosecutors have established a legitimate need and the Deputy Attorney General approves the request for the waiver, if the request is made and the corporation declines to give the information, the Department will not hold it against the corporation or view it negatively in making a charging decision. This is to ensure that where a valid privilege is asserted for legal advice or strategy, that the corporation and its lawyers are not penalized for deciding that they want to preserve the confidentiality of their communications. Prosecutors, however, may consider a corporation's decision to refuse to waive privilege to provide factual information – a concept that is consistent with the notion that a cooperating corporation should be willing to provide the facts when requested.

The *Memorandum* also establishes various internal Department record-keeping requirements to document occasions when protected materials are sought. The results of this record-keeping do not support the finding that privilege waiver requests are widespread or abusive. Since December 2006, the Criminal Division has received ten requests for factual information under Category I of the *McNulty Memorandum*, only five of which involved a

request for privileged documents actually covered by the *Memorandum*. Four of those five requests were approved. The Office of the Deputy Attorney General has not processed any requests for attorney-client communications under Category II of the *Memorandum*. The statistics gathered since the issuance of the *McNulty Memorandum* simply do not support a finding of widespread abuse. Legislative action is simply not needed.

Legislative Proposals to Establish a Blanket Prohibition on Waiver of Attorney-Client Privileged Information

Legislative efforts to establish a blanket prohibition on the government's ability to receive information voluntarily provided by cooperating corporations are deeply flawed and rest on faulty premises. For example, S. 186, the Attorney Client Privilege Protection Act of 2007 goes far beyond the Department's corporate charging policy, extending its protections to: (1) mere requests for information, involving the disclosure of privileged or protected facts; and (2) organizations and "person[s] affiliated with [those] organization[s]," potentially shielding not only corporations but also specific categories of individuals, namely corporate executives.

As an initial matter, the proposed legislation is problematic in one significant respect. It creates two sets of rules, one more favorable set of rules for corporations and their employees and another set of rules for everybody else. The bill also creates the appearance of favoring corporate non-constitutional privileges over the constitutional rights of the individual. On a daily basis throughout this country, individuals outside the corporate context, some of whom are not represented by counsel, are asked by law enforcement officers – consistent with longstanding Supreme Court precedent – to waive their constitutional rights, such as the right to remain silent,

the right to counsel, and the right not to have their homes searched without a court-authorized warrant. An individual defendant in the garden-variety criminal case may waive his privilege against self-incrimination and confess to police officers without counsel. But unlike the individual, a corporate defendant waives its attorney-client privilege only after it consults counsel with specialized expertise in accounting, business, and corporate governance. It is difficult to understand why a more sophisticated, corporate defendant could claim that its will is overborne when the government asks it to waive a non-constitutional privilege, when generally less sophisticated, individual defendants waive their rights and cooperate with police officers on the street every day.

The proposed legislation creates a broad prohibition covering information requests and will chill the ordinary exchange of information between corporations and federal entities. To illustrate, imagine a publicly held corporation has identified a fraud within the corporation committed by the Chief Financial Officer (CFO). The public company has obligations to the Securities and Exchange Commission (SEC) and to the investing public to disclose that there is a problem with its financial statements. If this bill is passed, the following simple questions by the SEC or the Department of Justice could be stymied if the corporation retained counsel to look into the matter: How did you learn of the fraud? What remedial actions did you take? Can you disclose what happened? What were the processes put in place to prevent this? What is the breadth of the fraud? What did the officers know about the fraud? Whenever questions must be answered with information obtained by counsel in the internal investigation, *i.e.*, protected by attorney-client privilege or work product, the legislation would prohibit asking these questions.

Subsection (c) of the bill entitled "Inapplicability" does not remedy this problem. That section provides that "Nothing in this Act shall prohibit an agent or attorney of the United States from requesting or seeking any communication or material that such agent or attorney reasonably believes is not entitled to protection under the attorney-client privilege or attorney work product doctrine." To invoke this provision, a federal prosecutor would have to hold a "reasonable belief" that the information is not privileged. In cases where a prosecutor can establish that the legal advice was communicated in furtherance of a crime or fraud ("the crime-fraud exception"), the prosecutor will be entitled to ask for that information. However, in most investigations, the prosecutor will be hesitant to take advantage of this section because of the potential for adverse rulings from a court if the matter is later litigated and the court sets an unexpectedly high threshold for finding "reasonable belief" that the materials are not entitled to protection. Certainly, when the attorney is providing information directly from the internal investigation that he or she conducted, a federal prosecutor would be reluctant to argue that attorney-client and work product productions are not implicated. As a result, a prosecutor investigating corporate fraud may not be able to ask the most basic questions of corporate counsel.

Basic fact-finding with corporate counsel routinely assists the government in determining whether to open an investigation. Given the broad prohibitions of this bill, however, prosecutors will hesitate to engage in such fact-finding because of the litigation risks that could occur in asking for that information. The potential inability to broach vital topics with counsel prevents the United States from making an assessment of whether opposing counsel's assertion of privilege is even valid. Furthermore, the prohibition on seeking privileged information lengthens the government's investigations, resulting in delayed justice for victims of corporate fraud. This

result would not occur with the *McNulty Memorandum* because prosecutors are able to make the request, as long as they seek approval from their supervisors and establish a legitimate need for the information before the request is made.

The bill also states that the government cannot "condition treatment" on the disclosure of protected information of a "person affiliated with that organization," which, if the plain language is read literally, extends the shield to individual employees, agents or affiliates of the organization.[1] Thus, the bill would effectively prohibit individuals from waiving their personal attorney client privilege (as opposed to the corporation's privilege) and receiving any benefit for this waiver. In the context of dealing with individuals who have retained counsel, such as whistleblowers or individuals who may be involved in criminal conduct, the legislation prohibits the United States from conferring any benefit on those individuals when they disclose wrongdoing inside the organization and waive their individual privilege. This practice would conflict with what occurs in nearly every other criminal prosecution. The United States is free to confer, and usually does, a benefit upon individuals who provide information, even when providing that information means waiving certain rights, including attorney client privilege. Such benefits are extended every day in courtrooms across the United States.

Critics claim that the Department's policies pit the individual's constitutional rights against the corporation's interests, but that ignores practical realities of the investigation of

[1] That provision is in conflict with established case law that the corporation's privilege belongs to the corporation, not the individual. *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 348, 105 S.Ct. 1986, 1991, 85 L.Ed.2d 372 (1985).

criminal wrongdoing. Due to the artificial nature of corporations, the discovery of wrongdoing by individual employees or officers will necessarily pit the interests of the corporation against the interests of that employee or officer. While a corporation has a duty to its shareholders to detect and disclose wrongdoing, a culpable employee often wants the corporation to maintain confidentiality about his misconduct. In the past, because a corporation's attorney-client privilege does not extend to the individual employee, the employee could not rely upon the corporation's privilege to maintain that confidentiality. Indeed, employees routinely receive *Upjohn* warnings by corporate counsel to that effect in internal investigations to ensure that there is no misunderstanding. This legislation, however, now alters that playing field. If the government can give no charging benefit, companies will be less likely to report wrongdoing. Because the legislation removes the incentive to disclose by the corporation, culpable employees will be better able to better conceal evidence of their misconduct from the government . By placing these roadblocks in the government's efforts to obtain information, this bill will allow individual wrongdoers like Jeffrey Skilling and Kenneth Lay to shield their misconduct, and elevate the interests of a culpable CEO over that of the shareholder.

Other provisions of this bill are simply unnecessary. The extension of this bill to a prosecutor's consideration of the advancement of attorney's fees is not needed. The Department's guidance already instructs prosecutors that they generally cannot consider a corporation's advancement of attorney's fees to employees when making a decision whether to charge the corporation. A rare exception is created for those extraordinary instances where the advancement of fees, combined with other significant facts, shows that such a step was intended to impede the government's investigation. In those limited circumstances, fee advancement may

be considered only if personally authorized by the Deputy Attorney General. The Deputy Attorney General has not authorized any requests for consideration of the advancement of attorney's fees.

Similarly, prohibiting prosecutors from considering the existence of a joint defense, information sharing, and common interest agreements between a corporation and its employees is unnecessary in light of the Department's charging guidance. The *McNulty Memorandum* allows prosecutors to consider the existence of a joint defense agreement and information-sharing in making a determination as to whether the company is cooperating. Joint defense agreements are used when litigants have interests in common in a matter or common goals, and where the communication and sharing of privileged information are part of an effort to set up a common strategy. The agreements themselves are not per se considered against companies. They are only considered when prosecutors are attempting to determine when a company is actually cooperating and when the actual sharing of information between a corporation and its employees was intended or did, in fact, taint witnesses or obstruct the government's investigation.

Finally, the bill prohibits prosecutors from considering the corporation's failure to sanction or terminate its employee when the employee exercises his constitutional rights by refusing to respond to a government request. This provision is unnecessary because the Department simply does not penalize a corporation for an employee's exercise of a constitutional right, including invocation of the Fifth Amendment privilege in response to a government's request for an interview. Moreover, this provision of the bill is confusing and appears to conflate the corporation's internal investigation with the government's investigation. In so doing, this

provision may embolden employees from providing critical information about corporate wrongdoing to their employers.

The corporation's internal investigation is separate and distinct from the government's investigation. The government does not ask or expect the corporation to act as an agent of the government in conducting an investigation. Apart from whether an employee asserts his constitutional rights in a government investigation, the company may have developed evidence in its own investigation about wrongdoing by the employee which justifies disciplinary action. When an employee declines to participate in a corporation's internal investigation, the corporation can make the choice to sanction that employee. In fact, if the corporation fails to take remedial action against an individual it knows to be a corporate wrongdoer, which failure would most probably be in conflict with its own internal policies, it is appropriate for the government to consider that fact in deciding whether the corporation itself should be charged.

The guidance does not state in any way that the prosecutor may consider the fact that an employee is exercising his right against self-incrimination as a factor against the corporation. It just allows a prosecutor to consider whether a corporation is properly policing itself. If the Department is to encourage good corporate governance, the way in which a corporation disciplines its wrongdoers must be considered. This provision chills not only government investigators from seeking relevant information, but discourages culpable employees from participating in a corporation's internal policing mechanisms.

Conclusion

When a corporation decides to cooperate, it should be required to provide information to the government -- how the crime was committed, who did it, and when it happened. Sometimes disclosing that information may implicate work product or attorney-client privilege protections. The *McNulty Memorandum* strikes the proper balance between the protection of the attorney-client privilege and the legitimate need of law enforcement to prosecute corporate misconduct. It should be given time to work. If the Department loses the ability to ask for relevant information in a criminal investigation, privileged or not, it will be far more difficult to bring corrupt corporations and their executives to justice. If history is our guide, in the next decade, the impact of this legislation will fall on American retirees and pension holders. We should not turn back the clock. Having learned the lesson of Enron all too well, we need to maintain our vigilance so that it does not happen again.

Thank you again for the opportunity to appear before you today, and I look forward to answering the Committee's questions.

Statement of Senator Patrick Leahy
Chairman, Senate Judiciary Committee
On "Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum"
September 18, 2007

Today, the Judiciary Committee considers whether the Department of Justice has struck the right balance between robust prosecution of corporate fraud and the bedrock legal principle of fairness protected by the attorney-client privilege. I thank Senator Specter for his leadership on this issue, and I thank the distinguished panel of witnesses for being with us today.

I am deeply concerned about the lawlessness that has affected this Administration's leadership at the Department of Justice. They have shown arrogance and asserted an unprecedented prerogative to rewrite the rules, often in ways that undermine the rule of law and disregard the finest traditions of impartial law enforcement and our justice system.

They have literally sought to rewrite the rules on the prosecution of politically-sensitive cases and on the retention and firing of United States Attorneys in ways that impermissibly and dangerously injected politics into our justice system. They have undermined the role of law enforcement by using partisanship in the hiring of career prosecutors, judges and other Justice employees. They have secretly rewritten the rules governing torture and the treatment of detainees in ways that call into question this Nation's commitment to basic human rights and American values. And they have secretly rewritten the rules for government surveillance of Americans, threatening our privacy and basic legal protections.

It is long past time for the Department of Justice to recommit itself to the rule of law and to the principles of our justice system. This Committee has through its oversight begun to seek accountability that I hope will lead to the restoration of law and order within the Justice Department and throughout the Executive branch.

In the area of corporate fraud prosecutions, this Administration has rewritten the rules. In 2003, the Department of Justice made it easier for prosecutors to pressure corporations to waive the attorney-client privilege. One judge went so far as to dismiss charges in a prosecution of fraud at the accounting firm KPMG based on government overreaching and misconduct. It is embarrassing for the government to lose cases, not because the evidence is insufficient, but because the Justice Department has pushed beyond the law. And it is unacceptable to steamroll principles that protect fairness.

Senator Specter and I made our concerns clear about Justice Department overreaching in this area in a hearing last fall. Soon after, the Justice Department rewrote the rules again, this time spearheaded by then-Deputy Attorney General Paul McNulty in what has come to be known as the "McNulty Memorandum." This memo added new safeguards and

restrictions, including some that had been called for at this Committee's hearing, on prosecutors' ability to request the waiver of the attorney-client privilege.

I said at the time that it was a step in the right direction. With this hearing we continue our consideration whether or not the Department has, in fact, found and is implementing the proper balance. The McNulty Memorandum has been in place for less than a year. We need to get a sense of whether and how it is working. We are evaluating whether the McNulty Memorandum and the Department's implementation of it has reached the right balance between aggressive enforcement of corporate fraud statute and proper respect for the attorney-client privilege. I look to today's witnesses for help in that analysis.

We are holding this hearing at a time when both the Attorney General and the Deputy Attorney General have resigned in the wake of the scandal associated with their firings of U.S. Attorneys. The Department of Justice has chosen not to send either the Acting Attorney General or the Acting Deputy Attorney General to testify today.

With nominations being made to the top positions at the Department of Justice, those who will be most directly responsible for setting and implementing the Department's policy are not yet in place. We do not know where Judge Mukasey, who the President just announced as his nominee to be Attorney General, stands on this issue. It will be vital to ask him and other top nominees for their views of these issues and what steps they intend to take to make sure that the Department strikes the right balance.

We must be mindful not to cripple law enforcement efforts to eradicate the scourge of corporate fraud, however. Early in this decade, an epidemic of greed among executives at companies like Enron and Worldcom, and many others, left employees without work and often bereft of their life savings, and it devastated the shareholders to whom those executives owed fiduciary duties.

Corporate wrongdoers who profit at the expense of ordinary, working Americans should be held accountable. In connection with the Enron and other corporate frauds, seemingly encouraged by this Administration's lax efforts, I authored criminal provisions included in the Public Company Accounting Reform and Investor Protection Act of 2002, known as the Sarbanes-Oxley Act, which strengthened existing criminal penalties for corporate crime. Aggressive prosecution of corporate fraud has helped to reduce the culture of greed that devastated so many Americans financial security. Enforcement must continue.

I am urging this Committee, the Senate and the Congress to continue our efforts in these regards by passage of additional anti-corruption and anti-fraud legislation. I introduced the War Profiteering Prevention Act, S.119, at the beginning of the year to provide better tools to investigate and prosecute those responsible for ripping off hundreds of millions of taxpayer dollars from efforts in Afghanistan, Iraq and elsewhere. That bill now has 21 Senate cosponsors and was reported by the Judiciary Committee in May. Along with Senator Cornyn, I have recently introduced the Public Corruption Prosecution Improvements Act, S.1946, to improve our efforts to combat public corruption. And last week, I cosponsored the False Claims Act Correction Act, S.2041, introduced by

Senators Grassley and Durbin and also cosponsored by Senators Specter and Whitehouse, to improve the effectiveness of anti-fraud efforts pursuant to that important statute.

We must be careful not to overreact to the Department's overreaching. This Administration has sought to immunize too much misconduct. Corporate misconduct should not be given a safe haven or immunized from accountability. Nor should the corporate bar, and its representatives in the American Bar Association, be allowed to use the legitimate concerns of overreaching we have identified to create favored status for corporate fraud defendants. We must not go back to the dark days before the Sarbanes-Oxley Act when Americans were too vulnerable to the greed of a few unscrupulous executives. We are working hard to protect prosecutorial independence and discretion from Administration efforts to influence them. Let us not undermine those efforts.

The Department of Justice and, in particular, its new leadership must understand the need to get this right. I hope that Congress demands that corporate fraud be pursued aggressively, but that prosecutors do so mindful of fairness principles. I hope the Department will work with us to get this right.

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Written Testimony
United States Senate Committee on the Judiciary
Hearing: "Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum"
September 18, 2007

Professor Daniel Richman
Columbia Law School

Chairman Leahy, Ranking Member Specter, Members of the Committee, and staff: Thank you for the opportunity to testify before you today about corporate fraud prosecutions and the role that Congress should play in limiting negotiations between federal prosecutors and corporate entities over attorney-client and work product privilege waivers. I am a currently a professor at Columbia Law School, and for the past fifteen years, my scholarship has focused on federal criminal enforcement issues. Before entering academia, I served as an assistant U.S. Attorney in the Southern District of New York, and ultimately was the Chief Appellate Attorney in that Office. Since leaving government service in 1992, I have served as a consultant for the Justice Department's Office of the Inspector General and have been retained as defense counsel or a consultant in a number of criminal and civil matters.

What would federal criminal enforcement in the white collar area look like, were Congress to bar federal prosecutors, when evaluating a corporation's cooperation, from considering whether a corporation is willing to waive its attorney-client and work product privileges? Any answer to this question is bound to be highly speculative – a point that itself counsels against legislative action at this time.

In a broad range of cases, legislative intervention would change little. Companies currently have very strong incentives both to pursue internal investigations and to voluntarily offer up otherwise privileged information obtained in the course of those investigations. Where a federal enforcer – prosecutor or agency official – has expressed an interest in a matter (or there is a risk that such an interest will develop), corporate interests will frequently be served by providing an oral report or handing over a written one, and perhaps disclosing the underlying factual materials. There is a wide range of disclosure possibilities, and a variety of accommodations can be and are made. The faster and more convincingly corporate counsel can either assure enforcers of the limited nature and scope of any improprieties or demonstrate that no improprieties occurred, the better for the company. This dynamic would continue even after legislative intervention – unless of course corporate counsel were legally barred from advancing corporate interests in this way, something that no one has proposed, or should propose.

To be sure, such voluntary waiver decisions by corporations can lead to the disclosure to the government of statements by officers and employees to corporate counsel that may have been made under a considerable degree of economic pressure. But that is an inevitable consequence of a regime in which the company controls the privilege. Efforts should be made – and I hope are being made by corporate counsel and in the courts – to ensure that officers and employees at

least recognize that they lack legal protection in this regard. Pending legislative proposals are not designed to advance the interests of these individuals, however – except to the extent that their interests coincide with the company's self-interest. There is thus no reason to expect that the proposed legislation would change the level of candor – or the apprehension – that mark corporate counsel's contacts with officers and employees.

What about these instances in which counsel does not believe that the corporation's interests will be advanced by initiating waiver? Since I take the need for enforcement of white collar crime statutes, particularly in the corporate fraud area, quite seriously, I would hope that there will be a range of cases in which prosecutors, even though deprived of any investigative assistance from privileged materials, would plunge ahead with their inquiry and not be deterred by the fact that they will need to engage in a long and intensive inquiry into internal corporate matters. I would also hope that Congress, recognizing the difficulty of illuminating these black boxes without the assistance of privileged materials, would massively increase the funding and resources available for white collar enforcement. Even as the Justice Department has trumpeted its commitment to enforcement in this area, there have been regular reports of underfunding and open slots in U.S. Attorneys' offices, and of the toll that counterterrorism, violent crime, and immigration programs have taken on white collar enforcement generally. I'm not in a position to assess the validity of these reports. But they ought to be taken seriously, and significant remedial action taken, particularly if Congress imposes the proposed restraints on corporate investigations. (This point goes beyond corporate fraud cases and equally applies to workplace safety and other areas of potential corporate malfeasance.)

Moreover, such a commitment of resources ought to occur immediately. It would be regrettable indeed if we simply waited until the next spate of headlines about corporate fraud and then played catch-up. And even worse if we waited until the next Enron, and then just created a few more federal crimes or hiked up the sentences of those who do get prosecuted and convicted.

In those prosecutions that do go forward, we should expect considerable and extraordinary pre-trial litigation, with regular claims that the government's decision to charge was illegally influenced by the defendant corporation's refusal to waive its privilege or perhaps even that the charges against an individual defendant were supported by privileged materials that the government illegally obtained through an illegal threat to prosecute. Maybe the individual defendant would be held to lack standing to raise the latter sort of claim. But this Committee needs to confront the cottage industry of prosecutorial abuse claims that the proposed legislation would generate. And each claim of abuse could offer defense counsel the opportunity to put a prosecutor or two on the stand to testify about the charging decision. Even the ultimately unsuccessful claim would – unless district courts developed an elaborate screening mechanism – carry the promise of a defensive prosecutor and perhaps interesting insights into the government's case. Moreover, the possibility of an intrusive inquiry into prosecutorial motivation might itself lead prosecutors to shy away from a worthy case.

One should also expect a range of investigations and possible prosecutions that will not go forward or that will be less fruitful as a result of legislative privilege protection. How large

will this class be and what will it look like? I have no idea, and am highly skeptical that anyone does. The class will include cases in which corporate counsel, having satisfied herself that no improprieties have occurred or that the corporation has adequately addressed the problem, will simply assure the government that matters are well in hand and that it should move on. And the government, faced with the choice of taking counsel's word or conducting a resource-intensive investigation will move on. Should we celebrate this combination of corporate responsibility and privilege? Perhaps, but I'd like to know a lot more about counsel and the kind of internal investigation they've conducted. Having been involved in internal investigations and being well-acquainted with some of my former colleagues in the U.S Attorney's Office who conduct them, I know that many such investigations leave no stone unturned and that considerable respect ought to be given to their conclusions. But the adage "trust, but verify," is relevant here too. Were Congress to limit requests for privileged material and were counsel to decline to offer such supportive materials, "trust" itself might be good enough. My confidence in my friends, however, is a pretty thin basis for policymaking. And the risk that other, less trustworthy counsel will have conducted little or no inquiry needs to be confronted, as well as the risk that counsel will protect managers at the expense of shareholders.

What about the argument that, notwithstanding the threat to white collar criminal enforcement that I've described, we still need legislative intervention to prevent the government from gaining an unfair advantage? After all, our criminal justice system puts many obstacles in the way of prosecutions, particularly in the form of constitutional rights. This should be the beginning of a conversation, however, not the end of it. For almost a decade, hearings and law review articles have resounded with claims that valuable corporate privileges have been eroded or even killed by the federal government's bargaining tactics. Let us put for aside the extremely unscientific support for these claims and presume that the government regularly has been using the explicit threat of prosecution to "coerce" (I use the term in its ordinary language sense) cooperation from corporations that includes a broad waiver of privileges. The government may indeed have fostered a "culture of waiver." But to say that hardly advances the argument for extraordinary legislative intervention. The fact is that the entire federal criminal justice system is based on a culture of waiver: Most federal criminal defendants plead guilty, and a very large percentage of them waive their Fifth and Sixth Amendment rights and provide information and testimony against others in order to avoid harsher sentences.

It is true that even those individual defendants who cooperate with the government in hopes of leniency or non-prosecution usually don't have to waive their attorney-client privilege. But the distinction between individuals and corporations arises less from any governmental bias against capital formation than from the special relationship between corporate counsel and corporate "knowledge." When an individual seeks to cooperate with the government, he is expected to tell all he knows about the matters being investigated and many peripheral matters (like unrelated personal misconduct), with grave consequences often attending his failure to be completely forthcoming. If one expects analogous disclosure from artificial entities like corporations, there may be no one to turn to other than the lawyers – the only corporate agents charged with gathering all the information within the entity's collective knowledge.

Is there a risk that prosecutors will be too quick to demand waivers and that lazy prosecutors will be too quick to free ride on the investigative efforts of corporate counsel, with the consequences being some combination of "cheap" cases that ought not to have been brought and curtailed efforts by corporate counsel wary of the uses to which the government will put their work? Certainly. But there are risks on the other side as well, particularly given the tight resources in the white collar enforcement area. The possibility that the government will rely on attorney assurances unsupported by due diligence and perhaps lacking in candor is all too real. And so is the risk that worthy prosecutions will be unduly impeded.

The question becomes how to balance these risks, and even more importantly, what institutions should be doing the balancing. For now, at least, I strongly believe that Congress should stay its legislative hand. Justice Department policy has evolved considerably over a relatively short period of time, and, as a result of the McNulty Memo, we will be receiving an increasing amount of information from the Districts about how policy is implemented. Although we will soon see changes in the Department's leadership, there is no reason to expect – under *any* Administration – that the interests of corporate managers in policing their own houses will not be given due deference by DOJ. At the same time, there is good reason to be concerned about a structural bias in the flow of information to Congress. At some distant point – perhaps after some future scandal – groups representing shareholders, workers, and other dispersed beneficiaries of white collar criminal enforcement might come forward to join DOJ in opposing the legislative protection considered here. But coalitions of private lawyers and corporate interests are far more easily mobilized on this issue. While their viewpoints are, of course, understandable, they ought not be allowed to dominate decision-making.

I have not, until now, said anything about attorneys fees. This is an issue on which Congress has even less information about at this time. Much attention has been paid to Judge Kaplan's ruling in the Southern District of New York in the KPMG. But his constitutional analysis is, to put it mildly, highly contestable. And I urge this Committee to avoid passing legislation based on one case that has yet to be squarely considered by an appellate court, in a prosecution in which the government has not even had the chance to present evidence of the nature and extent of the criminal conduct charged.

It is true that an outsider would find the world of federal criminal law very strange: an odd combination of overly broad statutes and harsh punishments set against an array of rights and privileges that are generally traded off for leniency or non-prosecution. It is also true, as some have noted, that the both the substantive law of corporate criminal liability and the evidentiary protections offered to corporation by the attorney client and work product privileges are in need of recalibration. And there are many who would gladly jump in to help Congress if it wants to take these projects on. But in the absence of any such Congressional commitment, the targeting for legislative action of this one part of the white collar enforcement regime is troubling and, at least for now, unnecessary.

Testimony before the United States Senate
Committee on the Judiciary
Professor Michael L. Seigel
University of Florida Fredric G. Levin College of Law

Mr. Chairman and Distinguished Members of the Committee:

Thank you for providing me with the opportunity to testify on an issue of considerable importance to the business community and federal law enforcement: corporate criminal liability and attorney-client privilege waiver. I take as my starting point the following question: What policy is in the best interests of the citizens of the United States as taxpayers, consumers, and shareholders in publicly-traded corporations? I am not concerned with the powerful vested interests of prosecutors, corporate boards and officers, attorneys, or accountants.

There can be no doubt that the attorney-client privilege is a central feature in the proper functioning of our system of justice. Nevertheless, the privilege is actually the exception, not the rule. The rule is that the government, acting on behalf of the people, is entitled to "every man's evidence" when attempting to uncover the truth. Moreover, even when the privilege would normally apply, the law has long recognized that sometimes it must give way to more significant interests. For example, the new ABA Model Rules of Professional Responsibility permit an attorney to disclose privileged information if disclosure is necessary to prevent "substantial injury to the financial interests" of another person (MR 1.6(b)(2)). Another example allows lawyers to breach a client's confidence when the lawyer is under a legal or ethical attack (MR 1.6(b)(3)). The question today, then, is whether S. 186 – by prohibiting prosecutors and other federal attorneys from requesting that a corporation *voluntarily* waive its attorney-client privilege to assist in the prosecution of white collar crime – strikes the right balance between the protection of client confidences and the need for effective law enforcement.

I will begin my examination of this issue with an exploration of why entity liability is essential to the successful pursuit of sophisticated white collar crime. That accomplished, I will discuss the many benefits of corporate cooperation with federal authorities. I will then explain how such cooperation often implicates a corporation's attorney-client privilege. I will demonstrate that, although waiver of such privilege should be sought by the government only as a last resort, *sometimes waiver is the only means by which federal investigators and prosecutors can cut to the heart of the alleged criminality in an efficient and timely manner.* That is why I believe that S. 186 is ill-advised. I believe, instead, that the McNulty Memorandum, perhaps with some tweaking around the edges, provides the proper balance between vigorous law enforcement and the prospect of governmental overreaching.

Public Benefits of Corporate Criminal Liability

Corporate culpability achieves significant additional deterrence beyond individual liability. Specifically, corporate liability deters high level corporate officials from creating an atmosphere in which lower-level employees know that criminal conduct is encouraged, but which acts as a shield

for the higher-ups themselves. Managers can foster such an environment in several ways; a typical method is to set productivity targets so high that they cannot be met through legal means, then fire or demote employees who fail to meet them. Employees quickly understand what they need to do to keep their jobs and get promoted, while management hides behind a veil of plausible deniability.

Entity liability reverses this equation. If managers obliquely encourage widespread criminality and the entity itself is targeted and convicted, it will suffer a loss of reputation and revenues, criminal fines, and perhaps even program debarment. Harm to the corporation means harm to the officers. They may lose their jobs, or at least suffer monetary losses such as a reduction in the value of their stock portfolios and perhaps the loss of future salary increases. Certainly their professional reputations will be tainted. Given these prospects, preventing – as opposed to encouraging – criminality within the corporation now looks like the better path to choose.

More specifically, the threat of criminal liability gives corporations an incentive to set up compliance programs with real teeth in them. Absent criminal liability, the decision whether to comply with the law is simply a matter of dollars and cents: Is compliance more or less costly than the cost of civil fines and penalties (multiplied by the risk of getting caught)? Criminal liability, with its negative stigma, raises the stakes to a higher level. It is hard to estimate in advance the degree to which a criminal conviction will harm a corporation's bottom line. The resultant uncertainty undoubtedly makes corporate officers much more risk adverse, increasing the attractiveness of implementing procedures and hiring experts to assure legal and regulatory compliance.

Finally, the threat of entity liability provides prosecutors with leverage to encourage the corporation to cooperate with an administrative or criminal investigation. Because this issue bears directly on the heart of the matter – attorney-client privilege waivers – I will take it up separately.

Public Benefits of Corporate Cooperation

I can attest from personal experience that the prosecution of white collar crime is slow and resource-intensive work. There are numerous reasons for this. First, the crime itself is often very complex. Indeed, sophisticated white collar criminals frequently do all they can to add to the complexity of their crime by disguising what they did beneath layers of accounting tricks, false or fraudulent transactions, deleted records, and second sets of books. In a case of any significance, investigators might face hundreds of thousands if not millions of pages of documents, increasingly in electronic form, that they must sort through to unravel the criminal behavior. This work might take a team of investigative agents and several prosecutors years to carry out.

Second, white collar defendants usually have the resources to hire excellent attorneys who specialize in that kind of defense. These attorneys have the ability to slow down an investigation to a considerable extent. They can object to subpoenas on a whole host of grounds, forcing repeated hearings relating to enforcement. Defense counsel can advise their clients not to give voluntary statements to government investigators and to exercise their Fifth Amendment right not to be compelled to testify in the grand jury absent immunity. If they are coordinating their efforts through a joint defense agreement, counsel can ensure that this lack of cooperation is widespread,

forcing prosecutors to decide which potential witnesses to immunize in a situation of substantial uncertainty. Unless it is fueled by a whistleblower or other inside information, these tactics can slow an investigation to a snail's pace, and perhaps even cause it to stall altogether.

Third, the difficult nature of white collar investigation means that it often must be prosecuted bit by bit, as prosecutors unravel the wrongdoing and work their way up the corporate ladder. Charges are first brought against the lower level employees, who are much more likely to have been caught red-handed, with the hope that their conviction will lead to cooperation against mid-level management. If this succeeds, the mid-level managers are prosecuted with the hope that they will implicate responsible corporate officers at the highest level. If so, prosecutors can finally bring these individuals to justice. The whole process can take many, many years.

A company that chooses to cooperate, however, shifts the balance of power against the alleged criminal activity dramatically. No longer foes, the corporation and the government can team up to unmask the individuals who were at the center of the criminal activity, thereby getting to the heart of the matter quickly and efficiently. With corporate cooperation, the successful completion of a complex white collar prosecution, including resolution of corporate as well as all individual charges, can very well be reduced from a matter of years to a matter of months. This huge efficiency gain represents a significant public good. Far more white collar criminal behavior can be attacked with the same amount of resources devoted to the effort. The efficiency argument is equally strong even when prosecutors erroneously target an innocent company. The fastest way a company can convince government agents of its innocence is to share all pertinent information with them so that they can draw this conclusion themselves.

There is more to be gained from cooperation, however, than mere efficiency. By cooperating, those in charge of the company signal to the company's workforce in no uncertain terms that illegal behavior is not acceptable. Cooperation lets the criminals in the organization know that, although the company may have tolerated their unscrupulous activities in the past, it will not be hospitable to such activities in the future. The company's collaboration with law enforcement makes a statement to the outside world as well, effectively declaring that, when wrongdoing is found in its midst, the company will do the right thing by ousting those responsible and seeing to it that they are brought to justice. Certainly, a business environment in which companies consistently make clear that criminal behavior is unacceptable is in the public's best interest.

Some of the complaints about DOJ's emphasis on corporate cooperation make it sound as if the technique of "squeezing" cooperation from a putative defendant is unique to the white collar setting. This is obviously untrue. American prosecutors have been striking deals with cooperators at least since the nineteenth century. Is the process of convincing a putative defendant to cooperate against others coercive? Of course it is. Does it require the defendant to give up fundamental rights? Again, the answer is, "of course." To facilitate cooperation, a non-corporate (human) defendant must waive his Fifth Amendment right against self-incrimination, along with his Seventh Amendment right to trial by jury, in addition to his right to appeal a guilty verdict. He must also go through the ordeal of being debriefed and prepared to testify against his confederates. He can choose this unpleasant experience or fight the charges. His Hobson's choice is not caused by an unfair or overbearing government; rather, it is the direct result of his prior criminal conduct.

The same is true for a company faced with having to choose between cooperating to minimize the damage done by wrongdoing, on the one hand, and fighting the charges, on the other.

Implicating the Attorney-Client Privilege

When a live human being decides to cooperate with prosecutors, his decision usually has no bearing on the attorney-client privilege. To effectuate his cooperation, the individual must tell all he knows about the criminal activity in question; although this will involve repeating to the prosecutor the facts he told earlier to his attorney, the facts themselves are not attorney-client protected.

The same could be true for corporations. Upon learning about potential criminal conduct by its employees, corporations typically launch an internal investigation. This is the only way the "corporation" can figure out "what happened." If the corporation were exclusively to use non-lawyers as investigators, the results – witness statements, investigators' notes, the final report – would not be attorney-client protected. Nor would they be protected by any other privilege. If the government later undertook an investigation, these materials would have to be turned over pursuant to subpoena.

Of course, corporations typically choose to employ counsel to conduct their internal investigations. This practice is eminently rational. As experts in the legal and regulatory landscape, lawyers are in the best position to advise the corporation whether a crime has been committed and, if so, what course of action it should take. Moreover, by using lawyers to conduct the investigation, the materials generated thereby gain protection under the attorney-client privilege. This gives the corporation the ability to control whether it will reveal such materials to outsiders at a later time through privilege waiver.

In any event, when a corporation decides to cooperate with a federal investigation, much of the assistance it can offer will have no bearing on its attorney-client privilege. For example, the corporation can provide access to non-privileged computer files and documents, including organizational charts, books and ledgers, policy manuals, and internal (non-legal) memoranda. It can also make available for interviews and testimony officers and employees who are willing to speak. Corporate officers, or counsel, can explain to prosecutors how pieces of the puzzle fit together to form a coherent picture of the activity in question. If cooperation of this nature is sufficient, the case can be concluded without any impact on the corporation's attorney-client privilege. As the McNulty Memorandum indicates, this manner of resolution should be the prosecution's goal.

On other occasions, however, this level of corporate cooperation will be of more limited use. Some white collar investigations involve criminality that spans years, implicates multiple individuals, and bleeds across a seemingly infinite array of documents. Worse yet for prosecutors, cases of this magnitude often involve extremely sophisticated schemes that are difficult for an outsider to understand, let alone unravel. In such cases, a corporation might point prosecutors in the right direction without waiving privilege, but this would be of only limited assistance. Only by waiving privilege can the corporation provide substantial assistance to the prosecution.

Arguments Against Privilege Waiver

One argument against privilege waiver is that it will discourage companies suspecting internal criminality from conducting an investigation because the materials generated by the investigation may be used against the company and its employees in a future criminal case. The proponents of this argument contend that, as a result, illegal conduct will be ignored or undiscovered for long periods of time, causing more harm to society than if corporate privilege were treated as sacrosanct. Though not completely without merit, this contention cannot survive careful scrutiny.

As an initial matter, a corporation that suspects criminality in its midst simply cannot afford to ignore it: the risks of regulatory and third party liability are too high. There is, however, an even stronger reason for high level corporate officials to investigate allegations of criminal activity amongst their subordinates: if they don't, and the government initiates a criminal investigation at a later date, the acquiescence of the officials in the criminal activity could subject them to personal criminal liability. One would think that the consequence of facing time in prison provides a strong incentive to act.

A related argument against waiver is that it causes in-house counsel to generate less paper in the course of an internal investigation because of the fear that it will fall into the government's hands at a later date. The power of this argument is limited because, in a complicated case, counsel really has no choice but to retain sufficient records to support and reconstruct her findings. More important, this barn door was opened a long time ago by the Supreme Court in *Upjohn Co. v. United States*, 447 U.S. 383 (1981). The Court held that corporate communications are protected by the attorney-client privilege regardless of the level or title of the employee who consulted with corporate counsel. The Court made clear, however, that the privilege belongs to the corporation as an entity, not to any of its agents. As a result, corporate counsel can *never* predict whether and to whom otherwise privileged documents might be released. Thus, if she is prudent, she will *always* attempt to minimize the records generated by an internal investigation – because of *Upjohn*, not DOJ's McNulty-limited use of waiver requests.

The most troubling arguments against privilege waiver stem from the impact it is said to have on the behavior of corporate employees who face questioning during an internal investigation and the lack of fairness that the prospect of waiver creates with respect to these individuals. These arguments merit careful consideration.

The main reason that an employee would refuse to cooperate with her company under threat of sanction is fear of self-incrimination. The employee might be worried about the prospect of suffering even worse employer sanctions upon discovery of the underlying conduct, or she might be fearful that her words will be used against her in a later criminal proceeding, or both. A potentially guilty employee thus faces a dismal set of options: (1) silence, and likely termination; (2) cooperation, and likely sanctions; and (3) lying, perhaps avoiding liability in the short term, but running the risk of facing worse consequences in the future.

Caught in this trilemma, the employee needs legal advice. If she is a high level officer, she is probably aware of *Upjohn* and will seek advice from a private attorney. If she is relatively

unsophisticated, however, she might believe that, in speaking to corporate counsel, her confidences will be kept and her personal situation addressed. This, of course, is not the case. There can be no question that, if the employee is not made aware of this fact, she has not been treated fairly by the corporation and its attorney. Once again, however, the situation the employee finds herself in is not dictated by the possibility that DOJ might make a future request for privilege waiver. Rather, it rests on the mere ability of the corporation, post-*Upjohn*, to waive privilege voluntarily *in any situation* it sees fit. *Upjohn* puts the employee at risk.

Moreover, the employee's trilemma is of her own making; that is, it is a result of her apparent participation in criminal activity. If she suffers consequences as a result of this behavior – be it termination from employment or a criminal conviction – she is not a candidate for a whole lot of sympathy. Nevertheless, the employee should have the opportunity to consult with counsel, in an absolutely privileged context, prior to making any decisions about her reaction to the corporation's internal investigation. To the extent that the law and legal practice is lacking here, the culprit is not DOJ waiver policy. Instead, it is with the rules regarding when and how corporate counsel must advise an employee that counsel does not represent the employee. In my opinion, these rules should be strengthened to protect employees in this situation.

Some might argue that strengthening such rules would have a chilling effect on internal investigations, thereby decreasing their utility and ultimately causing more corporate fraud rather than less. This is not the case. Undoubtedly, some employees would exercise their option to consult with counsel, which could slow down the pace of an internal investigation. But corporations would still possess considerable leverage to convince employees to be as cooperative as possible. The bulk of that leverage, of course, would come from the threat of the ultimate sanction: termination. Only an employee truly mired in criminality would suffer this consequence rather than cooperate. Thus, in most instances, the corporation should be able to discern the extent of the criminal activity from innocent employees and those whose conduct played only a minor role in it; it can then take any action the situation warrants.

Protecting Against Prosecutorial Excess

None of the foregoing should be taken to suggest that federal prosecutors are immune from abusing their authority. Protections should be in place to minimize the likelihood of such occurrences.

Attorney-client privilege waiver should be a last resort, not a prerequisite to a corporation's cooperation. Because of the important goals served by the privilege, a corporation should be permitted to invoke it if at all possible. Thus, if other means of assisting prosecutors are available to enable them to uncover the core criminality in a reasonable amount of time, such assistance should warrant full credit. Only if all else has failed or is likely to fail should the subject of waiver be broached. The McNulty Memorandum makes a decent effort in this direction, but it could be improved by incorporating an explicit statement that waiver should not be requested unless and until all other means of obtaining the necessary information through corporate cooperation have been pursued to no avail, or when it becomes clear that such means will not be sufficient to uncover the full extent of complex criminality in a reasonable amount of time.

Finally, care must be taken to prevent a corporate employee from being double-teamed by the government and his employer simultaneously. For example, the government should not encourage a cooperating corporation to exercise its authority over an employee to force the employee's cooperation with the government's investigation. This is the behavior that so exorcised Judge Kaplan in *United States v. Stein,* and rightly so. Already, DOJ has exhibited some agreement with Judge Kaplan by prohibiting prosecutors from considering a corporation's payment of its employees' attorney's fees when evaluating the corporation's cooperation. In my view, the McNulty memorandum should go further by making clear that the government will never pressure a company to use any power it holds over an employee (such as the power of termination) to coerce the employee into individual cooperation.

I hope these remarks have been assistance in shedding light on this complex issue. I look forward to taking questions from Committee members.

Testimony of Dick Thornburgh
Kirkpatrick & Lockhart Preston Gates Ellis LLP
Former Attorney General of the United States
Before the
Senate Committee on the Judiciary
Hearing on
"Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege under the McNulty Memorandum"
Tuesday, September 18, 2007

Chairman Leahy, Ranking Member Specter and members of the Committee. Thank you for the opportunity to speak today about the ominous dangers that the Justice Department's McNulty Memorandum poses to the attorney-client privilege, the work product doctrine and the rights of individuals.

Let me state at the outset, that in my view, the McNulty Memorandum is so inherently problematic that there is nothing to be gained by continuing to wait and see how it is implemented. To the contrary, Congress should enact legislation such as S. 186 promptly to restore the attorney-client privilege, the work product doctrine and the Constitutional rights of individuals to their proper places in our system of justice.

A year ago, almost to the day, this Committee received extensive oral and written testimony from Mr. Weissman, former Attorney General Edwin Meese and myself, among others, on the issues at stake here today. We emphasized the fundamental importance of the attorney-client privilege to our legal system generally and to corporate compliance programs in particular. We also explained the corrosive dynamic engendered by federal cooperation policies that provide credit to organizations when they waive the privilege or work product protection. No matter what its procedural requirements or how reasonably the Justice Department may promise to implement it, a waiver policy poses overwhelming temptations to target organizations, often desperate to save their very existence. Prosecutors do not need to issue

express requests for privileged documents to receive them. The same insidious result arises from policies that offer credit to organizations if they take adverse actions against employees that prosecutors deem culpable.

I do not question then-Deputy Attorney General Paul McNulty's good faith in attempting to remedy the widely-recognized flaws of the Thompson Memorandum. Unfortunately, the McNulty Memorandum is only an incremental improvement, and retains most of the basic flaws of its predecessors. For example, the Department emphasizes that the Deputy Attorney General now must personally sign off on a waiver request seeking so-called "Category II information," which the Memo defines as "attorney-client communications or non-factual attorney work product." But the Memorandum includes "witness statements" and "interview memoranda" within the basket of things it styles as "Category I" or "purely factual" information, for which a waiver request requires only the approval of the U.S. Attorney, after consultation with the Criminal Division. The statement of a witness to counsel is a paradigmatic example of the kind of communication the attorney-client privilege was created to protect. And even "purely factual interview memoranda" can reveal what a witness said to a lawyer – again, precisely what the privilege should guard from disclosure. Such memos are also clearly attorney work product. But the McNulty Memorandum explicitly allows prosecutors to deem organizations uncooperative if they do not accede to requests for these kinds of statements and memoranda.

To take another example, the Memorandum broadly states that "[p]rosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment." But a careful reading of the same paragraph reveals that the Department is referring only to cases where a company is legally obligated, by statute or contract, to pay such fees. Where a company chooses to do so voluntarily, prosecutors are still

free to pressure that company to stop, or be regarded as uncooperative. And yet this is exactly what happened in the KPMG case: with a few exceptions, the company did not have a legal obligation to pay its employees' legal fees, but had always done so customarily. Under the reasoning of Judge Kaplan's decision in that case, the McNulty Memorandum is just as unconstitutional as the Thompson Memorandum. And the McNulty Memorandum retains unchanged provisions authorizing prosecutors to draw negative inferences when companies share information with employees, enter into joint defense agreements with them, or decline to fire them if they exercise their Fifth Amendment rights.

There is no point in "giving the Department a chance" to implement the McNulty Memorandum, as some would suggest. Companies know what actions might win them a reprieve from indictment, and thus prosecutors do need to issue any express requests. The fact that companies can get cooperation credit for these actions is the fundamental flaw in the McNulty Memorandum.

S. 186 would forbid government lawyers from seeking waivers of privilege or work product, and from coercing organizations to take specified adverse actions against their employees. Importantly, S. 186 would also forbid government lawyers from "condition[ing] treatment" of an organization on whether the organization waived the privilege or penalized its employees, and from otherwise "us[ing such actions] as a factor in determining whether [the] organization . . . is cooperating with the Government." S. 186 thus addresses the fundamental flaw in the McNulty Memorandum. For that reason, I was gratified this past July to join eight other former senior Justice Department officials, from Republican and Democratic administrations, in writing you, Chairman Leahy and Senator Specter, and your House counterparts in support of S. 186 and its companion H.R. 3013.

Before I close, let me briefly respond to those who argue that legislation like S. 186 improperly or unwisely impinges on the discretion of federal prosecutors. As you know, for a large part of my professional career I either served as a federal prosecutor myself or supervised other federal prosecutors. S. 186 does not in any way impair federal prosecutors from doing their proper jobs. They would remain free to prosecute – or refrain from prosecuting –as warranted by the evidence and the law. In support of such determinations, they could seek any communication or material they reasonably believe is not privileged, and they could accept voluntary submissions by companies of the results of internal investigations. They could also continue to seek other information through Grand Jury subpoenas, immunity agreements, and all the other tools that prosecutors have historically used. They simply could not seek, directly or indirectly, waivers of privileged information.

In all the years that I served as a U.S. Attorney, as Assistant Attorney General in charge of the Criminal Division and as Attorney General, requests to organizations we were investigating to hand over privileged information never came to my attention – and I would have rejected such a request if it had. Clearly, in order to be deemed cooperative, an organization under investigation must provide the government with all relevant factual information and documents in its possession, and it should assist the government by explaining the relevant facts and identifying individuals with knowledge of them. But in doing so, it should not have to reveal privileged communications or attorney work product. This balance is one I found workable in my years of federal service, and it should be restored.

The attorney-client privilege dates from Elizabethan times. In defining the privilege in the corporate context, the U.S. Supreme Court in the *Upjohn* case reaffirmed that the purpose of that privilege is to encourage:

> "full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice. The privilege recognizes that such legal advice or advocacy depends upon the lawyers being fully informed by the client."

Perhaps with prescient insight into recent developments the Court also observed:

> "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all."

Just such uncertainty has been created by the Department of Justice and is only compounded by the McNulty Memorandum.

Thank you and I look forward to your questions.

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September 13, 2007

Senate Judiciary Committee
The Honorable Patrick Leahy, Chairman
The Honorable Arlen Specter, Ranking Member
United States Congress
Washington, DC

RE: Judiciary Committee Hearings on S. 186

Dear Chairman Leahy, Ranking Member Specter, and Members of the Committee:

I think it might be helpful if I begin by introducing myself. I am submitting this report to you as an individual and on a *pro bono* basis. I have been a member of the Delaware Bar for nearly fifty years, having served as a prosecutor, a member of a private firm, Chief Justice of the Delaware Supreme Court, and again (and currently) as a Senior Partner of a private law firm. A sketch of my biographical material appears in the footnote.[1]

[1] The following biographical material is excerpted from the website of my firm [www.weil.com]. Norman Veasey is a senior partner at the firm of Weil, Gotshal & Manges, LLP. He is the former chief justice of Delaware, having stepped down from the Delaware Supreme Court in May 2004, after serving a 12-year term as the top judicial officer and administrator of that state's judicial branch. During his tenure as chief justice, Delaware courts were ranked first in the nation for three consecutive years for their fair, reasonable and efficient litigation environment. Justice Veasey has also been credited with leading nationwide programs to restore professionalism to the practice of law and adopt best practices in the running of America's courts. He was awarded the Order of the First State by Delaware Governor Ruth Ann Minner, the highest honor for meritorious service the state's governor can grant. He has also received various other awards and honorary degrees, as detailed in his curriculum vitae.

As Congress considers passage of the Attorney-Client Privilege Protection Act of 2007, I hope that this report will offer you the opportunity to "hear" from me at least some of the voices and experiences of those who cannot be here to tell you their stories in person. Neither I nor my firm represent any of these entities or individuals in connection with the events related here.

I have been asked to act as a neutral in relating these stories to the Congress by the Association of Corporate Counsel (ACC) and the National Association of Criminal Defense Lawyers (NACDL), representing the Coalition to Protect the Attorney Client Privilege[2] who support this legislation. This anecdotal evidence represents a sampling of the stories of those lawyers for companies who have personally experienced instances of prosecutorial abuses of power in the coercion of the waiver of their clients' attorney client privilege or work product protection or the denial of the rights to counsel or job security protections for their employees in the corporate investigation process.[3]

Chief Justice Veasey was President of the Conference of Chief Justices, chair of the Board of the National Center for State Courts, chair of the Section of Business Law of the American Bar Association, chair of the American Bar Association's Special Committee on Evaluation of the Rules of Professional Conduct (Ethics 2000) and is immediate past chair of the Committee on Corporate Laws of the ABA Section of Business Law. He is a Fellow of the American College of Trial Lawyers. He and his wife, Suzy, have four children and eleven grandchildren.

Justice Veasey received his A.B. degree from Dartmouth College in 1954 and his LL.B. degree from the University of Pennsylvania Law School in 1957. At the University of Pennsylvania Law School, he was a member of the Board of Editors and the senior editor of the *University of Pennsylvania Law Review*.

From 1957 until he took office as chief justice in 1992, Mr. Veasey practiced law with the Wilmington, Delaware, law firm of Richards, Layton & Finger, where he concentrated on business law, corporate transactions, litigation, and counseling. He served at various times as managing partner and the chief executive officer of the firm. During 1961-63, he was Deputy Attorney General and Chief Deputy Attorney of the State of Delaware. In 1982-83, he was President of the Delaware State Bar Association.

[2] The Coalition to preserve the Attorney-Client Privilege includes the American Chemistry Counsel, the American Civil Liberties Union, the Association of Corporate Counsel, Business Civil Liberties, Inc., the Business Roundtable, The Financial Services Roundtable, Frontiers of Freedom, the National Association of Criminal Defense Lawyers, the National Association of Manufacturers, the Retail Industry Leaders Association, and the U.S. Chamber of Commerce. The American Bar Association is prevented from joining coalitions under its internal policies, but works with the Coalition in promoting its goals and the Attorney-Client Privilege Protection Act of 2007.

[3] The Association of Corporate Counsel and the National Association of Criminal Defense Lawyers contacted their membership via email to invite them to participate confidentially in this

I accepted this role because it is clear to me that these lawyers and their clients wish to have their stories heard through a credible neutral party. They believe that this information shows that in a number of cases the government is engaging in inappropriately coercive behavior. The lawyers with whom I spoke are concerned that public identification of their clients could lead to reprisals, and that public disclosure of these stories could further erode their clients' ongoing relationships with prosecutors or enforcement officials with whom they must continue to work. Because their clients are already (or have been) under scrutiny for some alleged or acknowledged failure that has led to a government investigation, many are concerned that they would be professionally remiss if they stepped forward publicly in a way that could identify their clients and further damage their clients' interests.

I have spoken personally to each lawyer whose information appears in this report. The information provided to me by the lawyers is *their* information, not mine. I have not independently verified the accuracy of the underlying facts.[4] I do not submit this report as an advocate for any one position or as a partisan complaining personally of government practices. I offer this report solely as a neutral, whose responsibility is solely to bring forward these stories on behalf of the lawyers who cannot tell you them in person.

In sum, while many respondents acknowledged that the DOJ and other government agencies have made strides to address these concerns by issuing the McNulty Memorandum, those presenting the post-McNulty information believe that practices under that Memorandum often fall short of providing meaningful protections from prosecutorial abuses in the field. Thus, those reporting these events believe that the McNulty Memorandum may not be fully effective in erasing practices that it was designed to address.

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project if they had anecdotal evidence to recount. ACC created a confidential website reporting form that was "linked" to the email. After explaining my role and what the project to collect this information entailed, it offered respondents the option to submit their contact information, with the promise that they would be contacted to collect their story, draft a written summary of their experience, and then engage in a conversation with me to allow me to verify that the information summarized was an accurate rendering of their experience, that they certified that it happened, and that they had personal knowledge of the facts/experience. This report will not attribute these stories to any company or lawyer, nor will I share the identity of those with whom I certified the accuracy of these reports and to whom I promised confidentiality. My role was to perform the function of a neutral narrator, without endangering any of the respondents or their clients' interests.

[4] As noted above, neither I nor my firm represents these entities or individuals in connection with the stories relayed in this report, although members or associates in my firm may have represented one or more of these parties in unrelated matters.

The Information

Some of the events that are recounted here occurred before, and some after, the Department of Justice (DOJ) issued the McNulty Memorandum in late 2006. The following events described to me are presented somewhat in reverse chronological order, beginning with events that took place (at least in part) after the McNulty Memorandum was issued in December 2006 ("post-McNulty cases"). There are many more stories of abuses that took place or began before the issuance of the McNulty Memorandum ("pre-McNulty cases"), some of which are next included here. These pre-McNulty stories are included to provide a baseline, so that post-McNulty conduct can be compared to examine if the McNulty Memorandum has made meaningful changes.

(1) Allegation under investigation: Fraud
Agency: US Attorneys Office – East Coast

Facts: Begun pre-McNulty, continued post-McNulty – Allegations of fraud arose in the corporate setting. The company hired outside counsel to investigate the allegations and met with the U.S. Attorneys' office. The company has not ultimately been charged, but no declination letter has been received.

This was not a case that involved a panoply of fraud allegations (they were discrete). During the first meeting with prosecutors *after* the McNulty Memorandum had been issued, the prosecutor asked the company to turn over *everything* (including privileged material) – to look behind the internal investigation. When the process required by the McNulty Memorandum was raised by company counsel, the prosecutor's response was, "I don't give a flying ----" about the policy, and further said that the burden was on the company to "appeal" the waiver request up the chain of command at DOJ. [This, of course, is not an accurate reading of the McNulty process.] During continued negotiations, the prosecutor's continued refrain was "I don't care about the [McNulty Memorandum] policy." Ultimately, the client decided to "split the baby" and turn over some material while continuing to assert confidentiality as to some key material.

(2) Allegation under investigation: Accounting fraud
Agency: US Attorneys Office – East Coast

Facts: This situation took place post-McNulty. The company hired outside counsel to investigate allegations of accounting fraud. The company eventually met with representatives from a U.S. Attorneys' office. No charging decision has been made at this time.

During the initial meeting with prosecutors, outside lawyers presented prosecutors with an oral report of the internal investigation – this report included names of individuals who were investigated and other material that was also given to the Board of

Directors, including the conclusions drawn by the lawyers who investigated the matter. The oral presentation, however, did not include accounts of what each witness said.

The prosecutor asked for *all* interview notes and *all* supporting documents, many of which were protected by the attorney client privilege or work product doctrine. Outside counsel responded that the McNulty Memorandum did not permit such a request since, among other reasons, the witnesses/employees were available for interviews. The prosecutor initially responded that the prosecutor was unfamiliar with the McNulty Memorandum's provisions. After presumably becoming familiar with the memo, the prosecutor said that the prosecutor's view of "cooperation" was that the company would be considered to be cooperative if the corporation would waive the privilege and the prosecutor did not actually have to seek higher approval under the McNulty Memorandum in order to demand waiver. [This, of course, is not an accurate reading of the McNulty process.] The company "stuck to its guns" and did not provide the material. The company has not yet received a declination letter since apparently no charging decision on the entity has been made, and the prosecutor has not yet indicated whether individuals may still be charged.

(3) Allegation under investigation: Financial fraud
Agency: U.S. Attorneys Office - East Coast

Facts: This situation took place post-McNulty -- Questions were raised as to how a retail sale that resulted in a merger was ultimately booked. An outside law firm was hired and advised the company that an investigation was appropriate, but that a written report should not be issued given the current climate of privilege waiver. The firm's investigation concluded that there was no material accounting failure, but that internal controls should be improved. In the meantime, a whistleblower alleged that top managers were committing fraud against the company. The company self-reported both of these issues to the U.S. Attorneys' office.

The Assistant United States Attorney ("AUSA") with whom the company met immediately requested the results internal investigation in writing, including any material protected by work-product doctrine and the attorney-client privilege. The company instead provided "hot documents" and an oral synopsis of the facts as adduced in the investigation. When the case was referred to a different branch office within the same district, the company was again asked by a different AUSA for a written internal report which would include privileged and work product information, without consideration to whether the material already provided contained sufficient material for the conduct of the government's inquiry. Company counsel asked the AUSA if his office planned to follow the McNulty Memo guidelines on requesting supervisory permission for demanding privilege waiver, and the AUSA said that *should not be necessary*. No charging decision has been made at this time.

According to counsel, the pressure placed on the company to produce, without McNulty reporting-up protections, is now more subtle, but nonetheless palpable.

(4) Allegation under investigation: Environmental Crime
Agency: Main DOJ Environmental Crimes

Facts: This situation took place post-McNulty. The company self-reported a possible environmental violation. The government used the McNulty Memorandum as an offensive strategy to obtain as much information as possible from the company's outside counsel. The initial meetings with environmental enforcement lawyers occurred after the McNulty Memorandum was issued. The company and its outside counsel were told directly that if it wanted the full benefit of "cooperation," that cooperation would have to be "total" under DOJ criteria, and that the company would have to jump through "all the hoops." The conversation continued until the company finally offered to produce certain privileged material, which in the eyes of the company was not a voluntary offer. Then, the prosecutors explained what little privileged information they would *not* need to see, rather than what they *did* need to see Counsel took this instruction as a clear indication of a fishing expedition into privileged material. No advice of counsel defense or any other strategy has been asserted that would suggest a necessity for reviewing privileged advice in order to conduct an investigation. Company counsel concluded that the government was setting them up to take away the benefits of having self-reported and having produced all the privileged material that was necessary if they did not turn over *everything*. Moreover, the government denied that they had to write any memos to higher authority under McNulty.

(5) Allegation under investigation: Compliance failure in a regulated industry
Agency: Main DOJ and SEC

Facts: Pre-McNulty 2006 and still pending today (post-McNulty) – The company voluntarily self-reported a Foreign Corrupt Practices Act (FCPA) violation that involved bribes passed between an employee in an overseas subsidiary and a local official. The violation was brought to the General Counsel's attention by the internal controls reporting mechanisms (hotline) employed by the company for these purposes. It was a relatively small case involving a low level "target" as the employee in question. As a result, the company was able to complete about 75% of its own internal investigation (through an outside law firm) before it contacted the government. Thus, the company knew the scope of issues and people involved before anyone expected them to respond to demands or offers of the government to expedite the case while the facts and players were still relatively unknown.

The company's approach, determined by the Board of Directors, was to offer the government full cooperation, providing not only all factual material requested and access to employees, etc., but also certain key privileged documents that the company and the firm were prepared to release to expedite the government's review of the case. As a part of this production of discrete privileged material, the company agreed to provide attorney notes and memos of interviews with employees whom the company had targeted or

considered to be fact witnesses. The accused employees had already been dismissed for what the company believed were their clear violations of corporate policy and law. The company specifically noted, however, that it would not include in their disclosure the memos, presentations, and conversations discussed between the Board and the attorneys reporting this matter, since the Board's decision is all that was important to the disposition of the case, and their decision was to cooperate.

The government lawyers requested counsel to inform them whether the company was paying for lawyers to represent individual employees who were being requested to appear as fact witnesses in the US (many of whom had to travel to the US to meet with the government). They were told: "Yes, the company is paying for that, and it's in your [the government's] interest, or these employees would not likely come and certainly might not want to talk, not knowing what the implications might be to them personally, especially as non-US citizens." To this the government lawyers further queried: "What if an employee refuses to talk to us?" To this the company's lawyers answered: "They must come to talk to you under our policies, but we advise them that they can take the Fifth if they so choose – it's their right."

Counsel's assessment is that even though the company has voluntarily come forward, has proven compliance systems that worked, has conducted an investigation and shared the results, has delivered privileged material, and has taken a variety of remedial measures, including firing the employees who took part in the violation, there is still a hesitancy on the part of the government to end the investigation, and it is still open. Even though the counsel agrees that the government lawyers have been reasonable and responsible to date (having been offered just about everything they could possibly ask for and more), there is no conclusion to the matter and counsel still fears that the prosecutors could conclude that despite the sufficiency of what's been provided, they don't have *all* privileged material. As a result, counsel believes that the government does not seem to be able to decide to let the matter go to remedy and rest. Counsel states: "The only reason we offered privileged material in the first place was our complete belief that nothing less than full waiver would be demanded, and that if we could choose the privileged documents that were relevant and limit disclosure to that -- along with all the factual files we readily produced – that we'd be better off than if we waited for the blanket privilege disclosure demand under Thompson."

Counsel also noted: "They have all the leverage in the relationship between us, and we feel as if we had to give the bully our lunch money before he beat us up on the playground, and he still hasn't decided if he's going to beat us up anyway. In this case, the prosecutor didn't demand privilege waiver, but he sure did tell us they appreciated it, so much so that it seems they're waiting to see if there's any more we'll give without their having to outright ask, given that they are now governed by the McNulty Memo process." The matter is still pending and undecided; the government has not indicated that it needs anything more (factually) to complete its assessment and close the case. And thus, counsel says he wouldn't be surprised if the DOJ came back for the privileged board reports before the day is done. He also believes that if DOJ doesn't ask for it, the

SEC might happen to bring up a request for it under Seaboard's authority, share it with the DOJ, and the end-run around the McNulty Memo would be complete."

(6) Allegation under investigation: Consumer fraud
Agency: U.S. Attorneys Office – Midwest

Facts: The case arose pre-McNulty, under the Thompson Memorandum, and was eventually settled under the terms of a deferred prosecution agreement. The AUSA made it a condition of settlement that the company waive its attorney client privileges and work product protection, which the company did not wish to do because of their concerns about resulting waivers cutting a path into the company's confidential files for possible third party litigation.

The company repeatedly requested the prosecutor to articulate what documents or information was sought, in an effort to figure out how to get that information to the AUSA as a factual production that did not entail blanket privilege waivers. They also asked the prosecutor to indicate which privileged materials were targeted to see if a smaller or limited production of privileged material was possible. It was made clear to the company that a blanket waiver was required as a condition of settlement.

(7) Allegation under investigation:
Environmental crime, obstruction, false statements
Agency: Main DOJ Environmental Crimes

Facts: The case took place pre-McNulty under the Thompson Memo. It originated with a series of media reports about the company. The prosecutors turned quickly to using the company to put enormous pressure on employees, pressuring the company to fire employees who had received target letters, even though the company had not had the opportunity to do its own internal investigation or consider the merits of the allegations. The company was also pressured to provide the government with a broad privilege waiver in exchange for a settlement.

At one point during the lengthy negotiation of this case, the company and line prosecutors reached an agreement about privileged material, and it was decided that a limited amount of fact-based attorney work-product would be supplied. Upon reviewing this agreement, the line prosecutors were overruled by supervisors who maintained under the terms of the Thompson Memorandum that the company must turn over *all* relevant privileged and work product material in exchange for a settlement. The company refused, and the company was indicted; the same negotiations and the same result ensured in separate federal districts with respect to different facilities. It was clear to defense lawyers involved in this case that prosecutors wanted the broad waiver to "fish" for information against the individuals (not the entity) who were ultimately charged and were alleged to be the underlying problem. But both the individuals and the company were indicted, tried, and were found guilty and/or pleaded guilty to violations that were largely comprised of false statement and obstruction charges, as distinct from charges

based on any substantive/environmental crime wrongdoing. The key point that really concerned counsel about the DOJ tactics in this matter is that they were pressing for a waiver of the privilege here. At the same time they were hypocritically saying publicly that they never press for waiver of the privilege.

(8) Allegation under investigation: compliance violation
Federal Regulatory Agency

Facts: Pre-McNulty. In the conduct of a non-public investigatory audit, a flaw in the company's software system (regulating data security) was detected. Because the data related to customers, the flaw was considered a violation by regulators of the company's industry. The company engaged an outside law firm to review past practices to determine if there were process problems that were more significant or that were not resolved by the fixes put in place by the company. Regulators demanded the outside counsel's report, which the company did not wish to produce because it was privileged. The company's counsel repeatedly asked the enforcement officials what they wanted to know, since the company's lawyers assured them they would be happy to provide them with any facts sought. Enforcement officials could not or would not articulate their needs. So, the company's counsel told the enforcement official, in effect, that "I can't give you the report, but if you ask me these specific questions, I can give you answers that will provide you with all the information that's in the report that you need, and I can provide that without waiving my client's privileges if you'll just ask for these facts and not ask for my privileged lawyer's report."

Regulatory officials responded by reminding the company's counsel of the enforcement environment and pressures under which they were working. They then explained that the Thompson Memo was the authority that agencies such as theirs looked to in order to determine a company's cooperation, and that privilege waiver was therefore necessary since it was a listed factor for cooperation (rather than a mere item on a discretionary list to consider). The officials further threatened that if the company did not offer the privileged documents, that such refusal is a bad indicator of "cooperation." The regulators alluded to the availability to them of a cease and desist order in such matters where there is a lack of cooperation. [In the industry involved, a cease and desist order can mean an immediate and large-scale hit to the company's stock price and disastrous impact to the company's reputation in the investment and business community].

The company's counsel reported that the irony was that the privileged report was exculpatory, but its disclosure would have waived the privilege in any third-party law suits that could follow. They paid the fine. Government counsel's comment was that the Thompson Memo was all the authority they felt they needed to demand the waiver of the company's privilege and work product rights.

(9) Allegation under investigation: Conspiracy to disclose national defense information (receipt of NDI) by a Non-Profit Corporation
Agency: U.S. Attorney's Office – East Coast

Facts: The case took place pre-McNulty, under the Thompson Memorandum. Individual defendants, along with the Non-Profit as an entity, were investigated as part of a sting operation; the two individual targets were ultimately charged with conspiracy to disclose "NDI" because of their *receipt* of such information. The Non-Profit was ultimately not charged, but before that result was reached, the Non-Profit was forced to agree to conditions that included firing the individuals and cutting off their attorneys' fees.

According to court documents, then-U.S. Attorney Paul McNulty explicitly told the Executive Director of the Non-Profit that it needed to fire the individuals, and explicitly cited the Thompson Memorandum as a guidepost for such cooperative steps. The next business day, the Non-Profit fired both individuals and terminated its joint defense agreement with them. The government then inquired pointedly into whether the Non-Profit was continuing to pay the former employees' attorneys' fees. The Non-Profit responded that it was, pursuant to its own by-laws. Moreover, no one had found them guilty of a crime, nor had they pleaded guilty. Prosecutors also asked whether the Non-Profit was providing severance pay and health benefits to the individuals (one of which suffers from a heart condition that had required recent surgery). Defense counsel for one individual confirmed that these requests were made by prosecutors to counsel and counsel responded in the affirmative.

Two months later, both former employees had been cut off entirely from benefits and payment of attorneys' fees that had been previously provided by the Non-Profit. The individuals were indicted. Both filed motions arguing that their Sixth Amendment right to counsel was violated by the government's conduct as described above. U.S. District Judge T.S. Ellis, III, ruled that the government's pressure was "unseemly and unjust" and that DOJ policy in this area was "obnoxious in general" and "fraught with the risk of constitutional harm." He held, however, that the defendants had not been *actually* prejudiced by their resulting inability to have the entity pay for counsel because, in fact, they were lucky enough to have top defense counsel continue representing them zealously even though payments had ceased. The indictments of the individuals are still pending.

[For an interesting comparison of results where the judge found that government pressure to cut off individual defendant's fees *was found to* affect the employee's constitutional rights to mount a defense, see the ongoing case of the KPMG partners under scrutiny for alleged problems in tax shelters they'd promoted in *United States v. Stein* (2007 U.S. Dist. LEXIS 52053).]

(10) Fraud allegation under investigation
Agency: Originally, the SEC, then joined by West Coast U.S. Attorney's Office

Facts: Begun pre-McNulty under the DOJ's Thompson Memo and the SEC's Seaboard Report – [The Seaboard Report is the SEC's internal policy statement that parallels the DOJ's Thompson Memo, listing criteria for cooperation in the investigation of an SEC enforcement matter and including both privilege waiver and a variety of actions to be taken against employees who are targeted, but not yet found guilty of crimes.]

The company responded to an SEC subpoena requesting information on supplier transactions pursuant to the SEC's investigation of the supplier company (and its high-profile CEO) who were the targets of an alleged securities reporting violation. The company complied. One year later, the AUSA and the SEC asked to speak to one of the company's product managers, which the company facilitated. The AUSA and the SEC enforcement lawyer involved then told the company's in-house lawyers that they should consider getting this employee an attorney.

The company began an investigation. The investigation showed that other employees involved may have engaged in problematic behavior with the targeted company and that their internal controls had not "bubbled up" this matter. The general counsel went to the Board of Directors and presented an extensive discussion of the problem; the result was a decision by the Board to cooperate fully with the government and to provide whatever factual information was needed (and, in fact, to provide even more than what was requested initially by government investigators). This was an effort to admit to the failure, commit to fixing the problems, and to move past this incident as quickly and cleanly as possible. The SEC ultimately recommended a cease and desist action and a disgorgement.

At the first meeting with both the SEC lawyer and the AUSA when a written report of the internal investigation was going to be done and when it was going to be produced to the government, they made repeated demands for a privileged written report that the general counsel and the forensic accountant were preparing. Neither the AUSA nor the SEC lawyer would explain why the privileged material was necessary to pursue a case against the individuals or the corporation or the original targeted company.

In the context of demanding the privilege waiver, the AUSA would periodically make threats about bringing indictments against the individuals and the company. Counsel for the company noted that while the SEC staff was tough on the company, they were uniformly professional in their approach, and they credited the company for the cooperative behavior it had displayed, even as they continued to argue for privileged material production. Company counsel was, however, extremely offended by the AUSA's "bullying" behavior, and what he labeled as an unprofessional "loose cannon" approach which indicated less interest in conducting an investigation than in putting a quick notch on his prosecutorial belt. Counsel intimated that even the SEC lawyers

involved in this case were dismayed by the prosecutors' approach and tactics, finding it unhelpful and inappropriate to the quick resolution of the problem.

(11) Allegation under investigation: Long-running pharmaceutical investigation of a corporation.
Agency: East Coast U.S. Attorney's Office

Facts: Pre-McNulty investigation. Although the company had provided millions of electronic and paper documents, the government, through a United States Attorney (not an AUSA) demanded *everything*, including *all* privileged material in order to "cooperate." The U.S. Attorney even told counsel and the CEO, in effect, that the CEO should direct the company's counsel to waive the privilege "so I can see if you have a good company." Counsel for the company kept asking for specific subject areas where the privilege waiver might be necessary, making clear that a broad, wholesale waiver was not necessary and could have adverse consequences in third party civil suits. The U.S. Attorney insisted on wholesale waiver and that failure to cooperate "will have consequences." Then the U.S. Attorney said, in effect, that "your civil suits are not our problem," insisting that wholesale waiver would "cleanse the company." Ultimately, the government and the corporation agreed to a targeted, discrete waiver in a court proceeding, sanctioned by a court order. Yet the government continued to insist for a time on a broader waiver. The case was, however, ultimately resolved.

(12) Fraud investigation of an individual. East Coast prosecutors and SEC enforcement officials.

Facts: Begun Pre-McNulty and pre-*Stein*. Counsel for an individual employee of a corporation was caught up in a botched investigation that conflated individual and corporate legal representation and the various attorney client privileges. The individual was indicted. The corporation settled with prosecutors. Part of settlement required company to fire the individual and to cut off his legal fees. While *United States v. Stein* was pending before Judge Kaplan in another federal district (SDNY), the individual moved on 6th Amendment grounds challenging the denial of attorneys fees. Counsel sought an evidentiary hearing on the circumstances of the government's requirement to the corporation that it fire the employee and cut off legal fees necessary for his criminal defense. On the eve of the Motion for an Evidentiary Hearing and just days before Judge Kaplan's first decision in *Stein*, the government agreed to permit the corporation to pay the individual's legal fees. The individual's criminal prosecution proceeded and resulted in a defense verdict of "not guilty." The SEC action against the individual is proceeding and is scheduled for trial.

Conclusion

I applaud the efforts by the government's line prosecutors and enforcement professionals to help society ensure that corporate and individual crimes are investigated and that wrong-doers are brought to justice. Nevertheless, if demands for privilege

waiver and the denial of employee rights become abusive tactics, they allow some prosecutors and enforcement professionals to assume the role properly reserved for impartial courts and judges. As a former Chief Justice of the State of Delaware, a former President of the Conference of Chief Justices, and a former State Prosecutor (albeit many years ago), it is my view that the defense rights of employees and decisions regarding the application of the attorney-client privilege and the work product doctrine are protections that courts, not the executive branch, should regulate.

Thus, this debate is not about protecting guilty company executives or about unfairly tying the hands of government investigators. Indeed, in my view, nothing in the legislation before the Congress prevents a prosecutor or enforcement official from vigorously and professionally investigating the facts or bringing the guilty to justice. Nor does it prevent or inhibit a company or an individual from cooperating with prosecutors in the conduct of that investigation. In fact, vigorous investigation and a spirit of cooperation should be fostered. Rather, the question we address here is whether this Congress should enact legislation that will require prosecutors to return to practices that successfully served them for decades and were acknowledged as fair to all parties involved.

Respectfully submitted,

E. Norman Veasey

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Written Testimony
United States Senate Committee on the Judiciary
"Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum"
October 18, 2007

Mr. Andrew Weissmann
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Good morning Chairman Leahy, Ranking Member Specter, and members of the Committee and staff. I am Andrew Weissmann, a partner at the law firm of Jenner & Block in New York. I served for 15 years as an Assistant United States Attorney in the Eastern District of New York and had the privilege to represent the United States as a Director of the Department of Justice's Enron Task Force and Special Counsel to the Director of the Federal Bureau of Investigation.

Not long ago, as the Director of the Enron Task Force, I was an eyewitness to how much collateral damage can be wrought by an arrogant corporate culture, unburdened by concern for either law or ethics. Seeing the seventh largest corporation in America implode in a matter of weeks led Congress and the Department of Justice to take swift action. Many of those measures were beneficial and over-due. But as with many initiatives taken to address a sudden crisis, the passage of time allows the people who have to live with those new strictures to detect fault lines.

The DOJ policy promulgated in 2003 as the "Thompson Memorandum" was one such initiative undertaken to respond to the shocking events at Enron and WorldCom; it governs the factors that federal prosecutors must follow in deciding whether to charge a corporation. It was intended to put teeth in a company's claim to being a responsible corporate citizen cooperating with law enforcement. The Thompson Memorandum, while surely undertaken in all good faith, contained provisions that have not all proved beneficial in practice. Although the DOJ has sought to remedy certain provisions of the Thompson Memorandum through the McNulty Memorandum in December 2006, real problems still remain. I will make four points regarding the McNulty Memorandum.

1. The Corporate Charging Decision

The advisability of promulgating a statutory solution to the infringement of the attorney-client privilege by the DOJ must be examined in the context of the unique nature of the corporate criminal charging decision.

First, the mere indictment of a company carries with it the *risk* of it being the equivalent of a death sentence for the company and resulting in severe consequences to hundreds or even thousands of innocent people. One of the lessons corporate America took away from Arthur Andersen's demise in 2002 is to avoid an indictment at all costs. A criminal indictment carries the risk that the market will impose a swift death sentence -- even

before the company can go to trial and have its day in court. In the post-Enron world, a corporation will thus rarely risk being indicted by a grand jury at the behest of the DOJ. The financial risks are simply too great. Indeed, the DOJ itself recognizes as much since it is largely due to these unique consequences that the DOJ has special guidelines for charging a corporation.

Second, a corporation of any significant size will inevitably be subject to possible criminal prosecution at some point during its existence. This is so because of the current overbroad standard of criminal corporate liability under federal common law. A corporation can be held criminally liable as a result of the criminal actions of a single, low-level employee if only two conditions are met: the employee acted within the scope of her employment, and the employee was motivated at least in part to benefit the corporation. No matter how large the company and no matter how many policies a company has instituted in an attempt to thwart the criminal conduct at issue, if a low-level employee nevertheless commits such a crime, the entire company can be prosecuted. This standard for vicarious liability is not the creation of any Congressional statute, nor of any decision of the Supreme Court – which has never ruled on the issue of the scope of vicarious criminal liability applicable to corporations. It is the product of a series of appellate rulings that have defined the legal standard and become accepted wisdom.[1]

In light of the Draconian consequences of an indictment and the fact that the federal common law criminal standard can be so easily triggered -- despite a company's best efforts to thwart criminal conduct -- prosecutors have enormous leverage. To avoid indictment, corporations will go to great lengths to be deemed "cooperative" with a government investigation. KPMG is a prime example, and one that has been spotlighted in the decisions by Judge Kaplan in the *United States v. Stein* case. In those decisions, the Court essentially equated the actions of the firm to those of the government, because the disproportionate power of the government was deemed to have turned the company into a mere amanuensis of the prosecution. The Bristol Myers prosecution is another notable example illustrating the effects of such disproportionate power: the company

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[1] The only Supreme Court decision to have directly dealt with a similar issue, *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481 (1909), merely held that it was constitutional for Congress to enact a statute permitting imputation to a company of its agents and officers' illegal grants of rebates for purpose of finding *corporate* criminal liability. *See generally* Weissmann, Andrew, "Rethinking Criminal Corporate Liability," Indiana Law Journal, Vol. 82, No. 2, Spring 2007, available at SSRN: http://ssrn.com/abstract=979055. For representative appellate decisions, see: *Dollar S.S. Co. v. United States*, 101 F.2d 638 (9th Cir. 1939) (affirming steamship corporation's conviction for dumping refuse in navigable waters despite the company's extensive efforts to prevent its employees from engaging in that very conduct); *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656 (2d. Cir. 1989) (affirming conviction despite the fact that bona fide compliance program was in effect at company); *United States v. George F. Fish, Inc.*, 154 F. 2d. 798 (2d Cir. 1946) (affirming corporation's conviction based on criminal acts of a salesman); *Riss & Co. v. United States*, 262 F.2d 245 (8th Cir. 1958); *Texas-Oklahoma Express, Inc. v. United States*, 429 F.2d 100 (10th Cir. 1970); *United States v. Dye Constr. Co.*, 510 F.2d 78 (10th Cir. 1975).

there acceded to a request by the lead prosecutor to endow a chair at the prosecutor's alma mater in order to resolve the investigation short of indictment.

This background explains why the charging decision at DOJ is so critical, as a company cannot afford to risk being indicted and never having its day in court. Thus, I disagree with suggestions that the pressures on a company are analogous to the pressures that the DOJ brings to bear routinely with respect to individuals, who are offered reduced sentences if they plead guilty and waive their numerous trial rights. An individual is subject to liability for conduct that she controls absolutely; not so, a corporation. A company can face indictment based on the conduct of any one of thousands of employees, and regardless of its efforts to detect and deter the conduct at issue. An individual also does not risk a death sentence *before* she ever stands trial. And the potential collateral consequences to an individual, although they can be painful and severe, pale in comparison to the scope of such consequences in a corporate prosecution where innumerable innocent victims can suffer such a fate.

Because of the unilateral nature of the charging decision, the standard for corporate criminal liability, and the collateral consequences at stake, it is vital that the government's policies governing that decision be subject to the strictest scrutiny within the DOJ and here by this committee. I turn now to where I believe those DOJ policies have been wanting and would be remedied by the Senate bill.

2. Lack of Oversight of Corporate Charging Decisions

One of the main flaws in the McNulty Memorandum, which was equally true of the Thompson Memorandum and the Holder Memorandum before it, is that the DOJ does not require the decision to charge a corporation to be reviewed in Washington at Main Justice. Such a lack of national oversight is bewildering given the wide array of relatively minor decisions that are overseen by Main Justice and the enormity of the potential consequences of charging a corporation. This lack of oversight is unfortunate, since I know from personal experience that there is considerable expertise in the leadership of the Criminal Division and elsewhere at Main Justice in wrestling with these issues. That knowledge and guidance should be brought to bear on these difficult judgment calls regarding when and how to prosecute corporations.

Thus, although the theory of the McNulty, Thompson, and Holder Memoranda is a good one -- setting forth the criteria that should guide all federal prosecutors in deciding when to seek to charge corporations -- in practice individual prosecutors are left to interpret and implement its "factors" in making the ultimate decision as to how to deal with corporate criminality. Wide variations currently exist. Indeed, even after the passage of the McNulty Memorandum there is good reason to believe that little has been done to train federal prosecutors on its dictates and to measure diligently compliance with its provisions. Even assuming good faith and dedication to public service by all federal prosecutors, they are not receiving the necessary guidance or being sufficiently monitored. My experience alone in defending corporate cases under the Thompson and McNulty Memoranda regimes is that line AUSAs have scant knowledge of their

provisions or inclination to follow their dictates. The DOJ would never tolerate such a situation in a corporation it was investigating – a mere "paper" compliance program would be seen for what it is. The DOJ should require no less of itself: it should assure that its strictures are not merely on paper, but are consistently carried out in the field, with detailed statistics to measure and demonstrate compliance.

National guidance and oversight in this area is needed. In spite of the potentially devastating consequences of a corporate indictment, current DOJ policy does not require the decision to indict even the largest of companies to be reviewed in Washington. This is largely inexplicable since myriad decisions are subject to such review, including whether to charge an individual with a RICO offense, whether to subpoena an attorney or a member of the press, whether to apply for immunity for a grand jury or trial witness, or how to settle tax and forfeiture counts. Indeed, individual death penalty cases are admirably required to be subject to searching scrutiny at Main Justice to be assured that there is consistency and no hidden local bias in the decision-making process. Yet, a potential corporate death sentence receives no similar national oversight. Similarly, detailed records are kept regarding death penalty determinations, yet no such detailed records appear to be extant with respect to corporate charging decisions. It is ironic that one of the key innovations in the McNulty Memorandum was to have national oversight of decisions regarding requests for waiver of the attorney-client privilege in corporate investigations. Yet, the larger decision regarding whether to charge the company receives no such scrutiny.

3. Penalizing Assertions of a Constitutional Right

The McNulty Memorandum, like the Thompson Memorandum before it, leaves completely intact the government's ability to penalize a company that does not take punitive action against employees for asserting a constitutional right to remain silent, and reward those companies that do take such action. Under the McNulty Memorandum companies may be deemed by the DOJ as uncooperative simply because they do not fire employees who refuse to speak with the government based on their assertion of the Fifth Amendment.[2] By contrast, the bill introduced by Senator Specter in December 2006 and

[2] *Compare* McNulty Memo at § 7.A ("[A] company's disclosure of privileged information may permit the government to expedite its investigation. In addition, the disclosure of privileged information may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure.") *and id.* § 7.B.3 ("Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus . . . a corporation's promise of support to culpable employees and agents, *e.g.,* through retaining the employees without sanction for their misconduct or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.") *with* Thompson Memorandum, § VI cmt. ("Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus . . . a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees [or] through retaining the employees without sanction for their misconduct, . . . may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.").

reintroduced this January would appropriately prohibit the government (not just the DOJ) from considering an employee's assertion of the Fifth Amendment in evaluating whether to charge the individual's employer.[3]

The Senate bill would uphold the finest traditions of the DOJ by allowing it to strike harsh blows but fair ones in combating corporate crime. The bill is a recognition that the issue raised by current DOJ policy is not about how "Big Business" behaves; it is about how the government does. Indeed, the current DOJ policy should be of concern to all of us, since it impacts the rights of all employees, not just employers. Any person who is employed by a public or private company, a partnership, or a non-profit could get caught up in an investigation into possible infractions as serious as embezzlement and market manipulation or as murky as alleged violations of arcane tax or OFAC rules.

The ability of the DOJ to weigh in on an employee's assertion of the Fifth Amendment has garnered significant attention recently by virtue of the second of two decisions by Judge Lewis Kaplan of the Southern District of New York, in the so-called KPMG tax shelter case.[4] Judge Kaplan addressed two of the Thompson Memorandum factors that govern whether to indict a company -- whether a company elects to pay the legal fees of its employees and whether it punishes personnel who assert the Fifth Amendment privilege against self-incrimination during a criminal investigation. The McNulty Memorandum addressed to a large degree the legal fees issue; it did nothing to protect the constitutional rights of employees by prohibiting prosecutors from goading companies to fire employees who assert their Constitutional rights.

Judge Kaplan's opinion highlights that this DOJ policy -- and the way it is wielded by federal prosecutors -- is causing companies to punish employees for merely asserting their constitutional right to remain silent. In the second *Stein* decision, issued in July of last year, Judge Kaplan concluded that certain statements made to the government by KPMG employees had been coerced and thus obtained in violation of the Fifth Amendment. KPMG had threatened certain employees that if they did not cooperate with the government's investigation they would be fired or their legal fees would not be paid. The court concluded that KPMG took those steps at the behest of the government and that the Thompson Memorandum precipitated KPMG's use of economic threats to coerce statements from its employees. Under these circumstances, the court found that KPMG's conduct could be legally attributed to the government. Because the government had coerced the pre-trial proffer statements of two defendants – coercion that was only

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[3] The Attorney-Client Privilege Protection Act of 2006, S. 186, 110th Cong. § 3 (2006) (providing that "[i]n any Federal investigation or criminal or civil enforcement matter, an agent or attorney of the United States shall not . . . condition a civil or criminal charging decision relating to a organization, or person affiliated with that organization, on, or use as a factor in determining whether an organization, or person affiliated with that organization, is cooperating with the Government . . . a failure to terminate the employment of or otherwise sanction any employee of that organization because of the decision by that employee to exercise the constitutional rights or other legal protections of that employee in response to a Government request").

[4] *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006); *United States v. Stein*, No. S1 05 Crim. 0888 LAK, 2006 WL 2060430 (S.D.N.Y. July 25, 2006).

possible due to DOJ's enormous bargaining power in corporate investigations -- Judge Kaplan suppressed them. Of note, the court found that the prosecution raised with KPMG the issue of whether it would punish employees who asserted the Fifth Amendment *prior* to determining it had a prosecutable case against the company and *prior* to determining that this factor could make a difference in the calculus of whether to charge the company. In other words, the government used this factor with the goal of altering corporate and employee behavior, by causing the company to punish employees who refused to speak to the prosecution.[5]

The factual situation in KPMG is not unique. Across the country numerous corporations have instituted strict policies that call for firing employees who do not "cooperate" with the government. The motivation behind these policies is often to enable the company to be in full compliance with the Thompson Memorandum factors – and now the McNulty Memorandum factors -- so that it can avoid being indicted. Employees at these companies who refuse to speak with the government based on their Fifth Amendment rights against self-incrimination risk losing their jobs. Ironically, now that the McNulty Memorandum has largely eliminated the ability of prosecutors to weigh in on an employer's decision to advance legal fees, but left intact the ability to reward a company that fires employees who assert the Fifth Amendment, the government can encourage employers to take the more Draconian corporate measure against its employees, but not the lesser.

Regardless of the validity of the specific facts and inferences that led Judge Kaplan to attribute state action to KPMG, that case underscores the continued need to reevaluate the

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[5] The constitutional problem with a corporation's dismissing an employee as a result of the government's Thompson Memorandum arises because of a Supreme Court case governing the appropriateness of state actors' firing employees for refusing to cooperate. In *Garrity v. New Jersey*, 385 U.S. 493 (1967), the Supreme Court considered whether an incriminating statement can be voluntary if the alternative to self-incrimination is losing one's job. The defendants were New Jersey police officers under investigation for "fixing" traffic tickets. A New Jersey statute provided for the dismissal of any public official who refused, on the basis of self-incrimination, to answer questions relating to his employment. The defendants cooperated and made incriminating statements, which the state attempted to introduce against them at their subsequent trial. The trial court concluded that the statements were voluntary and admitted them over the defendants' objections. The defendants were subsequently convicted of conspiring to obstruct the administration of the state's traffic laws.

In affirming the trial court's determination that the statements had not been coerced, the New Jersey Supreme Court placed great weight on the absence of coercive tactics during the officers' questioning. It noted that the interrogation lacked physical as well as psychological compulsion.

The United States Supreme Court reversed. That coercive interrogation tactics had not been used to elicit the officers' statements was of no consequence. Instead, the Court focused on the choice the officers faced. Although they may have chosen to cooperate rather than lose their jobs, the mere fact of election did not render their statements free of duress. The choice between self-incrimination or job loss was, in short, no choice at all, and was in fact "the antithesis of free choice to speak out or to remain silent." The Court held that the state could not condition the right to remain silent on the threat of removal from office.

McNulty Memorandum. The Senate bill recognizes that as a simple policy matter whether a company is willing to punish employees who assert their Fifth Amendment rights not to talk to the government is a poor proxy for determining whether the entire company should be charged with a crime. Other factors, such as the level and pervasiveness of the wrongdoing, a history of recidivism, and the presence of compliance measures, are far more accurate measures of corporate culpability.

More importantly, the DOJ policy should be altered because the government should not be fostering an environment where employees risk losing their jobs merely for exercising their constitutional right not to speak to the government. A company can properly decide on its own to fire an employee or cut off legal fees based on whether she cooperates with an investigation. But the DOJ should simply not base its decision to prosecute a company on whether it has punished an employee for asserting a constitutionally guaranteed right.[6]

4. The McNulty Memorandum's Continued Infringement Of The Attorney-Client Privilege

Yet another problem under the McNulty Memorandum – which the Senate bill would remedy -- is that companies will continue to feel undue pressure to waive the privilege because the memorandum still permits a prosecutor to consider a company's refusal to waive in various circumstances and also still gives "credit" to those companies for waiver. Although the McNulty Memorandum states that a refusal to disclose legal advice and attorney-client communications cannot count against a company, the same does not hold true for information the government deems "purely factual." In practice, however, the line between what is "purely factual" and what contains attorney work product is rarely clear-cut. Moreover, information that is deemed by the McNulty Memorandum to be allegedly "purely factual" is in fact usually clearly protected by the attorney-client and/or work product privileges. Thus, the McNulty Memorandum in reality does little to protect the privilege with respect to a large category of important privileged information.

The McNulty Memorandum's examples of purported "purely factual" information illustrate the problem. As examples of "purely factual" material, the memorandum lists: "*witness statements*, or purely factual *interview memoranda* regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, *factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel*."[7] But who an attorney interviews, what questions an attorney asks, and what information is chosen as important to memorialize can reveal important information about the company's defense strategy and the attorney's evaluation of the strength and weaknesses of the issues in a particular case. For this reason, courts have repeatedly held that "[h]ow a party, its counsel and agents choose to prepare their case, the efforts they undertake, and the people they interview is not factual information to

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[6] *See* Andrew Weissmann & Ana R. Bugan, *No Choice: It's Time to Rethink the DOJ's "Principles of Federal Prosecution of Business Organizations"*, The Deal, Aug. 7, 2006, at 24.
[7] McNulty Memorandum § 7.B.2 (emphasis added).

which an adversary is entitled."[8] Yet the McNulty Memorandum simply ignores this case law and its unassailable logic and abrogates to itself the determination that material that has heretofore been widely deemed to be privileged is not entitled to protection under the Memorandum.

By continuing to allow prosecutors to base their charging decisions on whether a corporation discloses this sensitive information, the McNulty Memorandum fails to provide the attorney client relationship with the protection it needs to serve its important role in our justice system.

Moreover, my own experience prosecuting corporate crime as Chief of the Criminal Division in the U.S. Attorney's Office in Brooklyn and as Director of the Enron Task Force belies the notion that a prosecutor must have such waivers in order to prosecute successfully corporate criminal cases. No doubt, exacting such waivers can cause the investigation to proceed more expeditiously and save government resources. But there are myriad ways for a company that seeks to cooperate to provide the government with valuable information, all without waiving the privilege. For instance, a company can give the government documents that will further its investigation and steer investigators to company employees with critical information. It can also give the government an attorney proffer of salient information. None of that requires the company to waive the attorney-client privilege.

Conclusion: The Propriety of a Senate Bill

Although DOJ has acted to remedy certain problems in its corporate charging policy, many remain. There is no reason to believe those problems will disappear with the passage of time since most of the problems I have addressed are embedded in the McNulty Memorandum. Moreover, even the beneficial provisions in the McNulty Memorandum have not been shown to be working in practice. The McNulty Memorandum was issued, as its author candidly admitted, to forestall more sweeping legislation. For such a stratagem to work it is incumbent on the DOJ to show, with clear statistics, that it is having the intended effect. But a survey by the National Association of Criminal Defense Lawyers, which is consonant with my own experience, confirms that it is not in fact being applied uniformly in the field. It is thus no wonder that such groups are calling for passage of legislation to remedy the situation. Although legislation may not be the preferred route, it may well be necessary where important rights are still being infringed, in spite of ample opportunity for the agency to remedy the situation.

The Senate bill would not be unprecedented or onerous. Federal prosecutors have numerous strictures on their conduct imposed by statute and rules, from the McDade bill requiring them to adhere to state ethics rules in conducting investigations, to the Federal

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[8] United States v. Dist. Council of New York City & Vicinity of United Broth. of Carpenters & Joiners of Am., No. 90 CIV 5722, 1992 WL 208284, at *10 (S.D.N.Y. Aug.18 1992); *see also* Massachusetts v. First Nat'l Supermarkets, Inc., 112 F.R.D. 149, 154 (D. Mass.1986) (holding that "pattern of investigation and exploration employed by its attorney" is protected from disclosure).

Rules of Criminal Procedure and Federal Rules of Evidence, which limit how they can investigate and prosecute a case. Like these various strictures on prosecutors' conduct, the Senate bill would leave completely intact the prosecutor's sole discretion as to whether to bring charges, when to do so, and what charges are appropriately lodged against any potential person or company. It would merely restrict the ability to exact waivers of a sacrosanct privilege as a sign of a company's *bona fides* that it is cooperating with law enforcement.

Thank you for the opportunity to address this committee.