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THE THOMPSON MEMORANDUM'S EFFECT ON THE RIGHT TO COUNSEL IN CORPORATE INVESTIGATIONS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

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THE THOMPSON MEMORANDUM'S EFFECT ON THE RIGHT TO COUNSEL IN CORPORATE INVESTIGATIONS

TUESDAY, SEPTEMBER 12, 2006

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:30 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter and Leahy.

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

Chairman SPECTER. Good morning, ladies and gentlemen. It is 9:30. The Judiciary Committee will now proceed with this oversight hearing on the practices of the Department of Justice on the issue of departmental policy on calling for a waiver of attorney-client privilege and the elimination of the corporate practice of paying for counsel fees of their employees in the defense of criminal charges or the investigation of criminal charges.

There is a memorandum of the Department which provides "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 attorney-client privilege and work product protection," and then a further provision on a "corporation's promise of support to culpable employees and agents either through advancing of attorney's fees," et cetera, all of which goes to the "value of a corporation's cooperation."

This memorandum and these policies may well have the effect of significantly modifying the traditional balance on a criminal prosecution where the Government has the burden of proof because of the Government's power in establishing a criminal case, which leaves traditionally the suspect or ultimately the accused with privileges—the attorney-client privilege being one—and the obligation or practice of corporation's employees to pay counsel fees, which can be so prohibitive as to be coercive in an individual's decision on whether or not to defend himself or herself.

The issue of privilege is one which the Government exercises with some forcefulness on some frequency. Executive privilege, certainly where the President were to invoke executive privilege, who could say that the President was being uncooperative, where we have the recurrent issue coming up in hearings before this Com-

mittee on nominees, including Supreme Court, where the Government says there is a privilege attached to what goes on in the Solicitor General's office, where we recently had Chief Justice Roberts and Justice Alito with documents and papers which the Government insisted on withholding, and understandably so, because of the overlying issue of privilege.

The Southern District of New York has taken up this issue in an opinion by Judge Lewis Kaplan, strongly worded, condemning the Department of Justice's procedures on constitutional grounds in the KPMG case. So we have a matter here which involves very fundamental considerations of constitutional rights, due process rights, Sixth Amendment rights.

Quite a number of former key employees of the Department of Justice, including Attorneys General, have objected to this policy, and this Committee will be scrutinizing it to see if it is appropriate for the Department of Justice to act.

We turn now to our first witness, the distinguished Deputy Attorney General Paul McNulty. He served with distinction as the United States Attorney for the Eastern District of Virginia, handling many very important and high-profile cases. He is a graduate of Grove City College and Capital University School of Law.

Thank you for joining us, Deputy Attorney General McNulty, and we look forward to your testimony.

STATEMENT OF PAUL J. MCNULTY, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. MCNULTY. Thank you very much, Mr. Chairman. It is good to see you, and it is good to be here today.

Today's hearing is about duty—the duty of prosecutors and the duty of corporate officials. It is about how those duties are brought together to enforce the law and to protect the integrity of the marketplace.

People of good will and great distinction have criticized how we at the Department of Justice are fulfilling our duty. These are smart and experienced people, and their concerns must be taken seriously. But, Mr. Chairman, as a United States Attorney and Deputy Attorney General for the past 5 years, I have a little experience myself, and I would like, therefore, to suggest five realities that I have observed in relation to the practice of waiving attorney-client privilege in corporate fraud prosecutions.

Reality number 1, Federal prosecutors have a duty to the taxpayers of this country to hold corporate officials and corporations accountable for criminal wrongdoing. Our job is to protect the integrity of public markets, to ensure that investors have a safe place to entrust their hard- earned dollars. And it is not in the interests of taxpayers, and investors in particular, for corporate fraud investigations to drag on for years.

Reality number 2, those corporations want out from under the dark clouds of criminal wrongdoing as quickly as possible. The moment it becomes known that a corporation could be facing a criminal investigation and potential prosecution, the value of that company's stock begins to plummet, its shareholders lose money, and the board of directors quickly recognizes its fiduciary duty to those shareholders. It immediately sets out to locate the cancer of cor-

porate corruption, excise the tumor, and get the company back on the road to good health. It is not in the interests of shareholders for corporate criminal investigations to drag on for years.

Reality number 3, most corporations, therefore, are anxious to cooperate with Government investigations. Whether it is the Holder memo, the Thompson memo, a McNulty memo, or no memo, corporations will continue to cooperate in order to bring criminal investigations to an end, to bring them out from under the dark cloud of potential prosecution.

Reality number 4, there are many ways for Government investigators to get the facts in a corporate fraud investigation, to find out who did what when. Some ways are faster and more productive than others. One of the most productive ways to get the facts is for a cooperating corporation to tell the Government what it knows. It is not the only way for the Government to learn the truth, but, generally speaking, disclosing the results of the company's internal investigation is one of the best ways. Let's face it. Searching for hot documents in rooms full of paper or on servers filled with computer files is much slower than looking through a three-ring binder or a CD-ROM identifying the most relevant evidence.

As a general counsel of a Fortune 500 company recently told me, "If I could bring a Justice Department investigation to a close by turning over an internal investigation and I did not do it, my board would fire me."

Reality number 5, once a corporation has turned over the internal report and the prosecutor is ready to decide, indict or not indict, the corporation will insist, will demand that its cooperation be given full consideration along with other relevant factors in deciding not to indict the company. Thompson memo or no memo, the waiving of attorney-client privilege will always be argued by a company in its defense. And why shouldn't it be? Would it be fair to treat a company that did not cooperate, that circled the wagons and fought the Government every step of the way, the same as one that said to the Government, "We are on your side, we will help you get the truth"? I am sure if prosecutors took that approach, my phone would be ringing off the hook.

Mr. Chairman, Senator Leahy, three final thoughts.

First, the attorney-client privilege is an extremely important component of our constitutional order and great legal tradition. The Justice Department may not and will not do harm to this principle of basic fairness. But just as drug-trafficking defendants routinely waive their constitutional right to a trial by jury in exchange for reduced charges, so, too, a corporation can waive a basic right when it is in its interests to do so.

Second, the waiving of the attorney-client privilege is just one part of one factor out of nine factors cited in the Thompson memorandum for consideration in deciding whether to prosecute a company. But such a waiver can make a big difference for the hopes and dreams of shareholders who are anxiously waiting for their investments to bounce back.

And, third, when it comes to waiving attorney-client privilege, we rarely have an interest in legal advice or counsel contemporaneous with the investigation. Mr. Chairman, we take the Sergeant Joe Friday approach—"Just the facts, ma'am."

The Justice Department stands ready to work with everyone who has a suggestion for improving this waiver process. We are currently holding discussions with several interested parties. All we seek at the end of the day is the ability under the right circumstances to get the facts as quickly as possible and to fulfill our duty to the taxpayers and investors.

Thank you, Mr. Chairman.

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

Chairman SPECTER. Thank you, Mr. McNulty.

I turn now to our distinguished Ranking Member, Senator Leahy, for his opening statement.

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

Senator LEAHY. Well, thank you, Mr. Chairman. I appreciate you having this hearing. I think it is extremely important.

The protection of communications between client and lawyer has been fundamental to our Nation's legal justice system since its inception, as Mr. McNulty, of course, and just about everybody else in the room knows. The right to counsel has long been recognized as essential to ensure fairness and justice and equality under the law for all Americans. This administration has taken extraordinary steps to investigate and prosecute the press and to intimidate the press and critics and attorneys while it has claimed unlimited privileges and an extraordinary, unprecedented amount of secrecy for itself.

As a former prosecutor, like the Chairman, I understand all too well that our democracy requires a healthy respect for the law and that criminal wrongdoing has to be punished, and wrongdoers who profit at the expense of ordinary Americans have to be held accountable. That is true for all, including corporate wrongdoers and those who violate the public's trust.

Following Enron's collapse in 2001, I authored the criminal provisions in the Public Company Accounting Reform and Investor Protection Act that strengthened existing criminal penalties for corporate crime. I have since repeatedly offered stronger criminal penalties and accountability for war profiteering and contractor fraud. Those did not go through because the Bush administration blocked them. But, historically—apparently one thing we can do is war profiteering. That is allowed in the war in Iraq today.

Historically, the attorney-client privilege has been balanced with competing objectives, including the need to ensure cooperation with the Government in criminal or regulatory probes. Now, the issue, of course, Mr. McNulty, as you have stated, is does the Department have this balance right.

In the wake of the major corporate scandals at Enron, WorldCom, and elsewhere, you revised your policy. We have the Thompson memorandum, and now we have increased emphasis and scrutiny of a corporation's cooperation with the Government.

But there is a growing number of critics of the Thompson memorandum, including former Republican Attorneys General. They have expressed concern that the Department's policy is too heavy-handed and that the policy has created a dangerous culture of

waiver in our criminal justice system. Last month, the American Bar Association adopted a resolution opposing the Department's policy. Last Friday, the Wall Street Journal editorial board joined the criticism of Attorney General Gonzales and the Thompson memorandum, noting that the coercive intimidation it represents is "more than a PR problem" for the administration.

Now, I am not one who automatically joins Wall Street Journal editorials. I think this time they are absolutely right. As I said, I am a former prosecutor. If I had taken a position like this when I was a prosecutor that, "Boy, you better cooperate or, wow, we are really going to hit you with a lot of charges," the judges on the criminal bench in my State would have referred me to the Vermont Bar Association for sanctions. And I hope, even with a Federal bench that is very, very beholden to this administration, that they might consider the same thing.

Now, I hold no brook for the kind of corporate wrongdoing and greed that has robbed a lot of our people. But just as I wanted to make sure the people I prosecuted had their rights so that I ended up getting a conviction that would be upheld, you ought to do the same. And I really cannot see any reason to tell a corporation, "Well, you better give up all your rights or you are in real trouble." And I hear this from a lot of corporations, this idea of a CEO telling you, "Well, if I do not just turn everything over and waive my rights and then we get in trouble, the board is going to fire me." Good Lord. Have we gotten to that point in this country?

Erosion of the right to counsel undermines the fairness of our criminal justice system for all Americans. I am really worried about this, and as I said, I hold no brief for the people who have broken this law, just as I held no brief for the murderers and rapists and others that I prosecuted. But I also know that we have a rule of law in this country, and something I worry that we sometimes forget about.

Thank you, Mr. Chairman. I will put my whole statement in the record. It is a lot stronger than that.

Chairman SPECTER. Without objection, it will be made a part of the record.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman SPECTER. Mr. McNulty, when you say that the Department of Justice wants to do fundamental fairness, it is really not a matter for the Department of Justice to make that determination. That is a matter for the courts. You refer to the experience you have had as a prosecuting attorney. I made no reference to the experience that I have had. Senator Leahy talks about being a prosecutor. We understand that a prosecutor is a quasi-judicial official, but a big part of the prosecutor's responsibility is as an advocate. So it is not for the prosecutor to make the decision as to what is fundamental fairness.

Now, you establish at the outset as your departmental policy that the value of a corporation's cooperation will be determined as to whether there will be charges. Well, charges themselves are a substantial penalty. That is the reality. We have a presumption of innocence in the law, but the man on the street thinks that if an individual is charged, it is somewhere between he must be guilty

or he must have done something wrong. But there is a heavy opprobrium attached to a charge. And the right to counsel is just very, very fundamental.

Would you say the President was being uncooperative, Mr. McNulty, if the President asserted executive privilege when the Conyers Judiciary Committee in the House asked him for materials which touch on executive privilege?

Mr. MCNULTY. No. I am not familiar with when it was asserted in that instance, but I would assume that that was not inappropriate.

Chairman SPECTER. Was the administration, President Bush's administration, uncooperative when they said to Senator Leahy, on a long letter he wrote for then-Judge Roberts's information, that they were not going to tell him what Judge Roberts did as an Assistant Solicitor General because it would chill the work of the Solicitor General's office?

Mr. MCNULTY. No.

Chairman SPECTER. Was the Department of Justice being uncooperative when similar requests for Deputy Solicitor General Alito's materials were not turned over?

Mr. MCNULTY. No.

Chairman SPECTER. Well, of course not. When you say that corporations want to have investigations completed promptly, you are exactly right, but so do individuals. The reality is that investigations drag on and on and on and on. And it may be that many of them, if not most of them, have to drag on. But it is a very, very heavy burden hanging over any individual to be subject to an investigation.

Mr. McNulty, I conducted investigations as a D.A. contemporaneously with what the Department of Justice conducted. It was not under your watch. It was a long time ago. But Federal prosecutors do not deserve any merit badges for promptness, necessarily. But delays are very tough on individuals as well as on corporations.

What is your reaction, Mr. McNulty, to the opinion of Judge Kaplan in the Southern District on the KPMG case, saying that there was a denial of fundamental due process and there was a denial of the Sixth Amendment right to counsel in that case by the Government's practices and policies?

Mr. MCNULTY. Well, we are litigating the Kaplan decision, so I am going to say just a few things. There is a lot you cannot say when it is an ongoing litigation like that. But we have stated that we disagree with the judge's reasoning in that case. The judge essentially concluded that the Thompson memorandum was unconstitutional because it created a pressure on the corporation to cut off the attorney's fees of the defendants.

We do not believe that is the correct reading of the Thompson memo. That case is on appeal now. So we essentially have taken that decision up.

Chairman SPECTER. My time has expired. I yield to Senator Leahy.

Mr. MCNULTY. Mr. Chairman, I will be happy to just keep listening. I just want to make sure that if there was an opportunity to respond to some of the things you said, I did not want to—I wanted

to look for an opportunity down the road at some point here to be able to respond.

Chairman SPECTER. You have a further response to make?

Mr. MCNULTY. You made a number of different points, and I—

Chairman SPECTER. Take them up and respond.

Mr. MCNULTY. Okay. I will just say a few key things.

Chairman SPECTER. Sure.

Mr. MCNULTY. First of all, with regard to the analogy of the executive privilege issue as it relates to this discussion, I appreciate certainly the point that there are- -it is important to respect the nature of confidential communications, and in various contexts and various places, confidential communications are critical to the way in which things operate. We all understand that. But the fact that both instances involve the confidentiality of communications to me is not as significant as the distinctions between those different areas.

One, that is, the executive branch's actions, has to do with the way in which co-equal branches of Government work together to try to deal with these questions of getting information from the executive branch.

In this case, we are talking about a corporation facing criminal prosecution. One of the things lost in a lot of this discussion is this issue, the Thompson memorandum—and before that, by the way, the Holder memorandum, which has virtually the identical language as the Thompson memo on this subject—

Chairman SPECTER. Yes, but the prior administration did not establish it as governmental policy. Point that out at the same time, Mr. McNulty. If you are going to refer to it, lay it all on the table.

Mr. MCNULTY. Well, I am—

Chairman SPECTER. Well, wait a minute. It was optional with U.S. Attorneys.

Mr. MCNULTY. It is optional now with U.S. Attorneys.

Chairman SPECTER. Excuse me?

Mr. MCNULTY. It is optional now with U.S. Attorneys.

Chairman SPECTER. Well, that is not my understanding.

That is not the way I read your policy. That is not the way everybody else reads your policy. Big difference between what you are doing now and what was done under Attorney General Reno.

Mr. MCNULTY. With great respect to you, sir, I have to disagree with that. This was guidance given to prosecutors-

Chairman SPECTER. Well, are you saying that the Thompson memo is not binding on U.S. Attorneys around the country?

Mr. MCNULTY. No.

Chairman SPECTER. Because if you are, I think that is good news to a lot of U.S. Attorneys.

Mr. MCNULTY. It is no more binding than any previous guidance to U.S. Attorneys as to how to make decisions, which is what—

Chairman SPECTER. I am not interested in any previous guidance to U.S. Attorneys. I want to know flat-out is the Thompson memorandum binding on U.S. Attorneys.

Mr. MCNULTY. It sets forth the guidance there to exercise when making a decision. It is binding as to here are considerations that you are take up, but it does not say you are to demand attorney-

client waiver in a particular situation. Not at all. It is just guidance as to how to make a decision.

Chairman SPECTER. Well, of course it does not, but it lists it as a prime consideration on whether they are going to be charged.

Mr. MCNULTY. Yes.

Chairman SPECTER. Well, I take your last answer to mean that this is policy which the U.S. Attorneys have to follow.

Mr. MCNULTY. That is fine. I am not trying to quibble on that point, sir. It is just that what I am saying is that it is not changed with regard to how we give guidance to prosecutors in the field who are trying to work with companies on this question. In the absence of this, you would have prosecutors on an individual basis trying to decide, Will we prosecute the company or not prosecute the company when we have the evidence to do so? And that is the time this comes up. The evidence and the ability to charge is now present. The question is: Do it or not do it? What factors should be taken into consideration? We give them nine.

Chairman SPECTER. But that is when you have the evidence, and balance in the criminal justice system is to impose the burden of proof on the prosecution and to require the prosecution to gather the evidence in a context where those who are being investigated or charged have the attorney-client privilege as well as other privileges.

When you talk about the executive privilege between co- equal branches, it is true, but the Senate Judiciary on confirmation stands in a pretty good position as a co-equal branch. When you talk about the power of the Government, it is very, very elevated compared to the power of the individual, and that is why they have the burden of proof, and that is why you have the privilege against self-incrimination, and that is why you have the attorney-client privilege, to put a balance in the system. And the concern that I have is of the material imbalance. Congress can protect itself with the executive branch, but an individual, a corporate employee is very different from the corporation. And the corporate employee's interests are very different from the corporation. The corporation wants to get the matter closed early for financial reasons. The individual who has the attorney-client privilege and who wants to have his counsel fees paid so he can defend himself wants to stay out of jail or wants to be treated fairly.

Do you have some further comments on the opening line of questions?

Mr. MCNULTY. Thank you, sir. I will stop there.

Chairman SPECTER. Senator Leahy?

Senator LEAHY. Well, thank you, Mr. Chairman. You know, I sort of hear you dancing all around the question of whether it is mandatory in U.S. Attorneys. There is not a single U.S. Attorney in the country who does not think this is the—who does not believe this is the policy. They feel this is the policy. They understand this is the policy. The Thompson memo, to follow up on what the Chairman was saying, even seems to encourage companies to fire employees under some circumstances to show their cooperation. Good Lord. This means you kind of come in with a sledgehammer and hope that everybody will run like hell.

Don't these policies compel corporate employees to waive their right against self-incrimination or risk losing their jobs? I mean, it is kind of an interesting choices, isn't it? You either testify or you might lose your job. No compulsion there.

Mr. MCNULTY. Now you are talking about whether or not employees must cooperate with an internal investigation. I am sorry, Senator Leahy. I am not sure if I understand—

Senator LEAHY. The Thompson memo seems to encourage companies to fire employees under certain circumstances to show their cooperation—if they do not show cooperation.

Mr. MCNULTY. Well, what the Thompson memo says is that one of the factors in looking at a company's conduct at the time of deciding whether to charge it criminally or not is if it has a compliance program. And anyone responsible for drafting a compliance program that would pass the straight- face test includes a discipline procedure. How do you handle people who fail to comply with an internal investigation?

Senator LEAHY. Mr. McNulty, you are probably getting into a definition of what "is" is. What you are saying, in effect, is you either cooperate and give us everything we want or you are in deep trouble. I mean, really, it comes down to that. It comes down to that. A corporation, if I was sitting on a board of a corporation, of course, I would be worried because I would see the Government coming in and saying, "You better waive your rights, or we are really going to get you. Not we might just a little bit get you. If you don't waive your rights, we are really going to get you." And don't you actually end up in a perverse way where a company is going to be very concerned about putting in some very specific guidelines and monitor those very specific guidelines to make sure everybody is behaving themselves, because they are afraid if they slip off those guidelines just a little bit, the Federal Government, with enormous resources, can play a "gotcha" game.

Mr. MCNULTY. No, I do not believe that is the intent of this—

Senator LEAHY. Okay. That is your answer. Now, the KPMG case you said is still being litigated. Are you going to appeal Judge Kaplan's decision?

Mr. MCNULTY. I believe that is what is going on, although I don't know at this moment. I will have to check to see if we have already filed.

Senator LEAHY. Will you check and let us know whether you have appealed? But it is your intention—

Mr. MCNULTY. We have appealed already.

Senator LEAHY. You have appealed. All right.

You know, the Coalition to Preserve the Attorney-Client Privilege found that 30 percent of in-house respondents and 51 percent of outside counsel for companies that have been under investigation during the last 5 years said the Government expected waiver of the attorney-client privilege in order to engage in bargaining or to be eligible to receive more favorable treatment. It gives them the impression that if you refuse to waive the attorney-client privilege, which is, after all, the bedrock of our constitutional legal system, it assumes that it means the corporate defendant is not cooperating. Is that right?

Mr. MCNULTY. Well, first of all, that is based upon this information that we are requiring or compelling a waiver—I am sorry. I am not sure I follow the question. Would you please—

Senator LEAHY. Let me go to another one. My time is up. But I will go back to that in written questions.

Yesterday was the fifth anniversary of the September 11th attack. We find in a new study that your Department's prosecutions have declined dramatically since September 11th. I will not go back to on September 10th when you wanted to—when your Department wanted to cut substantially the counterterrorism money but take since then. In 2002, right after, Federal prosecutors filed charges against 355 defendants in terrorism cases. Now it is 46. Nine out of ten terrorism cases do not go anywhere. But even those that you do list as terrorism convictions, I remember people in my State getting longer sentences for drunk-driving cases.

Are we cooking the books a little bit here?

Mr. MCNULTY. No, sir.

Senator LEAHY. Well, then why—I mean, I understand we do not catch Osama bin Laden. That is not your Department. But if we really have this great terrorist threat, why are people getting practically no penalties? In most States, traffic court or stealing a couple TV sets get higher penalties. What is going on? Is this just to make it look like we are doing something without—and hoping that nobody will look at nothing ever happened?

Mr. MCNULTY. I am not sure I understand what you are talking about. My sense is that the penalties have been extremely high. In fact, we have taken some criticism—

Senator LEAHY. What is the lowest penalty on a terrorism case that you have seen?

Mr. MCNULTY. I could not tell you off the top of my head, but I know I have seen—

Senator LEAHY. Would it surprise you if it was a matter of months?

Mr. MCNULTY. It would depend upon the case itself and what was the subject of the conviction and who the judge was that sentenced and what was the jurisdiction—

Senator LEAHY. Well, who the judge was, a lot of these cases it is a plea bargain where the sentence is exactly what you, the Department of Justice, recommended. Many times these are sentences that are similar to what might be recommended in a misdemeanor case. I mean, either you are being tough on terrorism or you are trying to get numbers to say you have convictions, but they are pretty minor cases.

Mr. MCNULTY. Can I answer the question?

Senator LEAHY. Whatever you like, Mr. McNulty. You are the Deputy Attorney General.

Mr. MCNULTY. We have seen sentences that go from life in prison to much lower sentences. It all depends upon the facts of the case and what—

Senator LEAHY. How many life imprisonment?

Mr. MCNULTY. I do not know off the top of my head.

Senator LEAHY. One? Two?

Mr. MCNULTY. Many more than one or two. Just Moussaoui and Richard Reid alone would be two right there.

Senator LEAHY. Okay. Three? Four?

Mr. MCNULTY. In Virginia, I can call on that memory much easier. We had a life sentence for Al-Tamimi. We had a 60-year sentence for Abu Ali. We had recently a 25-year sentence for another Virginia jihad case. The Virginia jihad cases, 11 convictions probably averaged somewhere from 15 years to life or 75 years, somewhere in that category. I can think of cases—

Senator LEAHY. What would be the median sentence?

Mr. MCNULTY. I am not familiar with any study that has looked at the sentences of—

Senator LEAHY. Take a look at the Track study.

Mr. MCNULTY. That study recently reported on the question of cases brought by U.S. Attorney's Offices, according to the coding numbers, the way in which U.S. Attorney's Offices identified terrorism cases at the time they charged them, which, by the way, is a different way for the Department of Justice to count or to keep track of terrorism cases. We also—

Senator LEAHY. In other words, if they are really successful, it is your case. If they don't, it is their case. Is that it?

Mr. MCNULTY. No. At the time a case is brought—

Senator LEAHY. Just thought I would ask.

Mr. MCNULTY. The case at the time it was brought, the Assistant United States Attorney logs it in and gives it a code number, and they have to do the best they can at that. Sometimes when they bring a case, they think it is going to turn out a certain way, and they coded it one way. But it does not always turn out that way.

Senator LEAHY. Were a number of the cases after September 11th—a number of the cases pending that had been coded one way before September 11th retrospectively coded a different way?

Mr. MCNULTY. Nothing has been retrospectively coded. But after September 11th, Assistant United States Attorneys had a new category to pay special attention to when it came to coding.

Senator LEAHY. But did that mean that they coded some of the cases after September 11th that had already been pending with different numbers?

Mr. MCNULTY. No, I am not familiar with doing that.

Senator LEAHY. There has never been a case like that?

Mr. MCNULTY. I am not familiar with that, sir. I have not heard that.

Senator LEAHY. Okay. Your answer?

Mr. MCNULTY. I think we are finished.

Chairman SPECTER. Thank you, Senator Leahy.

Mr. McNulty, in your prepared statement you have listed a number of cases where the Government prosecuted and got jail sentences, and I congratulate you on those cases. I think there have been many very important cases which you have brought and have gotten convictions and have gotten jail sentences, and the Department is to be commended on that. And certainly your own record as United States Attorney was an impeccable one, and your nomination to be Deputy Attorney General was greeted very favorably in all quarters, including on this Committee.

Senator LEAHY. I supported it.

Chairman SPECTER. I would make just a couple of comments about the proceedings, and that is, the heavily publicized fines

which we see on these conferences from the Department of Justice I find very unimpressive. I think the fines are not really very meaningful as a matter of deterrence or as a matter of punishment. But the jail sentences are. They are really very, very meaningful. And I would urge you to focus on that in the disposition of cases, and not to settle the cases but to carry them through, if necessary, in order to get the appropriate judgment of sentence at the very end.

I am not suggesting at all being easy on corporate America. This Committee is now considering legislation which would make it a criminal offense for a corporate executive knowingly to put into interstate commerce a defective product, knowing and willfully, with results in death or serious bodily injury. And the illustrative case on that is the Pinto case where the evidence showed that Ford put the gas tank in the back because it saved a few dollars as opposed to putting it in some other location, and a calculation was made as to how many damage cases they had and what the costs would be to the corporation. And that definition constitutes malice under common law, which would support prosecution for murder in the second degree.

In the Ford-Firestone case, where the evidence showed that both Ford and Firestone knew these defective tires were on the cars, resulting in many deaths and many, many serious injuries, we legislated to impose criminal penalties.

And this idea of imposition of criminal responsibility has been objected to very vociferously by the corporate community. And I can understand that. But I would not consider trying to structure a prosecution without the traditional burden of proof and attorney-client privilege and privilege against self-incrimination.

So the suggestion is not being made to you that you be soft on corporate America, but that you respect the traditional rights. And as I read this policy on the consideration of the "value of a corporation's cooperation" in charging, I think it is coercive, may even rise to the level of being a bludgeon. And when I referred to the individuals who want to avoid going to jail to have their defense fees paid, it is not only going to jail, they just want an opportunity to have fair treatment on the adjudication to show they were not, in fact, guilty.

I would ask you to reconsider your policy as to whether the U.S. Attorneys are bound, if there is some leeway there to go back to the Holder standard, or what I understand to be the Holder standard, where the memorandum had language similar to the memorandum authored by Mr. Thompson but was not binding on the U.S. Attorneys. They could consider it or not. Or if your current policy is not binding on the U.S. Attorneys, to make that specific.

Mr. MCNULTY. Well, Mr. Chairman, I will do that. That is the thing I pledged to you this morning, is that we are looking at this and will consider all possibilities.

Look, I have got the Chairman, the Ranking Member upset. I have got former DOJ officials writing letters. We have got everybody complaining. The easiest thing for me to do today would be to come here and say we are just going to go ahead and change this policy and make everybody happy. But I would not be doing the right thing as I sit here and I think it through as well as I possibly

can as a public servant. I really believe that the perception that is in existence here concerning what we are doing and how this works is different from the reality. And if I did not think that, I would not come here and say it.

And I have spent many hours trying to study this and understand it. I did this when I was a U.S. Attorney. I had the conversations with corporate counsel. I negotiated attorney-client privilege waivers. I experienced that firsthand. I have talked to many, many U.S. Attorneys about this. I chaired the Attorney General's Advisory Committee when the McCallum memo went out in order to coordinate the views on this subject. And I really do not see this as the kind of coercive practice that is being described by the groups. This is one factor to consider when the corporation is facing criminal prosecution. It is not an investigation issue. It is a charging issue, because it has already been determined that the violations of criminal law have occurred. Now the question is: Do you charge the company or not charge the company?

And we tell the prosecutors, Look at nine factors. As U.S. Attorney, I did not even consider this to be one of the big ones. One of the big ones is, How pervasive is the criminal conduct? Did you try to stop it? Did you have an effective compliance effort ahead of time to try to keep this from occurring? How far does it go up the ladder? Was the CEO involved in it? Those are the questions that you ask when you are trying to decide to charge the company or not.

Now, if they have cooperated, which they almost always do because they say, look, we are an independent board of directors with a fiduciary duty to get to the wrongdoing and make sure that we clean this up; we are on your side, how can we help put this behind us? That is when the issue of well, do you know what is going on? Do you have a report that you can hand us that says this is where the wrongdoing occurred, we have investigated it, and we are prepared to assist you and find out the facts.

If they are willing to do that, which any prosecutor in his right mind would say, yes, that would be very helpful to us, should they not get credit for that when it comes to charging the company criminally or not charging the company? That is all we are telling the U.S. Attorney, is consider this. The text of the Thompson memo language itself says this is one factor to be considered when making this decision. And that is what this attorney-client waiver factor amounts to. We are not trying to coerce anybody into doing it. We are giving them an option of providing us information if they will try to persuade us not to charge them criminally.

Chairman SPECTER. Just a couple more comments, and I will yield again to Senator Leahy. Mr. McNulty, I am not upset. I regard this as a conversation among three lawyers talking about what ought to be done here as a matter of public policy, three lawyers who have had some experience in the field and want to come to a proper conclusion.

Chief Justice Roberts said that when he argued cases before the Supreme Court, it was a conversation among equals. I was enormously impressed with his confidence and thought that he could be Chief Justice with that attitude when he was a lawyer.

[Laughter.]

Chairman SPECTER. This is just a discussion among three lawyers. But I do not think somebody ought to get credit for waiving a constitutional right or ought to get credit—or ought to get a demerit or a deficit for asserting a constitutional right. I think the response of the prosecutor ought to be exactly neutral. If someone asserts a constitutional right, that is ordained by a power of the Constitution, which in and of itself has enormous magnitude and a lot of experience in coming to that privilege and a lot of experience in applying that privilege. Stated differently, privilege against self-incrimination is a lot smarter than Arlen Specter. I am sure of that.

So I would not give anybody credit for waiving it, and I would not consider it a negative factor if it was asserted.

Mr. MCNULTY. But thousands of criminals today, as we sit here, will get that very benefit for waiving a constitutional right. Thousands of criminals today in the United States will stand before a court at a plea bargaining hearing and say—the court will ask in a colloquy, "Do you understand that you are waiving your right to a trial by jury, the right of the Government to prove its case beyond a reasonable doubt"—the right, the right, the right. And the defendant will say, "Yes, Your Honor. Yes, Your Honor, I do." And why is he doing that? He is doing that because the Government is going to hold him accountable for one of five counts or two of five counts and drop three counts, and he prefers that than to go to trial and risk conviction on all five counts. That is—

Chairman SPECTER. I think he is doing it because he is guilty.

Mr. MCNULTY. Well, of course.

Chairman SPECTER. That is why he is saying, "I plead guilty," and when he pleads guilty, he gives up a lot of rights. And I think he has pleaded guilty because he thinks if he does not, it is going to be proved anyway. But if he could defend himself and if he could go through a proceeding where the conclusion is not guilty, which is different than innocent, because the Government has not met its burden of proof, and he has counsel and someone to pay for the counsel—we sometimes lose sight of how expensive lawyers are, but when I practiced law, my fees were so high that I could not afford to hire a lawyer who charged those fees. Seriously. I did not earn enough as a lawyer to pay someone the hourly rate that I had to charge other people.

So I think when he pleads guilty, he does so because he is guilty, and he thinks if he does not, it is going to be proved. And, of course, it is fair on sentencing. And I think the cooperation of an individual along the way is fair for the judge to consider on sentencing, but not as to the charge by the prosecutor.

Senator Leahy?

Senator LEAHY. Well, Mr. McNulty, like the Chairman, I have respect for you. I voted for you both as U.S. Attorney and Deputy Attorney General. I appreciate your comment that you are concerned that you have upset the Chairman and myself. You do not have to worry about upsetting me, although I must note that you are probably the first person in 6 years in this administration that has given a darn whether he upset me or not.

[Laughter.]

Senator LEAHY. And I keep a daily journal. I intend to mark this in my journal as sort of a red banner day, unique, the first time anybody in this administration gave a darn. I will probably put it differently in the journal that they actually upset me.

But you and I should probably discuss this further, and I will not take the time. We have both gone over our time here, but I cannot tell you how concerned I am. It is not just a plea bargain. Heck, I have been there with plea bargains, both as a defense attorney and as a prosecutor. But there are lot of things that go on leading up to that time, and not the least of which is the Government has to prove they have a pretty good case, and the person says, "Okay, you got me." Now, let's figure out what we do about it.

And then there is a certain advantage to both sides in avoiding a trial at that time, especially in the kind of trials you are talking about, where the Government could be spending millions of dollars in a trial; and the other side of that, if they are guilty, let's work it out.

But what has happened, you have corporations and somebody says, Look, I cannot keep these people on salary because while, in effect, not the case of the Government having to prove they are guilty, but they are going to have to prove beyond a reasonable doubt that they are innocent, we are just going to cut them loose. We are going to cut them loose. They are going to suddenly be without a salary. They are suddenly going to be there where they really can be coerced into a plea. And you know yourself when you are talking about some of these things of conspiracy or obstruction of justice, you get into kind of a gray area where, if you know that you are going to have to hire very expensive lawyers to prove it, you may well want to look for a plea.

What I am worried about is that—and I hold no brief for it, whether it is corporate criminals or the person who puts on a ski mask and points a gun in your face. But I do worry that if the Government has made a mistake in bringing a case, they can ruin a whole lot of people's lives, and you can have a whole lot of people cut loose.

I look at the judge's ruling in the KPMG case and others, and as I said, I found the Wall Street Journal editorial rather compelling. I am really worried about this. I am really worried that we take this attitude that the Government is always right, and if you have been charged, you must be guilty. And I know no matter how much you talk about the presumption of innocence, I know every time I walked into a courtroom as a prosecutor, the jury would always say of course they are presumed innocent, and they are thinking, "Yeah, right." You already have an enormous number of arrows in your quiver. And I cannot imagine a U.S. Attorney who does not consider this mandatory.

So maybe, Mr. McNulty, you and I should sit down and chat about this some more. Your answers are not going to change beyond what you have given here today, but I am really, really concerned about it. I think the fact that you have a number of very conservative Republican Attorneys General who have raised a question about this, others across the political spectrum—across the political spectrum have raised a question about it. I would look at it very carefully. But maybe you and I might chat.

Mr. MCNULTY. I am happy to do that and address as best I can the worries that you do have here. We want to get it right. We do not want to be doing something that is inappropriate or unreasonable. But we want to do our job, and that is the question here.

We are not interested, just to clarify, in a lot of what would fall into attorney communications with their clients, the advice they are giving them in terms of the ongoing investigation. That is not sought. That is discouraged in the memo. And occasionally—rare, rare circumstance could you have an investigation involving perhaps a crime itself being committed in that conversation, but that would be a very unusual situation.

So we are not interested in a lot of what you might be thinking would be communications that should definitely not be touched. We are talking really here about the contents of an internal investigation. That is the very large percentage of what this conversation is about today—What happened? And the company has a fiduciary duty, an incentive to find that out fast. And, Senator Leahy, when it comes to finding that out fast, yes, they go to employees and they begin to question them, and they have what are called Upjohn warnings, and they tell them right up front, "Here is the deal. We do not represent you. We represent the company. The attorney-client privilege belongs to the corporation, not to any individual. And you are free to answer these questions or not, but we do have an internal policy at this corporation"—as all good companies do. I imagine if you went and looked at Fortune 500 companies, you might find 500 compliance plans just like this, which say that when we are doing an investigation, as a condition of your employment you need to speak truthfully to our folks.

And that will exist whether the Thompson memo is in place or not. If today I walked out of the room and said to you, "We will repeal the Thompson memo," tomorrow corporations would still go to people to get them to talk. They would still be compelled to cooperate. Corporations would still have counsel calling the Government and saying, "How can we help resolve this case?" And prosecutors would still be faced with the question. Now that you have helped me, what should we do with you? What should we do with the company itself? Do we charge or not charge under respondeat superior? And the company would say, "Well, can I write you a letter laying out the arguments why we should not be charged?"

Senator LEAHY. Mr. McNulty, I am aware of this. You know, I had—it has been years since I was a prosecutor, but I have a lot of friends in the corporate world. I am well aware of this. I have a lot of friends in the prosecution world and the defense bar. I am well aware of this. You do not have to—and I am sure the Chairman is, too. You do not have to give us Plea Bargaining 101. But the fact is—and you must be aware—that the amount of concern that has been raised by the ABA, that has been raised by former Attorneys General, that has been raised by both the business community, the non-business community, maybe—maybe—it may not all be as serendipitous as you seem to indicate. That is what I am saying.

I understand what you say. A lot of what you say I do not disagree with. But in my years here, in six different administrations, I have never seen such concern, especially concern toward an ad-

ministration that has been very, very, I think in many ways, lenient on the business community. I am thinking of the war profiteering and things like that, where your administration blocked efforts in that regard.

But what I am saying when you see the number of people, Republicans or Democrats, who have raised concern about this and the very prestigious people raising concerns about it, I think it is worth taking a second look. I really do.

Chairman SPECTER. We have honestly taken a lot more time up in our discussion here, and we have done so because there are so many items on the Senate agenda that others on the Committee could not be here. But we have also done so because I think your U.S. Attorneys may be interested in the dialogue and may have some effect on their thinking and the way they put the matters into operation. So it is always useful, and we do not have a chance to dialogue with you often publicly, Mr. Deputy Attorney General. So we utilized the time to keep you here for an hour, but I think to a good purpose.

It is nice sometimes when only Senator Leahy and I are here so we have a little more time for a discussion and do not adhere so strictly to the time limits which we customarily do.

Senator LEAHY. I can tell Mr. McNulty is delighted that we had all that extra time.

[Laughter.]

Chairman SPECTER. Thank you very much, Mr. McNulty.

Mr. MCNULTY. Thank you, Mr. Chairman. Thank you, Senator Leahy.

Chairman SPECTER. We turn now to our distinguished second panel: former Attorney General Edwin Meese; President of the U.S. Chamber of Commerce, Tom Donohue; President Karen Mathis of the American Bar Association; Andrew Weissmann, Esquire, of Jenner & Block; and Mark Sheppard, Esquire, from Sprague & Sprague.

Our lead witness is Hon. Edwin Meese, who is the Ronald Reagan Distinguished Fellow in Public Policy and Chairman of the Center for Legal and Judicial Studies at the Heritage Foundation. Mr. Meese was at Governor Reagan's right hand as his chief of staff, instrumental in Governor Reagan's election to the Presidency, served as domestic counselor in the first term of President Reagan, was Attorney General in the second term. He sat at this table in 1985 for his confirmation hearings, and I personally had the opportunity to work with him both as domestic counselor in structuring the armed career criminal bill and in his excellent work as Attorney General from 1985 through the end of President Reagan's second term.

We appreciate your taking the time to join us, Mr. Meese, and we look forward to your testimony.

STATEMENT OF EDWIN MEESE III, FORMER ATTORNEY GENERAL, RONALD REAGAN DISTINGUISHED FELLOW IN PUBLIC POLICY, AND CHAIRMAN, CENTER FOR LEGAL AND JUDICIAL STUDIES, THE HERITAGE FOUNDATION, WASHINGTON, D.C.

Mr. MEESE. Thank you, Mr. Chairman. As you point out, I am an official of the Heritage Foundation. For the record, may it be noted that the Heritage Foundation takes no Government money, nor does contract work, and is a nonpartisan public policy research and education institution here in Washington, D.C.

Let me also say that I have submitted written testimony, which I ask be made part of the record, and I will summarize it.

Chairman SPECTER. Without objection, it will be made a part of the record, as will all the written statements.

Mr. MEESE. Mr. Chairman, I have spent almost 48 years of my professional career, most of that time involved in one or another with law enforcement. I have been a career prosecutor for many years. I have educated prosecutors, and I have directed prosecutors. And I say that to provide some perspective as to my testimony this morning.

First of all, let me say that I have great respect for Deputy Attorney General McNulty, who just testified, as well as for Robert McCallum, who was the author of a revised version of the so-called Thompson memorandum, both of whom are men of great integrity and great professionalism and ethical conduct. I must point out, as I think has already been referred to, however, by the Committee, that there are literally thousands of Assistant United States Attorneys throughout the country, and it is important that they receive the proper guidance in terms of the application of constitutional rights. And so I commend the Committee for convening this hearing and, interestingly enough, having it chaired and having the Ranking Member be former prosecutors themselves.

I believe that the abrogation of the attorney-client privilege in any form would be a threat to constitutional rights, would be bad policy, unwise practice, and would be counterproductive to both compliance with the law and with just criminal proceedings. Let me mention four reasons why I believe that to be true.

First of all, the attorney-client privilege is most needed, I believe, in corporate investigations and corporate prosecutions. In an age of overcriminalization, particularly in regard to business conduct, there is a real question of whether a certain course of conduct is or is not a violation of law. Likewise, there is often a dispute over whether a specific action should be a crime in any event. And so as Senator Leahy said, these type of cases involved often a gray area. And so for that reason, effective legal representation and legal counsel is extremely critical.

Secondly, I believe that abrogating the attorney-client privilege is counterproductive to the compliance with the law. We want corporations to get the best legal advice. We want them to conduct investigations where there is whistleblower indications or other reasons to believe that there is a possibility of improper conduct taking place. And so I think it would be unjust then to have the results of their seeking legal advice and conducting an investigation

in-house to then, in order to ensure compliance, have that turned around and used as evidence against them.

Thirdly, I believe it would be wrong for the Government to have the power to coerce business firms into not providing legal counsel or not continuing the employment of employees who they believe to be innocent of criminal activity.

And, fourth, I think that if you abrogate the attorney-client privilege, you encourage corporate officials to keep information from their counsel, which, both from the standpoint of good lawyering as well as the standpoint of compliance with the law, would be necessary.

The remedy I suggest—and it is included in more detail in my written testimony—is, first of all, let me point out I think the work of Robert McCallum and the memo that he issued in 2005 is a significant reform. But I also believe it does not go far enough. In that regard, I would suggest that the memorandum be amended to eliminate any reference to waiver of attorney-client privilege or work product protections in the context of determining whether to indict a business organization. In the same manner and in the same context, I think that all references in the memorandum to a company's payment of its employees' legal fees or continuing their employment should be eliminated.

Secondly, I think that the written policies should explicitly state that requests for waiver will not be approved except in exceptional circumstances, and exceptional circumstances should generally be limited to those that would bring into operation what is well established as the crime fraud exception to the attorney-client privilege.

Third, I would suggest that in the meantime, prior to those reforms, that the Justice Department should make available to the public specific uniform national policies and procedures governing waive requests and that this become a national standard.

And, finally, in order to promote the responsible use of waiver requests, I believe the Justice Department should collect and publish statistics on how often waiver is requested, how often business organizations agree to those requests, and how often organizations waive even apart from any requests by prosecutors.

I think that these suggestions would enable the public generally as well as the Congress to understand more about how this particular problem is being handled by the Department.

Thank you.

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

Chairman SPECTER. Thank you very much, Mr. Meese.

We now turn to the President and CEO of the U.S. Chamber of Commerce, Thomas Donohue. Mr. Donohue established in the Chamber the Institute for Legal Reform. He serves on the Product's Council for the 21st Century Workforce and the President's Advisory Committee for Trade Policy. He has his bachelor's degree from St. John's University and a master's from Adelphi.

Thank you for coming in today, Mr. Donohue, and the floor is yours.

STATEMENT OF THOMAS J. DONOHUE, PRESIDENT AND CHIEF EXECUTIVE OFFICER, U.S. CHAMBER OF COMMERCE, WASHINGTON, D.C.

Mr. DONOHUE. Thank you, Mr. Chairman, and a special thanks to you and Senator Leahy and others for organizing this hearing. And thank you for saying a bit about my background. You all know that I am the one person here who is not a lawyer, but spend more time talking to corporate leaders than most.

I am here this morning on behalf of the Chamber, and I am also testifying on behalf of the Coalition to Preserve the Attorney-Client Privilege, which includes most of the legal and business associations in this country.

I am here to ask the Committee, either through oversight of the Department of Justice or by enacting legislation, to invalidate provisions of the DOJ's Thompson memorandum and similar policies at other Federal agencies, like the SEC, that prevent executives and employees from freely, candidly, and confidentially consulting their attorneys. We want you to help fix this problem.

While the intention of the former Deputy Attorney General Larry Thompson—who, by the way, now serves on our board of directors—to crack down on corporate wrongdoing was laudable and appropriate, the policies set forth in the Thompson memorandum violate fundamental constitutional and long-recognized rights in this country in their implementation by U.S. Attorneys and their colleagues around the country.

They obstruct—rather than facilitate—corporate investigations, and they were developed—and implemented— without the involvement of Congress or the judiciary.

This would perhaps be just another classic case of a Federal agency overstepping its bounds if the consequences were not so profound.

The attorney-client privilege is a cornerstone of America's judicial system. This privilege even predates the Constitution, as you have indicated.

The Thompson memorandum violates this right by requiring companies to waive their privilege in order to be seen as fully cooperative with Federal investigators. This has effectively served notice to the business community, and to the attorneys that represent them, that if you are being investigated by the Department and you want to stay in business, you better waive your attorney-client privilege.

A company that refuses to waive its privileges risks being labeled as "uncooperative," which all but guarantees that they will not get a favorable settlement. The "uncooperative" label severely damages a company's brand, its shareholder value, its relationship with suppliers and customers, and its very ability to survive.

Being labeled "uncooperative" also drastically increases the likelihood that a company will be indicted, and one need only look to the case of Arthur Andersen to see what happens to a business that faced the death blow— notwithstanding the fact that the Supreme Court found later on that it was all handled badly.

Once indicted, a company is unlikely to survive even defending itself in a trial or make the outcome of that trial relevant. Keep

this fact in mind the next time you hear a Justice official use the phrase "voluntary waiver."

The enforcement agencies argue that waiver of attorney-client privilege is necessary for improving compliance and conducting effective and thorough investigations.

The opposite may be true. An uncertain or unprotected attorney-client privilege actually diminishes compliance with the law.

If company employees responsible for compliance with complicated statutes and regulations know that their conversations with attorneys are not protected, many will simply choose not to talk to their attorneys.

The result is that the company may fall out of compliance—not intentionally—but because of a lack of communication and trust between the company's employees and its attorneys. Similarly, during an investigation, if employees suspect that anything they say to their attorneys can be used against them, they won't say much at all.

That means that both the company and the Government will be unable to find out what went wrong, to punish wrongdoers, and to correct the company's compliance system.

And there is one other major consequence. Once the privilege is waived, third-party private plaintiff lawyers can gain access to attorney-client conversations and use them to sue the company or obtain massive settlements.

Despite our coalition's repeated attempts to work with the Justice Department to remedy these problems, Justice has refused to acknowledge the problem or has argued that the attorney-client privilege waiver is only very rarely formally requested in an investigation. However, to debate the frequency of "formal" waiver requests or "voluntary waivers" is to engage in a senseless game of semantics.

As the CEO of the country's largest business association and as a member of three public company boards, I know how the game is played by prosecutors. As long as the Department of Justice exercises policies that threaten companies with indictment if they do not waive their privilege willingly, whether in the front line formal request or not.

Efforts to reform the Thompson memorandum have been ineffective. Last year, Associate Attorney General McCallum put out another memo, but what his memo said, Mr. Chairman, is 93 U.S. Attorneys, using the Thompson memorandum, which I also read and we read as compelling, they can put together their own interpretation of that policy. I am not sure that is a great idea, as the former Attorney General indicated.

I will end now by saying it does nothing to change the internal policies that penalize companies when the Justice Department and the SEC comes to visit.

What perhaps is most disturbing, as I wrap up here, is that the Thompson memorandum was developed without any input of the gentlemen sitting here or your colleagues or without any input of the courts.

Compromise reforms or half-baked ideas for softening the memo are not going to fix this. I call on the Congress and your Committee to use your influence—and you happen also to have a very impor-

tant seat on the Appropriations Committee—to get a little more attention to this matter. You know, the coalition got a letter back from the Justice Department and it said, well, they were not going to do anything about this because the Congress told them to get real tough on corporate crime. If we take away the rights of protection from corporations and corporate officials, when do we take it away from Congressmen and religious leaders and individual citizens? And that is what we are here about, Mr. Chairman.

Thank you very much.

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

Chairman SPECTER. Thank you, Mr. Donohue.

Our next witness is Ms. Karen Mathis, President of the American Bar Association; been active with the ABA for more than 30 years, member of the ABA Board; bachelor's degree from the University of Denver, law degree from the University of Colorado.

Thank you for coming in today, Ms. Mathis, and we look forward to your testimony.

STATEMENT OF KAREN J. MATHIS, PRESIDENT, AMERICAN BAR ASSOCIATION, CHICAGO, ILLINOIS

Ms. MATHIS. Thank you. Good morning, Chairman and Ranking Member. Thank you so much for allowing me to be here to testify with you. As you indicated, I am the President of the American Bar Association, and I am a practicing lawyer in Denver, Colorado.

Chairman SPECTER. Ms. Mathis, is your button on for the microphone?

Ms. MATHIS. Thank you. Can you hear me now, Senator? And were you able to hear me earlier?

Chairman SPECTER. Yes. Go ahead.

Ms. MATHIS. I am here today on behalf of the American Bar Association and its more than 410,000 members. The American Bar Association strongly supports the attorney-client privilege and the work product doctrine. We are concerned about the provisions of the Department of Justice's Thompson memorandum and related Federal governmental policies that have seriously eroded these fundamental rights.

We are working in close cooperation with a broad coalition which includes legal and business leaders, ranging from the U.S. Chamber of Commerce to the American Civil Liberties Union, in an effort to reverse these governmental waiver policies. We are concerned about the separate provisions of the Thompson memorandum that erode employees' constitutional and other legal rights, including the right to effective legal counsel.

The Justice Department policy outlined in the 2003 Thompson memorandum erodes the attorney-client privilege and the related work product doctrine by requiring companies to waive these protections in most cases in order to receive cooperation credit during investigations.

The ABA is concerned that the Department's waiver policy has caused a number of profoundly negative effects.

First, it has resulted in the routinely compelled waiver of attorney-client privilege and work product protections. The policy states that the waiver is not mandatory and should not be required in

every situation. However, most prosecutors regularly require companies to waive in return for cooperation credit. There is a growing culture of waiver, and it was confirmed by a recent survey of over 1,200 corporate counsel, which was conducted by the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, and the American Bar Association.

Second, the policy seriously weakens the attorney-client privilege and work product doctrine. It discourages companies from consulting with their lawyers, and it impedes lawyers' ability to effectively counsel compliance with the law.

Third, the policy undermines companies' internal compliance programs by discouraging them from conducting internal investigations designed to quickly detect and remedy misconduct.

For these reasons, the ABA believes that the Department's waiver policy undermines rather than enhances compliance with the law.

In an effort to persuade the Department to reconsider and revise its policies, the ABA sent a letter to Attorney General Gonzales in May recommending specific revisions, and we have included that in our written testimony. In its July response letter, the Department failed to address many of the specific concerns raised and simply restated the existing policy. We have included that in our submission.

Last week, a group of ten prominent former senior Justice Department officials from both parties, as the Senators have indicated, sent a letter to General Gonzales and raised many of the same concerns. This remarkable letter came from the people who ran the Department, and their widespread concerns should be of concern and interest to the Senators.

The ABA urges this Committee, exercising its oversight judgment and authority, to send a strong message to the Department that the Thompson memorandum is improperly undermining attorney-client privilege and work product protections, and it must be changed to protect these fundamental rights.

This memorandum also contains language that violates employees' legal rights by pressuring their employers to take certain punitive actions against them during investigations. In particular, it instructs prosecutors to deny cooperation credit to companies that assist or support their so-called culpable employees or agents in several ways: by paying for their legal counsel, by participating in a joint defense or information-sharing agreement, by sharing relevant information with the employees, or by declining to fire or sanction them for exercising their Fifth Amendment rights.

The ABA strongly opposes these provisions. By forcing companies to conclude that their employees are culpable, long before guilt has been proven or assessed, the policy reverses the presumption of innocence principle.

The ABA urges the Committee to encourage the Justice Department to eliminate these employee-related provisions from the Thompson memorandum, and we believe that this change and the other reforms we have discussed earlier in this testimony would strike a proper balance between effective law enforcement and the preservation of essential attorney-client, work product, and employee legal protections.

I would like to thank the Committee, the Chairman, and the Ranking Member on behalf of the ABA for allowing us to present this testimony and refer you to our more complete written testimony.

Thank you, Senators.

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

Chairman SPECTER. Thank you very much, Ms. Mathis.

Our next witness is Mr. Andrew Weissmann, partner of Jenner & Block in New York. He had been in the Department of Justice and was the prosecutor of more than 30 individuals relating to the Enron Task Force, where he was the Enron Task Force Director. He is currently actively engaged in criminal defense work, has a bachelor's degree from Princeton and a law degree from Columbia.

Thank you for coming in today, Mr. Weissmann, and we look forward to your testimony.

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

Mr. WEISSMANN. Good morning, Chairman Specter and Ranking Member Leahy. I would like to make two points regarding the Thompson memorandum.

First, there have been and there still are wide differences across the country regarding when and how to seek a waiver of the attorney-client privilege in white-collar investigations. The Thompson memorandum gives a green light to Federal prosecutors to seek waivers of the attorney-client privilege. But it offers no guidance about when it is appropriate to do so. The considerable variances in implementation of the Thompson memorandum often subject corporations, which are national in scope, to the vagaries and unreviewed decisions of individual prosecutors. Thus, although the theory of the Thompson memorandum is a good one—that is, setting forth the criteria that should guide all Federal prosecutors in deciding when to seek to charge corporations—in practice the interpretation and implementation of the factors is left to the unguided determinations of individual prosecutors. Even assuming, as I do, the good faith and dedication to public service of all Federal prosecutors, they are not receiving the necessary guidance to diminish the wide variations that currently exist.

Many prosecutors have interpreted the Thompson memorandum to mean that it is appropriate at the very outset of the criminal investigation—unlike what the Deputy Attorney General said previously, these are not determinations that are made after criminal—a criminal determination is made that there is a corporation that is guilty but, rather, made at the beginning—that it is appropriate to seek at that point a blanket waiver of all attorney-client communications other than the current communications with the corporation about how to defend the case. That waiver can include disclosure of all reports prepared by counsel of its interviews of company employees as part of an internal investigation, as well as production of counsel's notes taken at any interview, whether of a company employee or a third party. And this request for a waiver occurs even though the Government can interview those witnesses themselves, or if the Government was present for the interviews,

and easily could replicate the information by rolling up its sleeves and doing the interviews of the witnesses on their own.

On the other hand, other prosecutors take a more surgical approach and proceed incrementally, only seeking a full waiver where it is truly important to the investigation and other interim steps have failed. This latter approach is, of course, far more responsible and, in my opinion, the DOJ should promulgate guidance strictly cabining prosecutors' discretion to seek immediate blanket waivers and curtailing the solicitation of waivers that are simply a shortcut for the Government to obtain information they could obtain anyway directly.

The second point I would like to make is that I think that the issues being addressed here today by the Committee are symptoms of a larger problem with the current state of the law regarding criminal corporate liability. There are two principal forces at work. As has been mentioned, the first is the prevailing understanding that a corporate indictment could be the equivalent of a death sentence. 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 potentially devastating consequences, including 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 Department of Justice. The financial risks are simply too great.

The second principle at work is the current standard of criminal corporate law 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 a crime, the entire company can be prosecuted.

In light of the Draconian consequences of an indictment and the fact that the Federal common law criminal standard can be so easily triggered, the Thompson memorandum offers prosecutors enormous leverage.

A rethinking of the criminal corporate law is in order. The standard for criminal liability should take into account a company's attempts to deter the criminal conduct of its employees. Holding the Government to the additional burden of establishing that a company did not implement reasonably effective policies and procedures to prevent misconduct would both dull the threat inherent in the Thompson memorandum as well as help correct the imbalance in power between the Government and the corporation facing possible prosecution for the acts of an errant employee. A more stringent criminal standard, one that ties criminal liability to a company's lack of an effective compliance program, would have the added benefit of maximizing the chances that criminality will not take root in the first place, since corporations will be greatly incentivized to create and monitor strong and effective compliance programs. The objectives of a law-abiding society, of the criminal

law, and even of the Thompson memorandum itself, would thus be well served.

Thank you very much for the opportunity to testify.

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

Chairman SPECTER. Thank you, Mr. Weissmann.

Our final witness is Mr. Mark Sheppard, partner in the law firm of Sprague & Sprague. The Committee had asked Mr. Sprague, Richard Sprague, to testify, but he could not do so because he is on trial. Mr. Sprague had been first assistant district attorney during my tenure and is one of America's outstanding lawyers and specializes in criminal defense work now.

Mr. Sheppard was recognized as a Pennsylvania Super Lawyer in the area of white-collar criminal defense, a bachelor's degree from Lehigh and graduated with honors from Dickinson School of Law.

We appreciate your coming down today, Mr. Sheppard, and the floor is yours.

STATEMENT OF MARK B. SHEPPARD, PARTNER, SPRAGUE & SPRAGUE, PHILADELPHIA, PENNSYLVANIA

Mr. SHEPPARD. Thank you, Mr. Chairman, and Mr. Sprague sends his regards and is sorry he could not be here.

Good morning, Chairman Specter and Ranking Member Leahy. Before I get into it—and I thank you for getting into my background—I have practiced white-collar criminal defense work for the past 19 years, where I have represented both corporations and individual directors, officers, and employees in Federal grand jury investigations.

I want to begin my remarks by thanking you for giving me the opportunity to be here to discuss my concerns about the deleterious effect of the "cooperation" provisions of the Thompson memorandum and similar Federal enforcement policies, including the Securities and Exchange Commission's Seaboard Report. These policies have so drastically altered the enforcement landscape that they threaten the very foundation of our adversarial system of justice.

This threat is brought about by the confluence of two recent trends: increasing governmental scrutiny of even the most routine corporate decision making and untoward prosecutorial emphasis upon waiver of long-recognized legal protections as the yardstick by which corporate cooperation is to be measured. These policies and, in particular, those which inexorably lead to the waiver of the attorney-client and work product privilege upset the constitutional balance envisioned by the Framers, impermissibly intrude upon the employer-employee relationship, and in real life result in the coerced waiver of cherished constitutional rights.

The Thompson memorandum purports to set forth the principles to guide Federal prosecutors as they make the decision whether to charge a particular business organization. As the Chairman pointed out, while the majority of those principles are minor revisions of DOJ policy, the memorandum makes clear that corporate enforcement policy in the post-Enron era will be decidedly different in one very important aspect, and as the memo states: The main

focus of the revisions in the Thompson memorandum is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation.

According to the memorandum, "authentic" cooperation includes the willingness to provide prosecutors with the work product of corporate counsel from an internal investigation undertaken after a problem was detected. Authentic cooperation also includes providing prosecutors with the privileged notes of interviews with corporate employees who may have criminal exposure, yet have little or no choice to refuse a request to speak with corporate counsel. This means that employees effectively give statements to the Government without ever having a chance to assert their Fifth Amendment right. Incredibly, the Thompson memorandum is explicit in this goal of performing an end-run around the Constitution. It states, "Such waivers permit the Government to obtain statements of possible witnesses, subjects, and targets without having to negotiate individual cooperation or immunity agreements." Further, "authentic" cooperation includes disclosure of the legal advice provided to corporate executives before or during the activity in question. Lastly, and from my perspective as a practitioner, I believe the most troubling aspect of the Thompson memorandum, is the impact that it has on the ability of corporate employees to gain access to separate and competent legal counsel. The memorandum specifically denounces these longstanding corporate practices such as the advancement of legal fees, the use of joint defense agreements, and permitting separately represented employees to access the very records and information that they need to defend themselves.

Despite these Draconian outcomes, corporations are complying with these demands in ever increasing numbers. And while no one of the nine elements of cooperation outlined in the memorandum purports to be dispositive, each is, in fact, mandatory. In the current climate, few, if any, public companies can afford the risk of possible indictment and the myriad of collateral consequences, not the least of which is the diminution of shareholder value. Indeed, the words from the front lines are frightening, as one attorney recently noted: The balance of power in America now weighs heavily in the hands of Government prosecutors. Honest, good companies are scared to challenge Government prosecution for fear of being labeled "uncooperative" and singled out for harsh treatment.

Even before Sarbanes-Oxley, internal investigations were standard operating procedure. The reports generated by these investigations, including analysis by the company's counsel and statements by their employees who may choose not so speak with prosecutors, are a veritable road map. As such, they are simply too tempting a source of information for a Federal prosecutor to ignore.

It is my experience that occasionally, although not routinely, Federal prosecutors can be convinced to conduct their investigations without these privileged road maps. Indeed, law enforcement, as the Chairman pointed out, has a number of arrows in its quiver and certainly does not need the waiver of the attorney-client privilege in order to do its job.

The Thompson memorandum, however, makes clear that these standard elements of cooperation where the facts can be provided

without legal conclusions or the mental impressions of counsel are provided, these are simply not enough. Prosecutors are now empowered to expect that corporate counsel act as their deputies. Counsel is expected to encourage employees to give statements without asserting their Fifth Amendment rights, without obtaining independent counsel, all with little regard paid to the potential conflict of interest it poses for the corporate attorney and the employee. If the employee refuses, he may be terminated with no apparent recognition of the inherent unfairness of meting out punishment for the invocation of a constitutional right.

Too often, employees must face this Hobson's choice without the benefit of separate counsel. That is because employees face the prospect that the corporation will refuse to advance legal fees. The effectiveness assistance of counsel in the investigatory stage is essential, and the Government knows this. I fear that under the guise of cooperation, prosecutors are seeking to deprive employees of counsel of their choosing in the hope that counsel chosen by the corporation will tow the party line.

I can still vividly recall a conversation I had as a young associate with one of the recognized deans of the Philadelphia Federal criminal defense bar.

Chairman SPECTER. Mr. Sheppard, how much more time will you need?

Mr. SHEPPARD. Ten seconds. I am wrapping up now, Mr. Chairman. He told me, much to my dismay at the time, that much of white-collar practice is "done on bended knee." That statement was a recognition of the awesome power and resources of the Federal Government. It was possible, however, to effectively represent your client. In today's corporate environment, I and my fellow practitioners feel that this may no longer be possible.

Thank you, Mr. Chairman.

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

Chairman SPECTER. Thank you, Mr. Sheppard.

Senator Leahy is on a tight time schedule, so I will yield to him for his questions first.

Senator LEAHY. Thank you, Mr. Chairman. I appreciate the usual courtesy.

Mr. Meese, you and I have known each other for a long time, and I am glad to see you here. Can you think of any circumstances during your tenure with the Department of Justice where the Department requested or required a waiver of the attorney-client privilege from a cooperative corporate defendant in a criminal case?

Mr. MEESE. To the best of my knowledge and recollection, Senator, I cannot remember any such instance. To the best of my recollection, the issue never came up during the time that I was in the Department, and it was certainly not a part of the policy of the Department to require such a waiver.

Senator LEAHY. Would you have been pretty surprised if somebody had made such a request to you as Attorney General?

Mr. MEESE. I believe that I would, yes. I have always felt that the best way to proceed in any criminal matter is to have the best possible lawyers on both sides. This usually resulted in a settlement of the case in many instances, but also you had the protection

of the potential defendant as well as the best interests of the prosecution in going forward.

Senator LEAHY. Also, your case is more apt to stand up on appeal, too.

Mr. MEESE. That, too.

Senator LEAHY. Lastly, I looked at the letter you and several other senior Justice Department officials—you asked the Attorney General to stop the practice of requiring organizations to waive the attorney-client privilege and work product protections, and I read the letter to say because you felt the practice discouraged corporate employees from consulting with the lawyers about how to comply with the law.

Aren't there ways for the Government to obtain cooperation from a corporation without waiving the attorney-client privilege and work product doctrine?

Mr. MEESE. I believe there are, and I think this is something where, in certain cases, corporate counsel would recommend certain things to be done to cooperate without waiving the attorney-client privilege, such as agreements as to certain documents that would be turned over with the understanding that that did not constitute a waiver of the privilege in general.

Senator LEAHY. Notwithstanding the testimony this morning, I get the impression talking to U.S. Attorneys around the country that they think this is pretty much a black-letter rule from the Department of Justice. And if the policy is not changed, what impact do you think this is going to have on corporate compliance with our laws and regulations?

Mr. MEESE. Well, Senator, I think that it would have a positive impact to change the rule because I really do think that many companies now are hesitant to involve corporate counsel in investigations and in taking positive steps to ensure compliance. And so I think that changing the rule would be positive rather than negative in terms of the ultimate objective, which is not to prosecute corporations. It is to get compliance with the law.

Senator LEAHY. Mr. Weissmann, you are the former director of the Enron Task Force. Do you recall any case where a corporation received leniency when the corporation did not waive the attorney-client privilege?

Mr. WEISSMANN. Yes, that has happened.

Senator LEAHY. And when is that?

Mr. WEISSMANN. I am sorry?

Senator LEAHY. You do recall that happening?

Mr. WEISSMANN. Yes.

Senator LEAHY. Okay. So do you believe that there are effective ways for the Government to obtain cooperation without a corporation waiving the attorney-client privilege?

Mr. WEISSMANN. There are. There are a number of steps a careful prosecutor can take to obtain information that is useful for an investigation that will have no or limited impact on either the work product or attorney-client privilege, for instance, turning over so-called hot documents, directing the Government to particular witnesses who might be useful. But it is not necessary for the corporate counsel to turn over their own notes of that interview.

Senator LEAHY. So what former Attorney General Meese was saying, if you have got good lawyers on both sides, they are going to work their way through this labyrinth.

Let me ask just one last question before time runs out. In the case of *Garrity* v. *New Jersey*, the Supreme Court held that the Government could not force police officers to make statements that could be used against them criminally by threatening to fire them if they did not testify. This sort of follows up on some things that Mr. McNulty said earlier.

In your mind, are there potential *Garrity*-like concerns with the Department's cooperation policies since employees can be required to cooperate with an internal investigation and the corporation can be required in turn by the Government to waive the attorney-client privilege? Am I pushing this too far, or do you see a *Garrity* problem?

Mr. WEISSMANN. I do see a *Garrity* problem. For many years, I know that various Federal prosecutors have always stayed far away from the so-called *Garrity* issue because they were concerned about the actions of the private company being imputed, being taken as the actions of the State, which would then run afoul of *Garrity*. That is why KPMG was surprising and the *United States* v. *Stein* decision was surprising, because it appeared from that case that the line was crossed where the Government had asked the private actor to do something at their behest.

Senator LEAHY. Do the others agree? Or anybody disagree, I should say. Attorney General Meese, do you agree with what Mr. Weissmann said on *Garrity*?

Mr. MEESE. In general, yes.

Senator LEAHY. Mr. Donohue, I realize you are not a lawyer, but do you agree?

Mr. DONOHUE. Senator, what I can tell you is that in many cases prosecutors in a very careful way have raised the issue of protection of privilege. They have raised the issue of dismissal of employees. They have raised the issue of not protecting employees even when it is contractually agreed on legal fees. As many of your witnesses have said today, the Department of Justice is a very strong organization.

Senator LEAHY. Ms. Mathis, do you agree with Mr. Weissmann on *Garrity*?

Ms. MATHIS. Yes, the ABA does agree, Senator. And, further, we have given you in our written testimony a number of ways in which we believe that a diligent prosecutor can get to the relevant information.

Senator LEAHY. And, Mr. Sheppard, do you agree with Mr. Weissmann on *Garrity*?

Mr. SHEPPARD. Yes, I do, Senator Leahy.

Senator LEAHY. It probably will not surprise you to know I also agree.

[Laughter.]

Ms. MATHIS. Senator, if I may just add for the record, the ABA does not as a rule comment on particular cases, and I should clarify that we agree with the principle stated by the Court.

Senator LEAHY. And I fully understood that, and I have read your testimony and fully agree.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Leahy.

Mr. Meese, I know that you are a zealous protector of separation of power, and as this Committee focuses on these issues and considers legislation, we have the option of making a recommendation to the Department, letting the Department exercise its own discretion, which is very broad. We have the option of awaiting the outcome of the litigation in the Southern District of New York. The Court may make a definitive order. It may be upheld on appeal. Or we can legislate.

With your broad experience, what would your recommendation be?

Mr. MEESE. Mr. Chairman, I would hope that this hearing itself might have a salutary effect upon the Department to see how strongly not only the Committee in terms of both the Chairman and Ranking Member, but also what I would consider a broad array of the legal and business community feel about this particular action. And so I hope that that in itself might be helpful. I would hope that that would be the case, including perhaps a recommendation from the Committee itself in a more formal manner to the Department of Justice.

Perhaps the Court may have some decision in this matter. I would hope that legislation would be the last resort. But I think that if there were no other remedy availing, it would be appropriate inasmuch as it is a proper function of Congress to enforce—or to implement by legislation basic constitutional rights, which I believe this is one.

Chairman SPECTER. So you would say that the Congress would be acting appropriately, but as a last resort, if everything else fails?

Mr. MEESE. That would be my position, yes, sir.

Chairman SPECTER. Mr. Meese, the Committee is now wrestling with another privilege issue. We have not given you notice of this question, but I would like to get your view on it, if you care to comment. We are considering the reporter's shield privilege, and it arises in the context of the investigation on the so-called disclosure of the CIA agent Valerie Plame, and its emphasis was focused by the incarceration of a reporter, Judith Miller, for some 85 days.

The investigation proceeded after there was no longer the national security interest, and we are making a delineation. We are going to have a hearing to try to define more fully the national security interest to give protection to the Government on that issue so that the privilege would not extend that far. And it is complicated as to how we do that, but we are working on it.

But absent national security, do you think that it is a wise matter for public policy to have a Federal shield law, as so many States do?

Mr. MEESE. Well, Senator, Mr. Chairman, it is difficult to generalize from that particular case because, from what I know about it, this should never have come about. Again, this is only my knowledge from reading the news media, which from time to time cannot be totally relied upon. But I think from what I have learned, this should never have proceeded that far. I consider this a flawed investigation and prosecution, because it appeared from at least the facts that seemed to be available that no crime had been com-

mitted, which should have been determined by the prosecutor in the first 48 hours simply by reading the law and having the facts available. And so had that been done, that is when the prosecutor should have folded his tent and disappeared. Therefore, this would never have come about, the kinds of interrogations as well as the unfortunate—what I consider the unfortunate subsequent interrogations of many witnesses, which led ultimately to charges totally unrelated to the original crime under investigation, alleged crime under investigation. So it is a little hard to generalize from this case.

I have concerns about a general shield law for the news media that may go to the ultimate finding of guilt or innocence, and to say that in no case can a news media journalist be questioned as to their sources of information can be as damaging to defendants by keeping them from having sources of information and evidence that would be valuable in terms of defending themselves against charges, as well as in legitimate prosecutions.

So I have real concerns about shield laws as a blanket prevention of obtaining information. I would rather have something a little more flexible, leaving it up to the judge under the circumstances to determine whether a shield law would be appropriate rather than an absolute blanket shield.

Chairman SPECTER. With respect to your statement about the investigation went too far, the special prosecutor has been quoted as saying that it was important to protect the ability of the Government to get honest testimony. We intend to do oversight on that matter at the appropriate time. But when you talk about the ability of the Government to get honest answers, it has a ring of similarity to the justification for the policy that we are discussing today, where the Government wants to find out the facts. And we agree, everybody agrees the Government ought to find out the facts. It is just how you do it, and how you do it respecting the traditional balance on the criminal justice system.

But do you think there is any justification, at least as reported—and that is all we can go on at the present time—to structure a continuing grand jury investigation to uphold the integrity of the Government's finding out what the facts are?

Mr. MEESE. Well, the purpose of a grand jury investigation should be obviously what the Constitution sets it up for, and that is, a protection for both the people, the Government and the potential defendant, to make sure there is adequate evidence to go forward with a prosecution. And it seems to me that that should be the purpose—that that should be in a sense the limited purpose or confine the purpose of investigation, not simply as a fishing expedition for the Government. And to the best of my knowledge, that was the way in which grand jury investigations were conducted during the time I was Attorney General.

Chairman SPECTER. Mr. Donohue, in your experience what has been the effect of the policy of the Department of Justice? I want to introduce into the record, without objection, the testimony of former Attorney General Dick Thornburgh, who was supposed to testify here today, but advised that there is an emergency session of the Third Circuit. And Mr. Thornburgh's essential conclusions are, in a sentence, "In my view, they"—referring to the so-called

Thompson memorandum policies—"are not necessary for effective law enforcement, and they can actually undermine corporate compliance. Accordingly, these criteria should be dropped or substantially revised."

My question to you: Has this policy had a chilling effect or discouraged corporations from internal investigations?

Mr. DONOHUE. Just one comment first, and then I will answer that question directly. The American business community, and particularly the Chamber, has no tolerance and no love for people that intentionally and maliciously break the law in the business context. It is bad for business.

What has happened since the Thompson memorandum, we have emboldened Federal prosecutors—and, by the way, after that, State representatives—to a series of behaviors that they say are acceptable for two reasons: first of all, they have the Thompson memorandum; and, second of all, they have been told by the Congress and by the press and by the American people to root out all of this behavior that they long thought was going on with large companies.

And I think what it has done is created an atmosphere in which the conduct or the management of corporations is becoming more and more difficult, because if you look at the regulatory process, the antitrust process, all those things we live under, we have to deal with our lawyers every day. And as people begin to wonder every time they have, you know, a problem that if they are visiting with their lawyer and those notes that lawyer is taking, where are they going to end up? "Can I ask you, counsel, a really tough question? I got a big problem in my mind. I am dealing with my boss. I am dealing with outside forces. I am dealing with my investors. I need to talk to you."

And I believe that we are playing so much defense in the corporate boardrooms that we have taken our eye off running the companies and we are spending all of our time talking to more and more lawyers. This is a lawyers' retirement act, and I am glad for them. But we need to take a look here and say what are we doing to the fundamental ability to drive this economy to employ people and to lead the world's economy, and we are making some big mistakes here, sir.

Chairman SPECTER. Is it deterring internal corporate investigations?

Mr. DONOHUE. I believe it is.

Chairman SPECTER. Are corporations changing their policy about paying attorney's fees for individuals under investigation?

Mr. DONOHUE. I think there are a lot of corporations, as you are, watching the current case. Some of the attorney fee payments are guaranteed in employment contracts. Some have been the normal practice of sort of keeping company and employee together for mutual defense. And some are just thoughtful understandings of what it can cost what has been a good employee to defend himself for a week or a month or for 3 years. And people can be easily bankrupt and, therefore, as you well indicated, coerced into actions that they otherwise would not take.

Let me just say, Mr. Chairman, the environment in corporate boardrooms and in the CEO's office and in the general counsel's of-

fice has changed fundamentally in this country, and not for the better.

Chairman SPECTER. Thank you.

Ms. Mathis, when the ABA submitted a letter to the Department of Justice seeking to have some modifications in this policy, were you satisfied with the Department's response?

Ms. MATHIS. Respectfully, Senator, we were not. We received a response that was very general in its nature, that reflected much of what Deputy Attorney General McNulty testified to today. It did not deal with the specifics of our letter, nor did it deal with the specifics in the attachment to the letter, which sets forth a number of manners in which we believe prosecutors can obtain the information they need for their prosecutions without violating attorney-client privilege, the work product doctrine, or even the rights of employees.

Chairman SPECTER. May I suggest that the ABA try again in light of the testimony here today, perhaps referencing executive privilege, which you have heard Mr. McNulty's testimony on. Work product, the Department of Justice is a staunch defender of work product in the Solicitor General's office, withheld all sorts of documents, and I think appropriately so in the Roberts confirmation, in the Alito confirmation. And those are certainly analogous. Give some consideration to trying again.

Mr. Weissmann, in your task force on Enron, to what extent did you utilize the approach of the so-called Thompson memorandum?

Mr. WEISSMANN. Well, our understanding is it was required, so we used it consistently because we had to. There were—

Chairman SPECTER. You used it consistently, and did you get waivers of the attorney-client privilege?

Mr. WEISSMANN. We did, and I would say that we did it, what I would hope was strategically and in a limited way in the manner that I described earlier, which was it wasn't necessary at the outset—

Chairman SPECTER. It was not necessary?

Mr. WEISSMANN. It was not necessary at the outset to ask for blanket waivers, and we did not.

Chairman SPECTER. You did?

Mr. WEISSMANN. No, we did not ask for blanket waivers up front.

Chairman SPECTER. Was it necessary to ask for the waivers which you did ask for?

Mr. WEISSMANN. I think that there is one area where it was, and that is when you are investigating an underlying transaction. To take one example, in Enron there was a transaction involving moving the losses from one business segment to a winning business segment. And knowing what people at the time said to their lawyers within Enron was very useful information.

I would point out in that situation, most companies are more than happy to turn that over because they are usually going to rely on an attorney-client defense, having an advice-of-counsel defense.

Chairman SPECTER. Taking the situation as a whole, do you think that it was a fair practice to do what you did in Enron with respect to the Thompson memo?

Mr. WEISSMANN. I do, but I do think that there should be greater guidance, because I know that the practices that we used were

ones that we devised on our own, and it did not come from any guidance from the Department to require prosecutors across the country to be so surgical.

Chairman SPECTER. So you did not need the greater guidance, but you think that as a matter of policy, the DOJ practice needs more guidance for the attorneys in the field?

Mr. WEISSMANN. Yes.

Chairman SPECTER. Mr. Sheppard, tell us a little bit more about the "bend your knees" concept. Is it really that bad? And do you only have to go so far as bending your knees?

Mr. SHEPPARD. There are times when I have been flat on my back, Senator, on behalf of my clients.

Chairman SPECTER. A powerhouse lawyer like Richard Sprague bending his knees, that does not comport with the Richard Sprague I know—not that he has arthritis, but I don't think he bends at the knees before anybody.

Mr. SHEPPARD. He does not, Mr. Chairman. He sends me to do those things.

[Laughter.]

Chairman SPECTER. Well, that certainly should earn you a raise, which Mr. Sprague can afford to give you.

Mr. SHEPPARD. In answer to your question, Mr. Chairman, I think the concern that I have the most here is that the decision by the corporation needs to be the decision of the corporation. It really cannot be at the very outset and at the earliest parts of the investigation a decision that is made by, in essence, the prosecutor. Deputy Attorney General McNulty's comments about when these factors come into play do not comport at all with my experience.

From the very minute that a problem arises in the corporate context, these considerations, and particularly the cooperation considerations in the Thompson memorandum, figure prominently in every decision that corporate counsel makes and in every decision that the individuals who may be represented by separate counsel need to make.

For me, I think the answer is it should be the employee's decision, it should be the corporation's decision on whether they want to cooperate and how they should do so. It is not the decision that should be made by the prosecutor on pain of a corporate death sentence.

Chairman SPECTER. Well, thank you all very much. The Committee is going to pursue this issue. It is true that we have had a large, large number of complaints about it, just a tremendous number of complaints. And we have members of this Committee who have had considerable experience in the criminal justice system, and the criminal justice system has evolved over centuries, common law practice, and then the formulation of the Constitution and the Bill of Rights and many, many, many decisions and a lot of experience. And the attorney-client privilege is rockbed in the judicial system. And the practice of paying attorney's fees is also a very common practice and relied upon, and there is no doubt that it would weigh heavily on a judgment any individual would do when faced with an investigation as to whether he or she could afford the cost of defending himself or herself.

So we have to be very cautious on significant changes in that structure, and I think that these factors do constitute significant changes. And perhaps former Attorney General Ed Meese has given us the right formula. Let's see if we can solve the problem without legislation, but as a last resort, it is up to the Congress of the United States to determine what is appropriate in the administration of criminal justice in this country.

Thank you all very much. That concludes our hearing.

[Whereupon, at 11:33 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

February 26, 2007

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

Dear Mr. Chairman:

Enclosed please find responses to questions posed to Deputy Attorney General Paul J. McNulty following Mr. McNulty's appearance before the Committee on September 12, 2006. The subject of the Committee's hearing was "The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations."

We hope that this information is helpful to the Committee. If we may be of additional assistance in connection with this or any other matter, we trust that you will not hesitate to call upon us.

Sincerely,

Richard A. Hertling
Acting Assistant Attorney General

Enclosure

cc: The Honorable Arlen Specter
Ranking Minority Member

"The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations"
Committee on the Judiciary
United States Senate

Responses of Paul J. McNulty
Deputy Attorney General

Responses to Questions from Senator Leahy:

The Department's Cooperation Policies

1. **Prior to the adoption of the Holder and Thompson memoranda, the Department had no formal policy instructing its prosecutors to demand waiver of the attorney-client privilege as a condition for cooperation credit. Yet the Department appeared to have no trouble securing convictions against organizations that violated the law.**

   a. **Please explain what has changed about corporate fraud prosecutions in the past few years that would require the Department to alter its past practice and to routinely seek the waiver of this fundamental privilege?**

   Response:

   The Department disagrees that the Holder and Thompson memoranda were policies that instructed prosecutors to "demand" waiver of the attorney-client privilege as a condition for cooperation credit. Our policies never demanded waiver as a condition of cooperation.

   There is nothing different about the prosecutions from earlier years, except that they may have grown in size and complexity after the corporate scandals in 2000 through 2002. The Department respectfully disagrees with the suggestion that, prior to the issuance of the Thompson Memorandum in 2003, waiver was never discussed. Prior to 1999, corporate counsel provided federal prosecutors otherwise privileged materials, *e.g.*, internal investigations and documents the company's attorneys had prepared in investigating corporate fraud. The difference between then and now is that there was no formalized guidance to prosecutors about how they should consider that disclosure as part of a comprehensive analysis of whether a corporation should be charged.

   It should be noted that the McNulty Memorandum, which supersedes the Thompson Memorandum, expressly provides that 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. That language is consistent with the Thompson Memorandum, which expressly stated that waiver of attorney client and work product protections was not an absolute requirement for a cooperation benefit. Waiver is, and always was, only one sub-factor to consider when a prosecutor is evaluating whether a corporation has cooperated. Cooperation is but

one factor in a nine-factor analysis the prosecutor must undertake when making a charging decision.

Moreover, requests for waiver of privilege are not routine. In addition, they most often occur when the company has hired attorneys to conduct an internal investigation, and it has learned the facts through the interviews conducted during that investigation, the disclosure of which may require waiving the privilege. If the company wants to cooperate, it should inform the government of the facts and identify the wrongdoers. If the company can do that without waiving the privilege, the Department is satisfied, and it is happy to work with the company to eliminate or minimize any need for privilege waivers. But if the company cannot get the government the facts and identify the culprits without waiving the privilege, for whatever reason, then prosecutors appropriately may ask the company which has volunteered to cooperate in the government's investigation to waive the privilege in certain respects.

When requesting a waiver, prosecutors are not seeking a blanket review of attorneys' files; they are looking for limited information relevant to their case. The McNulty Memorandum provides that the waiver is only to be considered in appropriate circumstances after prosecutors have established that they have a legitimate need for the information. To request purely factual information that may be covered by privilege (Category I information), prosecutors must seek written approval from the United States Attorney or Department component head. To request attorney-client communications or non-fact work product (Category II information), the United States Attorney or Department component head must seek written approval from the Deputy Attorney General. The guidance further provides that Category II information should only be sought in rare instances and if the corporation declines to provide a waiver of Category II information, prosecutors must not consider this declination against it when making a charging decision. Because prosecutors must make a showing of legitimate need to obtain written approval to request waiver in either category, requesting a waiver is not, and cannot be, a routine occurrence.

b. Even if the government does not specifically demand a waiver of the attorney client privilege, the Thompson Memorandum essentially tells corporations that the government should <u>expect</u> such a waiver as evidence of cooperation. Have there been any cases where a corporation received leniency when it did <u>not</u> waive the attorney-client privilege since the issuance of the Thompson memorandum? If so, please briefly describe any such cases.

<u>Response:</u>

The McNulty Memorandum and its predecessor, the Thompson Memorandum, do not tell corporations that the government expects waiver of the attorney-client privilege. The memorandum provides a transparent schematic to the

government's decision-making process in evaluating a corporation's culpability. As discussed in the previous response, waiver of attorney-client privilege is but one sub-factor of one of the nine factors that are evaluated. If an assessment of the nine factors as a whole weighs against charging a company, the prosecutor will decline prosecution. Decisions to forgo charging are made every day by prosecutors across the country and those decisions are not dependent on whether the company waived a privilege.

c. Does the Department condone seeking blanket waivers of the attorney-client privilege at the outset of a corporate fraud investigation? If not, what steps have been taken to provide guidance to prosecutors in the field regarding when B and at what stage in the investigation B it is appropriate to seek a waiver of the attorney-client privilege?

Response:

The Department does not condone seeking blanket waivers at the outset of a corporate fraud investigation and it is not aware of any empirical evidence which suggests that this has ever been a routine practice by federal prosecutors.

Requesting blanket waiver at the outset of an investigation is inconsistent with Department guidance and practice. In assessing corporate liability, prosecutors look at a host of factors: the seriousness of the offense, the pervasiveness of wrongdoing in the corporation, the complicity of management, the corporation's history, its timely disclosure of wrongdoing, the adequacy of an existing compliance program, the corporation's remedial actions, collateral consequences to shareholders and employees, the adequacy of prosecuting employees, and the adequacy of remedies such as civil or regulatory actions. *See* McNulty Memorandum III-B. Waiver is one part of assessing cooperation, and if requested, it is up to the company whether to agree to waive. It can never be a *quid pro quo* in charging, because the prosecutor has to consider much more than waiver in making a charging determination. Moreover, the McNulty Memorandum expressly provides that waiver is not a prerequisite to finding that the company has cooperated. McNulty Memorandum VII-B-2.

The McNulty Memorandum also provides very specific guidance to prosecutors in the field in making waiver requests. Prosecutors have to establish a legitimate need for the information. A legitimate need is not established by concluding that it is desirable or convenient to obtain the information. Whether there is a legitimate need depends upon: (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 means other than waiver; (3) the completeness of the voluntary disclosure already provided; and (4) the collateral consequences to a corporation of a waiver. Prosecutors must meet this test before they can request waiver. Even after meeting the test, prosecutors are instructed to seek the least intrusive waiver

necessary to conduct a complete and thorough investigation, and should follow a step-by-step approach in requesting information. McNulty Memorandum VII-B-2.

These requirements necessarily mean that prosecutors cannot ask for blanket or unlimited privilege waivers at any stage of the government's investigation.

2. **During the hearing, you testified that when the Department seeks a waiver of the attorney-client privilege, the Government's real interest is in the results of internal audits and investigations and not in the confidential communications between corporate counsel and his or her client. Nonetheless, often when the Department seeks a waiver of the attorney-client privilege and the work product doctrine, this type of sensitive information is included.**

   a. **Will the Department revise its cooperation policies to prohibit prosecutors from seeking a privilege waiver with respect to the confidential communications between corporate counsel and his or her client?**

Response:

The Department has revised its policies with respect to waiver requests for attorney-client communications. In the new McNulty Memorandum, attorney-client communications and non-fact work product are designated as Category II information. To obtain Category II information, the prosecutor must establish a legitimate need for the information. In addition, prosecutors are told that Category II information should only be sought in rare circumstances and only if deemed necessary after a thorough review of Category I information. If the request is made, it is made by the United States Attorney or the Department component head to the Deputy Attorney General. The request and approval must be in writing and a record is maintained in the Office of the Deputy Attorney General.

With two types of attorney-client communications, however, approval to request waiver may be obtained from the United States Attorney. For instance, approval to request legal advice or communications in furtherance of a crime or fraud, coming within the crime-fraud exception to the attorney-client privilege, may be obtained from the United States Attorney. In addition, approval to request legal advice contemporaneous to the underlying misconduct when the corporation or one of its employees is relying upon an advice of counsel defense may be obtained from the United States Attorney. These communications may be vital to evaluating the viability of an advice of counsel defense when making a determination about whether the corporation should be charged.

b. **During the hearing, you acknowledged that there are other means for prosecutors to obtain helpful information from a corporation other than seeking a privilege waiver, such as conducting witness interviews of employees with relevant information. Given this, does the Department condone the practice of federal prosecutors seeking corporate counsel's confidential notes of privileged interviews of company employees when these employees are made available to the Government for interviews?**

Response:

The Department has always acknowledged that it has alternative means to obtain relevant information from a corporation. We compel production by subpoenaing documents and witnesses into the grand jury and using search warrants. The Department may also obtain the same information voluntarily. It accepts the production of attorney notes of employee interviews where the company waives privilege and voluntarily produces them. As explained in the prepared remarks submitted prior to the hearing, the voluntary production of this material often benefits a corporation by expediting the criminal investigation and the Department's charging decision. A quick conclusion to these matters is often desired by the company because it is much less disruptive to business operations. Moreover, employee interviews conducted during an internal investigation can yield additional facts for the investigation because witness recollections are generally better closer to the events at issue. Counsel interviews may aid the prosecutor in obtaining a more complete record of the circumstances surrounding the misconduct.

c. **Please identify all Department policies that limit the discretion of federal prosecutors to seek waivers of the attorney-client privilege as a short cut to obtaining information that the Government could have obtained simply by interviewing witnesses or by employing other investigatory techniques.**

Response:

The Department's policy regarding waivers of the attorney-client privilege is set forth in the McNulty Memorandum issued on December 12, 2006. As previously stated, the McNulty Memorandum requires prosecutors to seek prior approval when privileged material is requested from a corporation.

3. **Many in the business community have expressed concern that the Department's policies adversely impact corporate defendants, because – once waived – the waiver of the attorney-client privilege is permanent. As a result, corporate defendants are often exposed to civil litigation after the Department completes its criminal investigation. Will the Department revise its policy to seek information by voluntary agreement, rather than privilege**

waiver, so that the privilege and work product protections will still apply to these materials with respect to non-Government parties?

Response:

In appropriate cases, the Department enters into confidentiality agreements at the request of a corporation that wants to shield the documents from disclosure to third parties. However, the Department must produce these documents to other government agencies if such disclosure is authorized by law. The Department also typically makes exceptions in these agreements for use of documents in any criminal prosecution resulting from the investigation.

These agreements are rarely enforceable. The overwhelming majority of circuits have already held that the privilege is waived once the documents have been produced to the government, so that third parties typically obtain access to those documents when the issue has been litigated. The Department cannot establish policy contrary to case law, but it does support the adoption of proposed Federal Rule of Evidence 502. That Rule provides for selective waiver so that production to the government will not necessarily waive the corporation's privilege in litigation with a third party. The proposed Rule has been distributed for public comment.

4. **In October 2005, then-Acting Deputy Attorney General Robert D. McCallum issued a memorandum concerning Waiver of the Corporate Attorney-Client and Work Product Protections. This memo instructed all Department Component Heads and U.S. Attorneys to establish a written policy for when the Government would ask a criminal defendant to waive the attorney-client privilege or work product doctrine.**

   a. **Have all Department components and U.S. Attorneys complied with this memorandum by establishing a written waiver policy and, if not, how many offices have such written policies to date?**

Response:

The Memorandum issued by Acting Deputy Attorney General McCallum in October 2005 was binding on all Department components, U.S. Attorneys' Offices, and Department prosecutors. That memorandum required federal prosecutors to obtain approval from the United States Attorney or other supervisor before seeking a waiver of the attorney-client or work product protection. It has now been superseded by the McNulty Memorandum. The McNulty Memorandum requires that federal prosecutors obtain written approval from their United States Attorney or Department component head before requesting a waiver of privilege for factual information. It requires that the United States Attorney or Department component head obtain written approval from the Deputy Attorney General before requesting attorney-client communications or non-fact work product.

b. During the hearing, several witnesses testified that there is significant concern that different waiver policies -- which vary from office to office -- will create more confusion. What steps has the Department taken to address this concern and to establish a uniform Department-wide policy on this issue?

Response:

We disagree that confusion is created by each office with the Department's policy. The McNulty Memorandum provides clear guidance as to what factors must be considered in making a corporate charging decision, and it establishes the same approval process for United States Attorneys' Offices and components at Main Justice. United States Attorneys are required to consult with the Assistant Attorney General on each Category I request and the Deputy Attorney General approves Category II requests. This guidance provides uniformity and consistency in the Department's decision-making with respect to seeking privilege waivers.

c. Please provide copies of the Department's written waiver policies for all U.S. Attorneys' Offices and Department Components.

Response:

All United States Attorneys' Offices and the Criminal Division have had a written waiver policy as directed in the McCallum Memorandum. However, these policies are no longer in effect to the extent they are inconsistent with the new approval requirements established in the McNulty Memorandum. Notwithstanding, if the Committee continues to desire copies of the superseded policies, please let us know and we will provide them.

5. **An unfortunate consequence of the Department's cooperation policy is that companies are now reluctant to conduct internal audits and investigations out of concern that they will be forced to turn over this information to the Government and have it used against them. What steps is the Department taking to address concerns that its policy is discouraging companies from investigating and redressing corporate wrongdoing?**

Response:

A corporation is not obligated to turn over the results of its internal investigation to the Department in the criminal investigation if it believes that doing so will be adverse to the corporation's interests. The only way that this material can be obtained is through a voluntary waiver of privilege by the corporation. However, it should also be recognized that corporations are not at liberty to hide evidence of criminal conduct, keeping it in-house and hidden from scrutiny. A corporation has an independent obligation to identify misconduct and disclose this information to regulatory authorities and to its shareholders. It must be honest with the investing public. The focus should not be on developing law enforcement policy to encourage concealment of corporate misconduct; it should be directed towards encouraging greater transparency in corporate governance. Good practice requires corporate counsel to warn employees that their participation in an internal investigation may not remain confidential and that any privilege is held by the corporation and not by the employee. If an employee is properly counseled in that regard, the employee can make his own decision as to the extent of his participation in the company's internal investigation. As a matter of good governance, a corporation also should sanction or terminate employees who have committed criminal activity.

The Department's policy does not discourage companies from investigating; it encourages good corporate governance.

6. **In the case of *Garrity v. New Jersey*, the Supreme Court held that the Government couldn't force police officers to make statements that could be used against them criminally by threatening to fire them if they didn't testify. Are there potential *Garrity*-like concerns with the Department's cooperation policies, because corporate employees can be required to cooperate with an internal investigation as a condition of their employment and the employing corporation can be required, in turn, by the Government to waive the attorney-client privilege and to hand over the results of such an internal investigation to federal prosecutors?**

Response:

Internal corporate fraud investigations conducted by corporations are private in nature and thus do not involve state (government) action. The presence of state action was the foundation of the United States Supreme Court decision in *Garrity*

v. New Jersey, 385 U.S. 493 (1967). In that decision, the Supreme Court held that due process protections were implicated because a New Jersey state law required state government employees, police officers, to either answer questions which might incriminate them criminally, or be subject to dismissal from their government jobs.

On the other hand, corporate boards and officers are obligated by duties owed to stockholders to ferret out potential illegal acts or fraud committed by corporate officers or employees. These investigative activities, which may require officers or employees to provide personally incriminating evidence compelled by the possibility of dismissal for being non-cooperative, do not involve state action, and therefore are not subject to the constitutional guarantees against self incrimination that applied in *Garrity*.

7. **The Thompson Memorandum also seems to encourage companies to fire employees under some circumstances to show their cooperation. In essence, this policy appears to compel corporate employees to either waive their right against self-incrimination or risk losing their jobs. What steps is the Department taking to protect the Fifth Amendment rights of employees against self-incrimination under such circumstances?**

Response:

Employees questioned by employers that are not government entities are not protected by Fifth Amendment rights against self incrimination. Each non-governmental corporation is entitled to the full cooperation and candor of its employees. The corporation has an independent obligation to its stockholders to identify, deter and punish fraud or misconduct. While employees can always choose not to participate in the corporation's internal investigation, they risk discipline or termination. Those adverse consequences are far from coercive: rooting out misconduct is fundamental to the operation of our nation's securities markets and to the operation of the corporation.

This is not new. The Department's policy related to cooperation in this regard is longstanding. Our prosecution policy has always considered cooperation a key factor in its prosecutive evaluation of potential defendants (examples include the Civiletti Principles of Prosecution (1980s), and the memoranda issued by former Attorney General Thornburgh and Deputy Attorney General Holder and current Deputy Attorney General Paul J. McNulty). Banks, for example, have routinely provided information, including privilege-protected materials, to law enforcement when embezzlement and other internal crimes are discovered.

Rather than acting as agents of the government, the corporation grants access to protected information, on a case-by-case basis, based on the interests of the corporation and its owners, the shareholders. It is the corporation which is deciding what action is in its best interest. If fraud occurs, a corporation has a

duty to its shareholders to address the fraud, as well as to comply with public disclosure requirements of regulatory agencies.

8. **The attorney-client privilege does not apply when the lawyer-client relationship is being used to facilitate or promote a fraud, i.e., the crime-fraud exception. Given that corporations cannot use the privilege to conceal criminal activity, please explain why the Department needs to obtain a waiver of this privilege under circumstances where there is no evidence that a corporation is attempting to conceal fraud or corporate wrongdoing?**

Response:

Reliance on the crime-fraud exception as a substitute for voluntary cooperation from a corporation would provide a woefully inadequate alternative for swift and thorough review of the extent of the corporate wrongdoing and identification of the responsible actors. The breach of the privilege under the crime-fraud exception potentially will apply only in those instances where the relationship between the corporation and its attorneys furthered a criminal activity. This would not cover situations where the corporation's attorneys conducted an internal investigation and discovered that officers or employees of the corporation had committed an illegal act in the past.

9. **In your written testimony, you said that in white collar crime investigations, [i]f the company wants to cooperate, it has to tell us the facts and identify the wrongdoers. If the company can do that without waiving the privilege, the Department is satisfied and we are happy to work with the company to eliminate or minimize any need for privilege waivers. But if the company can't get us the facts and identify the culprits without waiving the privilege, for whatever reason, then prosecutors may ask the company, which has volunteered to cooperate, to waive the privilege in certain respects. Your statement seems to suggest that the Department is willing to work with corporate defendants to avoid the need for a privilege waiver. Please identify all steps that have been taken by the Department to communicate this policy with the 93 U.S. Attorneys' offices around the nation and with the Department's Components.**

Response:

This statement was not meant to suggest that the Department had a policy regarding waiver other than that set forth in the McNulty Memorandum. The meaning of this statement is only that, if a corporation is reluctant to waive the privilege, but wishes to receive a cooperation benefit for disclosure of certain information, it is free to suggest alternative means to disclose to the government without the necessity of waiving privilege. The means and method of such disclosure is selected by the company, not the Department. In fact, the McNulty Memorandum provides that when federal prosecutors request waiver, they must

first establish a legitimate need. Part of the legitimate need test is determining whether the information may be obtained by means other than requesting waiver.

10. **You also testified that under Department policy, waiver of the attorney-client privilege is sought only after the Department has determined that there is criminal liability. Please state the steps that the Department has taken to enforce this policy regarding the timing of waiver requests.**

Response:

The criminal charging process involves a complex series of decisions made before and after receipt of information from target companies and third parties. A determination that a company may be criminally liable is not made in a single moment. Because criminal liability is an assessment made over time, the Department does not time its waiver requests to coincide with any particular point in its negotiations with the corporation. The subject of waiver is raised when prosecutors are considering whether to charge the corporation. The Department has not developed a timing policy because every investigation and its accompanying charging negotiations are highly individualized with unique sets of facts and circumstances. Moreover, the McNulty Memorandum requires that prosecutors satisfy a legitimate needs test before they can seek approval to request privileged materials.

11. **In *United States v. Stein*, the court found that federal prosecutors in the KPMG case raised the issue of whether KPMG was paying for legal fees for employees at the very first meeting with the company. Without commenting on the specifics of this ongoing litigation, please state what the Department's policy is with respect to when, if ever, it is appropriate for federal prosecutors to inquire about a company's policies regarding the payment of legal fees for employees. Please provide a copy of this policy.**

Response:

As noted, the Department cannot comment on *United States v. Stein* because the litigation is pending. The McNulty Memorandum provides that prosecutors generally cannot consider a corporation's advancement of attorneys' fees to its employees as part of an assessment of a company's cooperation in a criminal investigation. A rare exception is created for the instance where the advancement of attorneys' fees, combined with other telling facts, demonstrates that a corporation was acting with the intent to impede the government's investigation. Where this rare circumstance exists, the United States Attorney or Department component head must obtain approval from the Deputy Attorney General before this factor can be considered in a charging decision.

12. **The Thompson memo has been criticized by a wide variety of legal institutions from across the political spectrum, including the ABA, the**

Heritage Foundation, and the ACLU. What internal steps, if any, has the Department taken to review this policy in light of these concerns?

Response:

The Department met with a variety of business and legal associations to listen to their concerns about this guidance. We have received a number of letters and reports from these associations. In addition, the Deputy Attorney General requested input from Departmental components about revisions to the guidance. The result of these discussions was the issuances of revised guidance, the McNulty Memorandum, on December 12, 2006. The new guidance strikes a fair balance between the interests of the business community and the investing public. It encourages corporate self-policing, self-reporting, and cooperation with law enforcement.

13. **During the hearing you stated that you would be willing to meet with me to further discuss my concerns about the Department's corporate fraud policy. Will you meet with me to discuss this important issue?**

Response:

The Deputy Attorney General is always available and willing to meet to discuss the provisions of the new corporate charging policy.

Terrorism Prosecutions

14. **During the hearing, I asked you about a recent article in the Washington Post which reported that a new study by the Transactional Records Access Clearinghouse ("TRAC"), shows that the Department's terrorism prosecutions have declined dramatically over the last few years. According to the TRAC report, in 2002, federal prosecutors filed charges against 355 defendants in terrorism cases. But, last year this number dropped to just 46 – to pre-9/11 levels. In addition, as many as nine out of 10 terrorism investigations do not even result in criminal prosecutions, according to the report.**

    a. **How do you explain this dramatic decline in terrorism prosecutions?**

Response:

We do not agree with TRAC's methodology, analysis, and conclusions, all of which are inconsistent with the reality of the Justice Department's efforts to prevent terror in the 21st Century. In fact, the TRAC study ignores the value of early disruption of potential terrorist acts by proactive prosecution of terrorism-related targets on less serious charges. This strategy has proven to be an effective method of deterring and disrupting potential terrorist acts.

TRAC bases its report exclusively on statistics obtained from the Executive Office for United States Attorneys (EOUSA), yet those statistics are just one data source for evaluating terrorism prosecution efforts. In public statements and testimony, as well as in the Counterterrorism White Paper referenced by TRAC, the Department primarily utilizes the statistics of terrorism and terrorism-related cases with an international nexus which have been maintained by the Criminal Division since September 11, 2001. As stated in the Counterterrorism White Paper,

> "Our successes have not been confined to any single district or any single approach. We have had significant successful criminal prosecutions in every region of the country, as prosecutors nationwide have taken up the counterterrorism mantle."

Based on statistics maintained by the Criminal Division on terrorism and terrorism-related criminal cases with an international nexus, as of August 31, 2006:

- 456 defendants have been charged;
- resulting in 288 convictions in 54 jurisdictions;
- including 243 guilty pleas;
- 45 convictions after trial;
- 139 cases remain pending; and
- 29 cases which have not resulted in conviction and are no longer pending.

b. **According to the TRAC report, many of the defendants in the terrorism cases that the Department does criminally prosecute serve little or no jail time. Please state the median sentence for the Department's terrorism cases since September 11, 2001. How many of these terrorism cases have resulted in sentences of life in prison?**

Response:

TRAC's report rests on a number of faulty assumptions which result in inaccurate conclusions. TRAC incorrectly assumes that the large sentences obtained in terrorism cases pre-9/11 reflect that these were "real" terrorism cases, whereas the

lesser sentences reflected in post-9/11 terrorism and anti-terrorism cases reflect a mischaracterization of terrorism enforcement efforts. In fact, the pre-9/11 terrorism cases focused on completed acts of terrorism that were prosecuted and resulted in substantial sentences. In contrast, our post-9/11 focus on prevention and disruption before these efforts culminate in terrorist acts means that we use the full range of criminal offenses at our disposal to charge offenses that fit the facts before those who would do us harm put their plans into action. Thus, we use non-terrorism offenses, such as false statement charges, immigration fraud, and use of fraudulent travel documents, to prevent and disrupt actual terrorist threats and planning before they culminate in acts of terrorism.

TRAC also incorrectly assumes that criminal prosecution resulting in lengthy incarceration is the only means of measuring effective terrorism enforcement efforts. Criminal prosecution, conviction and sentencing to terms in prison is only one possible successful measure of effective criminal enforcement. Alternative resolutions include pleas to lesser offenses, and recruitment of cooperators who provide testimony against others, sentencing to time served on lesser offenses and immediate deportation from the United States of aliens, and exploitation of intelligence for national security purposes.

Iraq Fraud

15. **According to a recent study by Taxpayers Against Fraud, a nonprofit watchdog group, there are more than 50 ongoing investigations of fraud in connection with the war and reconstruction effort in Iraq, and at least five False Claims Act cases involving contracting abuses in Iraq have been filed under seal. But, to date, the Justice Department has not brought a single civil or criminal fraud case against a Government contractor doing business in Iraq, and the Department has refused to join the two civil fraud cases that have been brought by private relators against dishonest Iraq contractors. Why isn't the Justice Department investigating and prosecuting fraud in connection with the Iraq war and reconstruction effort? Please state the number of civil and criminal cases or investigations arising out of the Iraq war and reconstruction effort that are currently pending within the Department.**

Response:

The stated premise of the question concerning the number of investigations and the absence of fraud cases is incorrect. The Department of Justice takes seriously the statutory requirement that "the Attorney General diligently shall investigate" violations of the False Claims Act. 31 U.S.C. § 3730(a). Cases involving alleged fraud by contractors in Iraq are being investigated and worked upon at least as aggressively as all other matters filed under the False Claims Act. Most recently, EGL, Inc., headquartered in Houston, paid the government $4 million to settle allegations that it added $1.4 million in fraudulent charges for "war risk

insurance" to its invoices under a subcontract for military cargo shipments to Iraq, and a company vice-president pleaded guilty and was sentenced to 30 months imprisonment. *United States v. Cahill*, 4:06-cr-40004-MMM-JAG (C.D. Ill.).

The Department often requires more than 60 days to conduct its investigation of a relator's allegations, but in each civil *qui tam* case involving Iraq, the relators have fully consented to the extensions, and the courts have found good cause for the extensions. Because fraud investigations are protected by grand jury rules and statutorily required seals, there is little precise information that can be publicly revealed. Nevertheless, there have been a number of *qui tam* cases filed in which the allegations could involve the reconstruction and war effort in Iraq. So far, the seal has been lifted on six *qui tam* cases where the government has declined to intervene in the relators' suits. *United States ex rel. DRC, Inc., et al., v. Custer Battles, LLC, et al.*, No. CV-04-199-A (E.D. Va.); *United States ex rel. McBride v. Kellogg, Brown & Root*, No. 1:05CV0828 (D. D.C.); *United States ex rel. National Whistleblower Center v. Halliburton*, No. 1:05cv02110 (D.D.C.); and *United States ex rel. Wilson, et al. v. Kellogg, Brown & Root*, No. 1:04CV595 (E.D. Va.); *United States ex rel. Doyen v. Tryco International*, No. 1:05cv350 (E.D. Va.); *United States ex rel. Courtney v. Kellogg, Brown & Root*, No. H-05-1766 (S.D. Tex.).

The Department of Justice has also brought a number of criminal actions. For example, the Criminal Division's Fraud Section has participated with the United States Attorney for the Central District of Illinois in the indictment or conviction of 7 individuals who were former employees of government contractors, including KBR, Eagle Global Logistics, and Tamimi. Two of these indictments were brought in the Western District of Tennessee.

In addition, the Criminal Division's Fraud Section is conducting multiple additional investigations arising out of the Iraq war and reconstruction effort. Because these are active investigations, we cannot disclose specific information regarding the number, location and nature of these pending matters.

Responses to Questions From Senator Schumer:

1. **Many critics of the Department of Justice's policy with respect to waivers in connection with corporate prosecutions believe that the situation would be improved if the standard for requests for attorney-client or work-product privilege did not vary from district to district. Under current policy, for example, all wiretap applications, all RICO charges, and all terrorism charges must be approved through Main Justice.**

    a. **After some outcry, in 2005, the Associate Attorney General issued a directive requiring U.S. Attorneys to develop a written process for privilege waiver requests. However, given the collateral consequences**

and the potential for abuse, what would be wrong with requiring waiver requests to corporations to be approved through Main Justice as well?

Response:

There is nothing wrong with establishing a procedure that requires Main Justice approval for waiver requests. As an initial matter, the McCallum Memorandum never created substantive changes in policy. Rather, it merely mandated a process requirement. In any event, the McNulty Memorandum, which supersedes the McCallum Memorandum, creates new approval requirements requiring consultation with Main Justice when prosecutors request privileged factual information. Main Justice approval is required when prosecutors request attorney-client communications.

b. Would not a centralized process reduce the potential for abuse, increase accountability, and minimize variations in practice among the 94 U.S. Attorney officers?

Response:

As indicated in our response above, we disagree that there is a potential for abuse and variation. We believe that our response to Senator Leahy's question 4(b) is responsive to both subsections of this question.

2. Please describe, with specificity, the trend with respect to the frequency of corporate entity prosecutions over the last ten years. In particular:

a. Please provide the number of corporate entities indicted for each year over the past 10 years?

Response:

Our Central System does not specifically capture "corporate" entities, but captures businesses as a defendant identity code. We are unable to provide the business defendants who were indicted in FY 2003 and earlier because the business defendant code was not captured in our Central System. The business defendant code was implemented in FY 2004 in which our Central System indicates that 306 business defendants were indicted. In FY 2005, the Central System indicates that 367 business defendants were indicted. In FY 2006, the Central System indicates that 319 business defendants were indicted.

b. Please provide the number of corporate entities that have entered into deferred prosecution agreements for each year over the past 10 years.

Response:

The Department and the EOUSA databases are not searchable in a manner that would reliably identify and capture the number of deferred prosecution/non-prosecution agreements that have been entered into with corporations during the last 10 years. In March 2006, the Department's Corporate Fraud Task Force conducted a partial survey of U.S. Attorney's Offices regarding specific cases known at that time to task force members. The study focused on decisions to prosecute, forego prosecution, or reach negotiated dispositions with corporate targets. Most of the cases and matters selected for the survey were opened after the creation of the Task Force, and involved situations in which a major corporation/entity was deemed a putative defendant. Individual survey questionnaires were sent for the cases and matters selected. A total of 54 surveys, one for each case or matter, were circulated; 47 responses, reporting information about 52 corporate entities, were received. These cases ranged back to 1993 through March 2006. Of these cases there were 20 non-prosecution agreements and 21 deferred prosecution agreements.

c. **Please describe what, if any, impact the issuance of the Holder Memorandum in 1999 and the Thompson Memorandum in 2003 had on the number of corporate prosecutions and pleas.**

Response:

After the issuance of the Holder Memorandum in 1999, our nation's economy was severely impacted with the corporate scandals of 2000-2002. The Department began investigating and prosecuting cases such as Enron and WorldCom. During the midst of these large-scale corporate prosecutions, the Department issued the Thompson Memorandum in 2003.

While both memoranda created new transparency in our corporate charging decisions, the existence of this guidance was not a catalyst for an increase in corporate prosecutions. The guidelines merely memorialized the charging factors prosecutors had been considering for decades. The increase in prosecutions and pleas during this time period is attributable to an increased focus on corporate fraud by the Department through the Corporate Fraud Task Force and investigative agencies.

3. **One of the principal concerns of corporations that are asked to waive privilege by the government is the likely judicial finding that the privilege has also been waived with respect to third-party civil litigants, who may capitalize on such waivers to the detriment of the cooperating corporation. Some have suggested that Congress should act to create a selective waiver rule, permitting firms to waive the privilege for purposes of cooperating with an investigation, but to preserve it with respect to third party litigants.**

a. Do you believe a selective waiver rule is desirable?

Response:

The Department has been open to a new rule in the Federal Rules of Evidence that would permit selective waiver in certain limited circumstances. The Advisory Committee on the Evidence Rules is currently considering just such a rule and has published a proposal for public comment. We believe selective waiver could alleviate concerns by some corporations and allow for full cooperation in government investigations, without facing the necessity of waiving the attorney-client privilege for all time and as to all persons. The Department supports the proposal.

c. Do you believe that such a rule will only embolden prosecutors to seek waivers even more frequently?

Response:

We do not believe this would be the case. Prosecutors would continue to be governed by the criteria set forth in the McNulty Memorandum, and the decision to seek a waiver would continue to be subject to approval by a United States Attorney or the Deputy Attorney General, depending upon the circumstances in a particular case and the type of material sought. However, it would make a decision to waive privilege easier for a corporation which might have otherwise determined such a waiver to be in its own best interest in light of is duties to its stockholders, but has been constrained by a fear that the waiver would be universal.

SUBMISSIONS FOR THE RECORD

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June 7, 2006

BY FACSIMILE

The Honorable Alberto Gonzales
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Gonzales:

Business Roundtable is an association of chief executive officers of leading U.S. companies with over $4.5 trillion in annual revenues and more than 10 million employees. Member companies comprise nearly a third of the total value of the U.S. stock market and represent nearly a third of all corporate income taxes paid to the federal government. Collectively, they returned more than $110 billion in dividends to shareholders and the economy in 2005.

In recent surveys, Business Roundtable CEOs have said litigation costs are among the top three cost pressures facing their businesses. For the U.S. to sustain a vibrant economy that promotes job creation, we must continue to seek ways to reform our legal system which is the world's most expensive, costing our economy over $246 billion a year.

Passage of the "Class Action Fairness Act of 2005" was a major victory for America's citizens and its businesses. Business Roundtable is continuing to work at the federal level to enact responsible, common sense legal reforms, including asbestos liability reform and medical liability reform.

A key area of concern for Business Roundtable is the attorney-client privilege and what appears to be increasing attacks on this fundamental right, particularly in the corporate context.

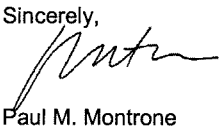
In April 2006, the U.S. Sentencing Commission voted 9-0 to strike language which made the waiver of attorney-client privilege determinative of whether a company was cooperating with a government investigation. Business Roundtable applauds this decision but remains concerned that the Justice Department's waiver policy continues. Businesses and their employees must have the right to consult freely with their attorneys particularly now in our complex world of corporate compliance with such laws as Sarbanes-Oxley.

According to a recent survey of over 1,200 in-house and outside corporate counsel, almost 75% of the respondents believe that a "culture of waiver" has evolved in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections.

Business Roundtable urges the Justice Department to address these concerns and find a more reasonable and proper balance that will enable investigators to gather information needed without jeopardizing the fundamental right of attorney-client privilege that enables individuals and companies to communicate with their attorneys in confidence, often to ensure compliance with the law.

Thank you for your leadership and for considering the views of chief executive officers of leading U.S. companies. We look forward to working together with you on these important issues. If you or your staff have any questions, please contact Maria Ghazal of Business Roundtable at (202) 496-3268.

Sincerely,



Paul M. Montrone
Chairman & CEO, Fisher Scientific International, Inc.
Chairman, Civil Justice Reform Task Force, Business Roundtable

Submission to the U.S. Senate Judiciary Committee

The Honorable Arlen Specter, Chairman
The Honorable Patrick Leahy, Ranking Democrat

Regarding Hearings on

Coerced Waiver of the Attorney-Client Privilege: The Negative Impact for Clients, Corporate Compliance, and the American Legal System

September 12, 2006

Submitted by 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
National Association of Criminal Defense Lawyers
National Association of Manufacturers
U.S. Chamber of Commerce

Introduction

The continued vitality of the attorney-client privilege is threatened by a number of governmental policies – foremost among them those of the U.S. Department of Justice. Because of these policies, companies that have been accused of wrongdoing or that are engaged in voluntarily self-evaluation or self-reporting are often forced to waive their attorney-client privileges in order to be judged as "cooperating" with prosecutors or enforcement officials. Erosion of the attorney-client privilege has a negative and concrete impact: executives and directors who would like to consult with corporate counsel about the most sensitive issues are confused about whether the corporate attorney-client privilege will apply to their conversations with counsel and thus their communications with lawyers are "chilled"; lawyers investigating allegations of wrongdoing are worried about how their honest attempts to unearth and correct serious problems may be used against the company's interests in the future; and line employees who lack the sophistication or means to protect themselves can be deprived of their Constitutional rights and left without the protections we would guarantee to any other person whose actions are under scrutiny as a result of a government investigation.

The Coalition to Protect the Attorney-Client Privilege is made up of a diverse and broadly representative constituency of interests and memberships, all of whom are concerned by governmental policies and practices that erode the protections of the attorney-client privilege. The coalition includes bar and professional associations, representatives of the

business community, and civil liberties organizations. But even with this breadth of representation, our respective constituencies are not the only ones affected by privilege erosion issues. The practice of forcing waivers of the attorney-client privilege has the unintended consequence of chilling aggressive self-policing by corporations, which we should encourage in order promote a compliant and reliable economic marketplace. Policies and practices of the government that undercut the lawyer-client relationship in the corporate context have the effect of deflating responsible corporate compliance efforts and ethical leadership by making it more likely that industrious executives in fast-paced businesses will simply forego consultation with lawyers with whom no predictable presumption of confidential communications exists.

Background and Importance of the Attorney-Client Privilege

Attorney-client confidentiality is the foundation of the relationship between a lawyer and client. The attorney-client privilege is an evidentiary / procedural right governed by a court when one party to an adversarial matter wishes to exclude from the other party's discovery requests or questioning that material which includes attorney-client communications or confidences. What can be excluded from an adversary's request as attorney-client privileged is actually quite narrow in scope: the privilege does not protect facts, or information that has been previously divulged to parties who aren't part of the confidential lawyer-client relationship. Since it thus only protects the client's requests for legal advice and the actual advice or work product of the legal counselor responding to that request, there is rarely a reason to assume that withholding such information from an adversary will leave the adversary without the ability to discover the facts needed to make its case.

While lawyers are generally bound by rules of professional ethics[1] to preserve their clients' confidences, it is the attorney-client privilege that allows a *client* to assert its rights to the confidentiality of its conversations with counsel and the non-disclosable nature of the work lawyers do for the client in anticipation of possible or pending litigation. The U.S. Supreme Court confirmed that corporations are entitled to the protections of the privilege as clients of lawyers they retain or employ in the landmark Supreme Court case of *Upjohn Co. v. United States.*[2]

The *Upjohn* decision is clear: privilege should be respected and promoted in the corporate context because it operates in the public's best interest by encouraging executives and managers in companies to seek out legal advice in order to ensure compliant conduct in their daily work. The Court reasoned that protecting client confidences also helps to facilitate timely reporting of problems so that they can be quickly addressed and remedied. The Supreme Court was clearly concerned that without predictable and enforceable confidentiality in lawyer-client communications, employees of a company would be unwilling to put corporate concerns ahead of their own personal interests in staying out of the spotlight when trouble might be brewing inside the company. The Court endorsed the concept of rewarding – not penalizing – employees for consulting a lawyer about a complex,

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[1] See, for example, ABA Model Rule of Professional Conduct 1.6, and its counterpart rule in every state's code of professional responsibility.

[2] *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981).

sensitive, or troubling matter; to do so encourages well-informed and responsible corporate actions.

We would note that some exceptions to the privilege exist, which make it impossible for a client to assert privilege rights against another party. The most important exception is what is called the crime-fraud exception. Under this well-recognized doctrine, a client cannot claim and a court cannot apply privilege protections regarding conversations or advice which result in the lawyer's services being used in furtherance of the commission of a crime or fraud. Our Coalition does not request or suggest that a client should be able to sustain a privilege claim that violates this exception – we ask only that communications and materials that fall soundly under the protections of traditional doctrines be respected.

What's Changed? What Causes Our Rising Concerns?

For hundreds of years, the courts have acted as guardians of clients' privilege rights, but increasingly, demands to waive the attorney-client privilege are being made outside the courthouse and without the oversight of an impartial judge. And so, our concerns today are not that the courts are somehow incorrectly making decisions that improperly erode privilege protections: rather, we are concerned that government agencies (such as the Department of Justice) are unilaterally making their own decisions about whether privilege rights and protections should or should not be afforded to those they plan to prosecute or, worse yet, against those against whom they have no case, but hope to enlist in collecting information that can be used against the real targets of their investigations. When prosecutors feel entitled to unilaterally force companies to waive their attorney-client privileges in order to receive fair treatment, courts are no longer the impartial arbiters of the privilege rights: rather, they simply are not present when privilege waiver demands are being made during pre-charging conversations between prosecutors and targets, and therefore they are no longer properly positioned to adjudicate privilege confidentiality disputes.[3]

Our surveys document an alarming increase in the number of instances in which privilege waiver demands are unilaterally made by prosecutors, enforcement officials, auditors and third-party plaintiffs.[4] Those demanding a waiver of the corporation's privileges regularly presume that they need to review everything and anything that may assist them in investigating potential misconduct or problems at the company, even if the information would be protected were a court of law overseeing the parties, and even if there is no showing that this most intrusive and extreme method of gathering information is necessary because other avenues of investigation or fact-finding are not available.

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[3] Coalition member The Association of Corporate Counsel developed and published two surveys that helped document the actual practices and experiences of corporate lawyers and their clients regarding privilege waiver and the practical effect of government prosecutorial policies and practices. Coalition member the National Association of Criminal Defense Lawyers offered parallel surveys to the outside defense bar community. Other partner organizations also sent the surveys to their members. The survey results are found online at http://www.acca.com/Surveys/attyclient.pdf, and http://www.acca.com/Surveys/attyclient2.pdf. The results of these surveys will be offered in greater detail later in this document; for now, we wish to note that the foundation for our assertions regarding privilege waiver practices of the government flows from documenting the actual experiences of hundreds of corporations through these surveys.

[4] While we have collected data and have serious concerns about waiver demands arising in the audit and third party suit contexts, we wish to remain focused in today's hearing on the issues that arise in the prosecutorial or enforcement process. While significant, the origins of the audit and third party privilege problems and the possible solutions to be considered are distinct and, as a result, probably best discussed in a separate forum.

In the enforcement or prosecutorial context, privilege waiver demands are often made at the earliest stages of the charging process. According to their own policy statements, in order for the Department of Justice or the Securities and Exchange Commission to deem a potential "targeted" company as cooperative, they may in their own discretion require a waiver of the corporation's privilege rights, well before charges have been filed or even a determination of the relevant facts is complete. Our surveys suggest that an increasing number of these "requests" are made at the first meeting between the targeted company and the prosecutors – before any facts are in or any investigations have been done: indeed, often before there is a confirmation that an allegation of wrongdoing has any merit at all.

When privilege waivers are demanded and secured unrelated to any pre-determined need for the specific information that constitutes the attorney-client communication, the only real beneficiaries are future third-party plaintiffs who can then demand access to privileged information that the company was forced to waive to the government. Some companies engage in a last-ditch effort to protect themselves against third party plaintiffs by executing a confidentiality agreement (otherwise known as a limited waiver) that they hope will have the effect of allowing them to put privileged documents provided in the context of an investigation "back into the box" of confidential material. DOJ and enforcement officials often suggest limited waiver agreements to reticent targets as an incentive to believe that the future distribution of privileged material that they wish to review can be controlled. While there is a split between the circuits regarding the enforceability of such confidentiality or limited waiver agreements when challenged by third party plaintiffs, the majority of courts have held that, once waived as to one party, the privilege is waived as to all future parties, as well, regardless of what the parties may agree amongst themselves to protect.[5]

Privilege In The Post-Sarbanes-Oxley Environment

While nothing has technically changed in the laws governing the application of the privilege in the corporate context in recent years, past corporate accounting scandals have raised concerns about the need for corporations to operate in a more transparent and accountable fashion, and have put pressure on prosecutors and enforcement officials to find and punish the bad guys. But the fact that the number of opportunities for prosecutions has increased, does not infer that the tools needed by a prosecutor in order to obtain a conviction have changed. Indeed, as noted by a stunning array of former top DOJ officials from past administrations (both Democrat and Republican), privilege waivers are not necessary for the DOJ to do its job; these former attorneys general and senior enforcement officials state that they are disappointed that current leadership at DOJ suggest that privilege waivers are a necessary and appropriate tool to ensuring a successful prosecution.[6] They make a

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[5] For example, see the recent holding of the 10th Circuit Court of Appeals, in *In re: QWEST Communications International, Inc.*, (No. 06-1070, decided in June of 2006), in which the Court refused to provide relief to QWEST from demands made by third party plaintiffs for documents produced to the SEC at the government's demand. Even though QWEST waived its privileges to satisfy the SEC requirements, it did so pursuant to the government's promise that a limited waiver agreement would protect the company from third party requests of just this type. The Court held that much as they might like, the SEC and QWEST could not contract around privilege waiver doctrine. As a result, the SEC received the full benefit of the bargain it struck; QWEST was painted into a waiver corner by the SEC, and then denied the protections of the bargain that was their only comfort and upon which they had reasonably relied.

[6] *See*, Letter of Former DOJ officials to Attorney General Alberto Gonzales, September 5, 2006: available at http://www.acca.com/public/attyclientpriv/agsept52006.pdf

compelling case against these tactics, arguing that weakening the attorney-client privilege will be counterproductive to the ultimate goals of promoting corporate accountability, transparency, self-reporting, and preventive compliance. They join us in arguing that increased corporate transparency is not connected to the elimination of confidential legal counseling; indeed, without a right to engage in confidential counseling, corporate transparency will suffer.

According to our surveys, privilege is essential to successfully counseling officers, directors, and employees on legal compliance issues that arise in the daily conduct of business. Though it is clear that corporate counsel's client is the entity and not any one of the entity's individual officers, directors or employees, in order to fulfill their fiduciary duties, corporate leaders must be able to include lawyers in every aspect of the business' work so that they are present when managers are making decisions about how to proceed with even seemingly routine tasks. The success of corporate counsel's efforts requires that they gain the trust of employees and are able to encourage these employees in their role as agents of the entity to seek and follow legal advice in an increasingly fast-paced, competitive, complex and highly-regulated business environment. Corporate counsel know that many of the employees they counsel believe their jobs would be easier if they didn't have to take time out to consult a lawyer in the first place; if the confidentiality of corporate communications with the lawyer is attacked as well, a relationship that is hard enough to encourage is further chilled, and the lawyer's pro-active role as a gatekeeper in the company is nearly impossible to fulfill.

In sum, the attorney-client privilege is an important incentive encouraging those with relevant information or concerns about possible wrongdoing to report what they know, rather than simply sitting on (or affirmatively burying) troubling facts. Knowing that a sensitive conversation about a potential problem is confidential allows an employee or executive to feel more confident about sharing these issues with their company counsel, who can then advise them as to whether there is indeed a problem (rather than a misunderstanding) and how to react. If employees believe that the attorney-client privilege will not protect the confidentiality of these kinds of conversations (knowing that the privilege is not the employee's but the entity's to waive or protect), then these conversations will likely not occur. As the Supreme Court declared in the *Upjohn* case, "An uncertain privilege . . . is little better than no privilege at all."[7]

Government Prosecutorial Practices are the Leading Cause of Privilege Erosion

In recent years[8], particularly at the federal level, criminal law enforcement and regulatory authorities have adopted policies and employed practices and procedures promising that if

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[7] Upjohn, supra note 2,449 U.S. at 393.

[8] Former leaders of the Department of Justice have testified in alignment with our coalition that the aggressive practices occurring today were not the norm during their tenures, and are not only unnecessary to accomplishing the Department's goals, but deplorable and inappropriate. *See, e.g.*, the testimony of former Attorney General Dick Thornburgh before the US Sentencing Commission at http://www.ussc.gov/corp/11_15_05/Thornburgh.pdf; and the submitted statement of a number of former senior DOJ officials, including former Attorneys General, Deputy Attorneys General and Solicitors General at http://www.acca.com/public/policy/attyclient/doj.pdf. An additional letter from these former Attorneys General is offered to the Committee today as a separate handout.

corporations disclose documents and information that are protected by the corporate attorney-client privilege and work-product doctrine, they may receive credit for "cooperation."

While this sounds like an option that a company can choose to exercise or not in its discretion, the reality is that corporations have no practical choice but to waive their attorney-client privilege when they are offered this "choice" because they are under investigation by the government. In federal criminal cases against companies, US Attorneys cite the "authority" granted them to consider privilege waiver as a necessary component in assessing a targeted company's cooperation by both the Justice Department's internal policy guideline on charging corporations (the Thompson Memorandum[9]), as well as a (now-proposed-for-elimination) provision of the Federal Sentencing Guidelines[10], both of which suggest that prosecutors can demand waiver of privilege if they feel that it is important to making their case. Companies that refuse to waive can be deemed uncooperative and thus may forfeit the ability to engage in settlement discussions, smaller (remunerative) fines or damages (as opposed to punitive penalties), or deferred or non-prosecution agreements. SEC enforcement officials who are targeting companies suspected of wrongdoing and who seek privilege waiver rely on the precedent set by the SEC in the so-called "Seaboard Report," as well as their well-asserted need for lawyers to act as "gatekeepers" in their entity

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[9] Deputy Attorney General Larry Thompson issued a 2003 memorandum that addressed the principles of federal prosecution of business organizations. (Memorandum from Deputy Attorney General Larry Thompson to Heads of Department Components and U.S. Attorneys, "Principles of Federal Prosecution of Business Organizations" (Jan. 20, 2003) (http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm). The Thompson Memorandum (which updates the "Holder Memorandum," originated by one of his predecessors, Deputy AG Eric Holder, who served during the Clinton Administration) lists nine factors that federal prosecutors should consider when charging companies. One of the factors 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 protections." This provision in practice is interpreted to require that companies routinely identify and hand over damaging documents, disclose the results of internal investigations, furnish the text and results of interviews with company officers and employees, and agree to waive attorney-client and work product protections in order to be deemed cooperative; such demands are often made without regard to whether privilege wavier is in fact necessary to the government getting all the facts it needs to undertake its investigation or prosecution, and before any meaningful assessment or investigation into the allegations suggesting that the company or any of its employees were engaged in any wrongdoing or negligent failures.

[10] Amendments made to the US Sentencing Guidelines, which became effective in November of 2004, state that in order to qualify for a reduction in sentence for providing assistance to a government investigation, a corporation is required to waive confidentiality protections if "such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." (U.S. Sentencing Guidelines Manual § 8C2.5 (2004) (available at http://www.ussc.gov/2004guid/8c2_5.htm). The Coalition to Preserve the Attorney-Client Privilege, and a number of its members and other interested organizations such as the American Bar Association, petitioned the US Sentencing Commission to overturn their recent amendments and we are pleased to note that this year's amendment cycle, currently before Congress for authorization purposes, include a proposal to remove the privilege waiver language from § 8C2.5. The Coalition's testimony to the Sentencing Commission can be found at http://www.acca.com/public/attyclntprvlg/coalitionussctestiony031506.pdf, and the Sentencing Commission's amendment proposals for 2006 can be found at 71 Federal Register 28063-28073, available at http://www.ussc.gov/FEDREG/2006finalnot.pdf.

clients.[11] Furthermore, other enforcement officials at agencies such as the IRS, the DOL, the FTC, the EPA, the FEC and others are imitating the SEC's strategies.

Prosecutors most often take privilege waiver conversations to the level of an inappropriately coercive tactic when they threaten criminal prosecution of the corporate entity as a means to secure the company's assistance in their case against the individuals who are the actual targets of the government's probe. (Ironically, these individuals are often rogue perpetrators who also make the entity a victim of their fraudulent activities, leaving the company the Hobson's Choice of surrendering its confidentiality rights for all time in order to help the government prosecute rogue employees or refuse privilege waiver requests and be accused of complicity.)

The abusive nature of the Thompson Memorandum's coercive use against corporate targets was underscored in a recent decision in the Southern District of New York in the cases of individual partners embroiled in the KPMG tax shelter cases. In *U.S. vs. Jeffrey Stein, et al.*,[12] Judge Kaplan held that Justice Department tactics deployed under the authority of the Thompson Memorandum violated the Fifth and Sixth Amendment rights of the defendants in the case. The court found that prosecutors coerced KPMG to cut off defendants' legal fees provided under KPMG's partnership policies; the government stated that if KPMG company wished to be deemed cooperative and avoid indictment as an entity it must sever all ties with the targeted partners.

One needs only to see what has happened to entities that have refused to "cooperate" (according to the government's dictates under the Thompson Memo) to see why KPMG and any other targeted entity would wish to avoid that fate. Those companies which have been charged as entities – Arthur Andersen, Milberg Weiss, and others – have either failed, or are currently suffering the dire consequences that attend indictment, including en masse departures of the company's most valuable employees and leaders (who no longer wish to risk their own reputations by continued affiliation with an indicted employer), loss of clients or customers who lose faith in the company's integrity or long-term viability, rescission of partnerships and relationships crucial to doing business, ineligibility for government contracts, loss of financing options and insurance coverage, and a general diminution (usually irretrievable) of their corporate brand and value.

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[11] Federal regulators, and particularly the SEC, have begun to adopt policies and practices mirroring those of the Department of Justice, which while discussing "cooperation credit," mention disclosures of protected confidential information. See, e.g., the Seaboard Report, ["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," Exch. Act Rel. No. 44969 (Oct. 23, 2001)]; in the Seaboard Report, the SEC outlined some of the criteria that it considers when assessing the extent to which a company's self-policing and cooperation efforts will influence its decision to bring an enforcement action against a company for federal securities law violations. The concern that waiver of the attorney-client privilege and work-product protections are now viewed as necessary elements evidencing a company's cooperation is bolstered by public remarks made by former SEC enforcement chief Stephen Cutler, in his remarks made during a program discussing the changing role of lawyers in remedying corporate wrongdoing during a presentation at UCLA's Law School in the Fall of 2004 ("The Themes of Sarbanes-Oxley as reflected in the Commission's Enforcement Program," (September 20, 2004) (transcript available at http://www.sec.gov/news/speech/spch092004smc.htm.)

[12] The KPMG case was decided by Judge Lewis Kaplan on June 28, 2006, [S1 05 Crim. 0888 (LAK)], opinion available online at http://www.acca.com/public/attyclientpriv/kpmg_decision.pdf.

Judge Kaplan was on point when he said, "Few if any competent defense lawyers would advise a corporate client at risk of indictment that it should feel free to advance legal fees to individuals in the face of the language of the Thompson Memorandum itself. It would be irresponsible to take the chance that prosecutors might view it as 'protecting ... culpable employees and agents.'" (Opinion at page 51.) Swap "privilege waiver" under the Thompson Memo into the statement above where "advancement of legal fees to individuals" appears, and you can see why defendants who are concerned about surviving a prosecution waive their privilege rights, even when there is no showing by the government that waiver is necessary for them to make their case. No one in a responsible positions of corporate leadership can afford to have their company labeled as non-cooperative in a government investigation; being labeled as "non-cooperative" is simply not an option to consider, even if the Justice Department suggests that companies that are asked to waive their privileges (or "throw employees under the bus" as one colorful prosecutor told one of our survey respondents) are given a choice as to whether they wish to cooperate with the government or not.

Formerly, a company could evidence its cooperation with prosecutors by providing insight and access to both relevant information and to the company's workplace and employees. The definition of a company's "cooperation" did not entail production of legally privileged communications and attorneys' litigation work product. Nor did it entail the need for the company to become the unofficial deputy of the prosecutor in implicating employees who may or may not be culpable for underlying failures or criminal activities. Now, however, in order to convince the prosecutor or regulator that the company is cooperating with the investigation, and indeed to avoid being accused of engaging in obstructionist behavior, companies are told directly or indirectly to waive their privileges and help prosecutors cut targeted employees off from any ability to defend themselves from the government's accusations. Neither requirement is tenable or appropriate for the government to impose on a company; neither requirement serves the public's interest in assuring that culpable wrongdoers will be prosecuted and convicted, or that our system of justice will be better served. So why do government officials continue to argue that privilege waiver is an appropriate requirement to prove that a company is cooperating or is necessary to successfully prosecute a corporate wrongdoer?

The Justice Department does not seem to have an answer to this question. Worse yet, in October of 2005, in what is now referred to as the McCallum Memorandum (named for its author, Associate Attorney General Robert McCallum),[13] the DOJ instructed its field offices regarding the issue of waiver by requesting – not that they conform to a new standard or even a uniform and non-abusive reading of the current policy, but – that they each establish or review their own office's policies for privilege waiver requests and report them back to DOJ Main. Mr. McCallum specifically notes in this memo that it is fine if field office policies differ from office to office based on local needs and circumstances. Thus, DOJ does not seem interested in either justifying or reigning in abusive practices, but in encouraging each field office to make its own procedural decisions, ensuring further chaos for clients unsure about whether or how they can push back against inappropriate privilege waiver demands made in each of the 90-some offices of the US Attorneys across the country.

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[13] A copy of the McCallum Memo can be found at http://www.acca.com/public/attyclntprvlg/mccallumwaivermemo.pdf.

Coalition members and partners have proposed more than one method by which the Thompson Memorandum could be revised to address our concerns and prosecutors could be educated in its more appropriate application. For example, both the Association of Corporate Counsel[14] and the American Bar Association[15] offered specific language suggestions for amending the Thompson Memo to the DOJ, and recently the ABA received a letter from the Attorney General's offices noting that the DOJ was not interested in amending the Thompson Memorandum. The gist of the letter is that the DOJ is satisfied that local US attorneys are operating just as they should.[16]

And so the DOJ continues to deny that there is a problem, even in the face of combined support from all of the nation's leading bars, business groups, and civil liberties organizations, two national surveys on the subject detailing abusive practices, extensive media criticism of DOJ waiver policies, a House Judiciary Committee hearing that decried prosecutorial practices (on March 7, 2006), a ruling by Judge Kaplan in KPMG that provisions in the Thompson Memorandum are clearly unconstitutional, and most recently, a statement from the Conference of Chief Justices (made up of the chief justices of each state's court system) that DOJ waiver policies and practices are inappropriate and must be stopped.[17] It seems that no one other than the DOJ thinks that the Thompson Memo sets good or appropriate policies or engenders appropriate prosecutorial practices regarding privilege waivers. And since the DOJ won't acknowledge to these problems, and since these practices cannot continue, we request that the Congress join us in demanding that the DOJ revisit and revise the Thompson Memorandum and stop the privilege waiver practices undertaken in its name.

In the Trenches: Waiver of the Privilege Has a Strong Negative Impact

The Department of Justice maintains that the privilege is not in danger and our concerns are overblown, stating that its prosecutors very rarely seek waivers.[18] Confident that the DOJ's contention is not supported by the facts but rather by their incorrect conjectures, our Coalition decided to collect empirical data on the prevalence of waiver requests made to our constituent members, as well as other indicators of the current health of the attorney-client

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[14] See the Association of Corporate Counsel's letters to senior DOJ officials outlining their suggestions for revising the Thompson Memorandum at http://www.acca.com/public/attyclientpriv/gonzales021306.pdf and http://www.acca.com/public/attyclientpriv/mccallum042106.pdf.

[15] See the ABA's letter to Attorney General Gonzales outlining their suggestions for revising the Thompson Memorandum at http://www.acca.com/public/article/attyclient/aba_to_ag.pdf.

[16] See the DOJ's letter to the ABA at http://www.acca.com/public/attyclientpriv/dojresponsetoaba.pdf.

[17] Resolution of the Conference of Chief Justices, adopted on August 2, 2006, and reprinted at http://ccj.ncsc.dni.us/resol9StateCommitteesOnAttorneyClientPrivilege.html.

[18] *See, e.g.*, Mary Beth Buchanan, "Effective Cooperation by Business Organizations and the Impact of Privilege Waivers," 39 Wake Forest L. Rev. 587, 598 (2004), citing to DOJ internal surveys conducted several years ago. No more recent review of department practices has been made available and many question whether this survey asked the best questions to elicit information that is responsive to this debate.

privilege. We particularly wished to address the contention of the Justice Department that waiver of the privilege is only one of the several criteria it examines under the Thompson Memorandum and is rarely determinative in the assessment of whether a company is cooperating with the government. Our findings, based on actual experiences of corporations under investigation or being prosecuted by the government, suggest that this singular criterion – privilege waiver – is all-powerful in determining whether a company will qualify for the crucial designation of "cooperative."

We have repeatedly challenged the Department of Justice to undertake a similar process by asking US Attorneys to respond to detailed information requests that include more nuanced questions than have been asked in the past, but so far, the only response we have received from the Department is that most US attorneys are required to get permission from a supervisor before they demand privilege waivers of corporate defendants, and only a small handful of such permissions have ever been recorded. We do not find it odd that prosecutors who may be violating internal policies requiring formal permissions to request waivers are not likely to report that they've asked for waivers without such permissions.

Further, we know that many prosecutors claim that "permission" requirements pertain to waiver waiver "demands" and not to conversations with targeted companies when waivers are merely "requested." Some prosecutors actually believe that when they say, "It's your *choice*: you can waive or we'll indict," that they have actually provided the company with two viable options from which they can choose. Thus, they believe that their "requests" for privilege waivers do not constitute "demands."

Other prosecutors cited in our surveys employ other "subtle" tactics such as tossing a copy of the Thompson Memo on the table with the privilege waiver section highlighted and making a statement such as "you'd like to qualify for the benefits of cooperation in this investigation, correct?" Perhaps prosecutors don't deem such practices to qualify as "demands," but the client receiving that communiqué gets the message loud and clear. Such loaded prosecutorial "requests" or presentations of "choices" are the functional equivalents of a demand to the corporation facing possible indictment and a shutdown of the entity. No choice but waiver exists for the company interested in protecting their stakeholders' interests in continuing to engage in business and trying to get past the problems currently plaguing it.

The Coalition's survey results from its members stems from original efforts to collect general information about privilege erosion in 2005, and a follow-up survey to delve deeper into additional related questions in 2006. In the first survey (2005), over 700 corporate lawyers offered answers and detailed perspectives about their privilege waiver experiences in the prosecutorial, enforcement, audit, and civil litigation context. Over half of our responses came from corporate counsel, many of them general counsel; the remainder came from outside counsel who specialize primarily in white collar criminal defense. We were struck by the strong response rate given the limited size of the pool we solicited to comment, and the unanimity of the message sent by respondents from different disciplines. The following are the results from this survey:[19]

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[19] An executive summary of this survey and its results is online at http://www.acca.com/Surveys/attyclient.pdf.

- **Reliance on privilege:** In-house lawyers confirmed that their clients are aware of and rely on privilege when consulting them (93% affirmed this statement for senior-level employees; 68% for mid and lower-tier employees).

- **Absent privilege, clients will be less candid:** If the privilege does not offer protection, in-house lawyers believe there will be a "chill" in the flow or candor of information from clients (95%); indeed, in-house respondents stated that clients are far more sensitive as to whether the privilege and its protections apply when the issue is highly sensitive (236 of 363), and when the issue might impact the employee personally (189 of 363).

- **Privilege facilitates delivery of legal services:** 96% of in-house counsel respondents said that the privilege and work-product doctrines serve an important purpose in facilitating their work as company counsel.

- **Privilege enhances the likelihood that clients will proactively seek advice:** 94% of in-house counsel respondents believe that the existence of the attorney-client privilege enhances the likelihood that company employees will come forward to discuss sensitive/difficult issues regarding the company's compliance with law.

- **Privilege improves the lawyer's ability to guarantee effective compliance initiatives:** 97% of corporate counsel surveyed believe that the mere existence of the privilege improves the lawyer's ability to monitor, enforce, and/or improve company compliance initiatives.

Presented with this data, the United States Sentencing Commission initiated a process to review its 2004 decision to include privilege waiver language in its organizational sentencing guidelines. Commissioners asked us to conduct further research in several areas of particular interest to their inquiry. The results of this second, follow-up survey were cited by the US Sentencing Commission as a primary determinant in their decision to propose amending the corporate sentencing guidelines in the 2005/6 amendment cycle to eliminate language they'd only inserted in 2004.

In brief, this second survey[20], found:

- **A Government Culture of Waiver Exists:** Almost 75% of both inside and outside counsel who responded to this question expressed agreement (almost 40% agreeing strongly) with a statement that a "'culture of waiver' has evolved in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections." **(Only 1% of inside counsel and 2.5 % of outside counsel disagreed with the statement.)** It is important to note that these surveys were sent to a cross section of practitioners without any knowledge of whether their company clients had had exposure to government prosecutions or specifically to privilege

[20] The second survey's results are online at http://www.acca.com/Surveys/attyclient2.pdf.

waiver requests, and so the overwhelmingly negative evaluation of government practices is doubly troubling.

- **'Government Expectation'[21] of Waiver of Attorney-Client Privilege Confirmed:** Of the respondents who confirmed that they or their clients had been subject to investigation in the last five years, approximately 30% of in-house respondents and 51% of outside respondents said that the government expected waiver in order to engage in bargaining or to be eligible to receive more favorable treatment.
- **Prosecutors Typically Request Privilege Waiver – It Is Rarely "Inferred" by Counsel:** Of those who had been investigated above, 55% of outside counsel responded that waiver of the attorney-client privilege was requested by enforcement officials either directly or indirectly. Twenty-seven percent of in-house counsel confirmed this to be true (60% of in-house counsel responded that they were not directly involved with waiver requests). Only 8% percent of outside counsel and 3% of in-house counsel said that they "inferred it was expected." Clearly, prosecutors are regularly asking this question, even if they don't believe that asking for waiver is the functional equivalent of demanding it, as our member constituents believe,
- **DOJ Policies Rank First, Sentencing Guidelines Second Among Reasons Given For Waiver Demands:** Outside counsel indicated that the Thompson/Holder/McCallum Memoranda are cited most frequently when a reason for waiver is provided by an enforcement official, and the Sentencing Guidelines are cited second. In-house counsel as a group placed the Guidelines third, behind "a quick and efficient resolution of the matter" (1) and DOJ policies (2).
- **Third Party Civil Suits Among Top Consequences of Government Investigations:** Fifteen percent of companies that experienced a governmental investigation within the past 5 years indicated that the investigation generated related third-party civil suits (such as private antitrust suits or derivative securities lawsuits). Of the eight response options that asked respondents to list the ultimate consequences of their clients' investigations, related third-party civil suits rated third for in-house lawyers. The first and second most common outcomes for in-house counsel were that the government decided not to pursue the matter further (24%), or that the company engaged in a civil settlement with the government to avoid further prosecution (18%). For outside counsel, the most cited outcome was criminal charges against individual leaders/employees of the company (18%), and a decision by the government not to prosecute (14%). "Related third party civil litigation" finished fifth (for outside counsel respondents) with 12%.

Faced with this evidence of privilege erosion and increasingly successful government waiver demands, the United States Sentencing Commission acted on April 5 of this year to repeal the privilege wavier language contained in the commentary to Chapter 8 – over the Justice Department's objections. Thus, a critical leg of the stool on which the Thompson Memorandum rests has been kicked out; the DOJ has lost the one "independent" justification it regularly cited as an authority upon which it premises its right to demand

[21] The survey defined 'government expectation' of waiver as a demand, suggestion, inquiry or other showing of expectation by the government that the company should waive the attorney-client privilege.

privilege waivers. All that remains to justify DOJ's waiver practices is their own internal policy guideline, which they suggest is not open to discussion or public scrutiny.

The Role of Congress in Protecting the Attorney-Client Privilege

In your oversight capacity for the Department of Justice, we ask you to join us in sending a message to the DOJ that the Thompson Memorandum and the practical interpretations of prosecutors applying it in the corporate charging process are at odds with long-standing and valuable benefits afforded to the public by a well-regarded and protected the attorney-client privilege. Prosecutorial demands for privilege waiver (and other coercive tactics, such as cutting off access to legal fees or by-passing employees' rights to exercise Fifth Amendment protections against self-incrimination) attributed to the prescriptions of the Thompson Memo are inappropriate. The attorney-client privilege is a client's right and a necessary safeguard to the effective operation of our legal system; its application supports corporate compliance, encourages corporate self-evaluation and self-reporting, and promotes greater corporate legal responsibility.

Privilege waiver should not be coerced or even considered when assessing whether a corporation is cooperating in an investigation or can qualify for leniency in a prosecution. Companies can cooperate with government investigations in a variety of ways that will serve the interests of justice and the swift and sure prosecution of wrongdoers, without any need for privilege waiver to enter the conversation. We ask this Committee to exercise its oversight of the DOJ and invalidate provisions of the Thompson Memorandum and similar policies at other federal agencies that prevent executives and employees from freely, candidly and confidentially consulting with their attorneys.

We thank you for your consideration of these important issues, and look forward to working with you as you continue to assess these matters and examine the resulting remedies the Committee may wish to pursue.

Senate Judiciary Committee

Hearing on:
The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations

Oral testimony By Thomas J. Donohue
President & CEO, U.S. Chamber of Commerce

224 Senate Dirksen Office Building
September 12, 2006

- Good morning, Mr. Chairman and members of the committee. My name is Tom Donohue. I am president and CEO of the U.S. Chamber of Commerce, the world's largest business federation, representing some 3 million businesses.

- I am also testifying on behalf of the Coalition to Preserve the Attorney Client Privilege, which includes most of the major legal and business associations in the country.

- I am here to ask the Committee, either through oversight of the Department of Justice or by enacting legislation, to invalidate provisions of DOJ's Thompson Memorandum and similar policies at other federal agencies that prevent executives and employees from freely, candidly and confidentially consulting with their attorneys.

- While the intention of former Deputy Attorney General Larry Thompson to crack down on corporate wrongdoers was laudable, the policies set forth in the Thompson memo violate fundamental constitutional and other long recognized rights in this country.

- They obstruct – rather than facilitate – corporate investigations.

- And, they were developed – and implemented -- without the involvement of Congress or the judiciary.

- This would perhaps be just another classic case of a federal agency overstepping its bounds if the consequences were not so profound.

- The attorney client-privilege is a cornerstone of America's justice system – this privilege even predates the Constitution and the Bill of Rights.

- The Thompson memo violates this right by requiring companies to waive their privilege in order to be seen as fully cooperating with federal investigators.

- This has effectively served notice to the business community, and the attorneys that represent them, that if you are being investigated by the Department and you want to stay in business, you better waive your attorney-client privilege.

- A company that refuses to waive its privilege risks being labeled as uncooperative, which all but guarantees that it will not get a settlement.

- The "uncooperative" label severely damages a company's brand, shareholder value, their relationships with suppliers and customers, and their very ability to survive.

- Being labeled uncooperative also drastically increases the likelihood that a company will be indicted and one need only look to the case of Arthur Andersen to see what happens to a business that is faced with that death blow.

- Once indicted, a company is unlikely to survive to even defend itself at trial or make the outcome of that trial relevant. Keep this fact in mind the next time you hear a Justice official use the phrase "voluntary waiver."

- The enforcement agencies argue that waiver of attorney-client privilege is necessary for improving compliance and conducting effective and thorough investigations.

- The opposite is true. An uncertain or unprotected attorney-client privilege actually diminishes compliance with the law.

- If company employees responsible for compliance with complicated statutes and regulations know that their conversations with attorneys are not protected, they will simply choose not to seek legal guidance.

- The result is that the company may fall out of compliance – not intentionally – but because of a lack of communication and trust between the company's employees and its attorneys.

- Similarly, during an investigation, if employees suspect that anything they say to their attorneys can be used against them, they won't say anything at all.

- That means that both the company and the government will be unable to find out what went wrong, punish the wrongdoers, and correct the company's compliance system.

- And there's one other major consequence – once the privilege is waived, third party private plaintiffs' lawyers can gain access to attorney-client conversations and use them to sue the company or obtain massive settlements.

- Despite our coalition's repeated attempts to work with Justice to remedy these problems, Justice has refused to acknowledge the problem or has argued that the attorney-client privilege waiver is only very rarely formally requested in an investigation.

- However, to debate the frequency of "formal" waiver requests or "voluntary waivers" is to engage in a senseless game of semantics.

- As the CEO of this country's largest business association and as a member of three corporate boards, I know how this game by prosecutors is played. As long as the Department of Justice exercises a policy that threatens companies with indictment if they do not waive their privilege, companies will feel compelled to waive -- whether a front-line prosecutor "formally" requests the waiver or not.

- Efforts to reform the Thompson Memorandum have been ineffective. Last year, then-Associate Attorney General Robert McCallum issued an update to the Thompson Memo that instructs U.S. attorneys to issue a waiver review process for each of their offices but does nothing to change internal policy that penalizes companies for preserving their attorney-client privilege.

- What's perhaps most disturbing is that the Thompson Memo was developed without any input from the Congress or the Judiciary. In fact, the only independent bodies that have actually reviewed these policies have rejected them.

- Compromise reforms or half baked ideas for softening the Thompson memo will not fix its fundamental shortcomings and may threaten to cause more problems than they solve.

- The only solution is for Congress, either through its oversight of the Department or directly by enacting legislation, to enact new policies that do not allow DOJ or other agencies to threaten businesses with the death penalty for exercising their fundamental right to consult freely with their attorneys.

- Let me be very clear about our motivation: we are not trying to protect corrupt companies or businesspeople. Nobody wants corporate wrongdoers caught and punished more than legitimate and honest businesspeople.

- Rather, our efforts are designed to protect well established and vital Constitutional and common-law rights and to facilitate legitimate investigations by encouraging candid and confidential conversations.

- Thank you very much. I look forward to your questions.

Statement of U.S. Senator Russ Feingold

Senate Judiciary Committee

Hearing on the Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations

September 12, 2006

Mr. Chairman, first I want to thank you and the Ranking Member for holding this hearing. I believe that the threat to attorney-client privilege raised by the Department of Justice policy established in the Thompson Memorandum is serious and must be discussed. The confidential nature of the attorney-client relationship is essential to the functioning of our legal system and should not be undermined. The promise of confidentiality encourages people to seek legal advice and encourages full disclosure between attorney and client so that the best possible legal advice can be offered.

The attorney-client privilege in the corporate context allows corporate officers and employees to ask questions and discuss potential problems with corporate counsel in order to make sure that the corporation acts lawfully. The privilege also enables corporate self-investigation, one of the most effective methods of detecting and stopping malfeasance. Attorney-client privilege is already very limited; I am far from convinced that there is reason to further restrict these protections in the corporate context.

I am concerned not only that federal prosecutors may be able to coerce corporations into waiving the attorney-client privilege, but also about the ramifications these waivers have on employees. If a corporation has no attorney-client confidentiality protection, an employee speaking to corporate counsel during an internal investigation has no guarantee that statements made during the investigation will not later be turned over to federal prosecutors. This forces employees to decide whether to cooperate with an internal investigation and give up their legal rights or face firing. This is a situation no employee should be forced to contemplate.

Mr. Chairman, I recognize that the Department of Justice faces many hurdles when undertaking the investigation and prosecution of corporate malfeasance. It is vital that federal prosecutors have all the tools necessary to protect the public in these matters. Facilitating and encouraging such investigations, however, should not occur at the cost of the legal rights of corporations or their employees. To aid

federal prosecutors, the Department of Justice should clarify and narrow its policy on the corporate waiver of attorney-client privilege.

I hope that today's hearing will begin a dialog between the interested parties about how to preserve the attorney-client privilege for corporations under federal investigation while not unduly hamstringing the ability of Department of Justice attorneys to conduct investigations of corporate wrongdoing. I believe that with the proper guidelines, the power of federal prosecutors to investigate corporate wrongdoing and the legal right to confidential communications between lawyers and clients can exist together. I hope this hearing will help the Department and the corporate counsel community, with the involvement of this Committee, start to figure out how. Thank you Mr. Chairman.

Statement Of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee
Hearing On "The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations"
September 12, 2006

The protection of communications between client and lawyer has been fundamental to our nation's legal justice system since its inception. The right to counsel has long been recognized as essential to ensure fairness, justice and equality under the law for all Americans. This Administration has taken extraordinary steps to investigate and prosecute the press and to intimidate the press, critics, and attorneys while it has claimed unlimited privileges and secrecy for itself.

As a former prosecutor, I understand all too well that our democracy requires a healthy respect for the law and that criminal wrongdoing must be punished. Wrongdoers who profit at the expense of ordinary working Americans must be held accountable. This is true for corporate wrongdoers and for those who violate the public's trust.

Following Enron's collapse in 2001, I authored the criminal provisions in the Public Company Accounting Reform and Investor Protection Act of 2002, commonly referred to as the Sarbanes-Oxley Act, which strengthened existing criminal penalties for corporate crime. I have since repeatedly offered stronger criminal penalties and accountability for war profiteering and contractor fraud-- only to be stymied by Administration and Republican opposition. Those war profiteering provisions are now also included in the REAL Security Act, introduced by the Senate Democratic leadership last week to refocus our efforts against terrorism and to make American safer. Like so many aspects of the Administration's involvement in Iraq, the fraud and waste that have plagued the rebuilding efforts there undermine our efforts to win hearts and minds in that part of the world that are necessary to any success.

Historically the attorney-client privilege has been balanced with competing objectives, including the need to ensure cooperation with the Government in criminal or regulatory probes. The issue before us today is whether this Justice Department has struck the right balance.

In the wake of major corporate scandals at Enron, WorldCom and elsewhere, the Justice Department revised its corporate fraud policy in 2003, when then Deputy Attorney General Larry D. Thompson issued the "Principals of Federal Prosecution of Business Organizations." The "Thompson Memorandum" – as it is commonly known – increased the emphasis on, and scrutiny of, a corporation's cooperation with the Government in connection with corporate fraud investigations. Specifically, the memorandum requires, among other things, that corporations under criminal investigation who wish to cooperate with the Government demonstrate their willingness to cooperate by waiving the attorney-client privilege and work product doctrine, by restricting the payment of legal fees for employees under investigation, and by refraining from entering into joint defense agreements and other information-sharing arrangements.

A growing number of critics of the Thompson Memorandum – including former Republican Attorneys General – have expressed concern that the Department's policy is too heavy handed and that the policy has created a dangerous "culture of waiver" in our criminal justice system. Last month, the American Bar Association adopted a resolution opposing the Department's policy because it has the effect of eroding constitutional and other legal rights. Last Friday, the *Wall Street Journal* editorial board joined the criticism of Attorney General Gonzales and the Thompson Memorandum, noting that the coercive intimidation it represents is "more than a PR problem" for the Administration.

Two recent cases involving the Justice Department's corporate fraud prosecutions highlight the ABA's concerns. Earlier this year, the Department took the unusual step of criminally indicting the securities class-action law firm of Milberg Weiss Bershad & Schulman after that law firm refused to sign a deferred prosecution agreement that would have required the firm to waive the attorney-client privilege. In June, a federal judge in the

Southern District of New York ruled that the Department had unfairly pressured accounting firm KPMG not to pay the legal fees of its former partners, in violation of the partners' Fifth Amendment right to a fair trial and Sixth Amendment right to counsel.

The serious legal and constitutional concerns raised by the Department's policy have far-reaching implications. Erosion of the right to counsel undermines the fairness of our criminal justice system for all Americans. Once lost, this fundamental right would be hard to regain. Many critics worry that the Thompson Memorandum is yet another example of this Administration's tendency to overreach in asserting executive power without regard for the Constitution, the laws, and basic fairness.

Today, we will hear from the Deputy Attorney General and a distinguished panel of legal experts with broad range of experience and expertise on this issue. I look forward to a meaningful exchange.

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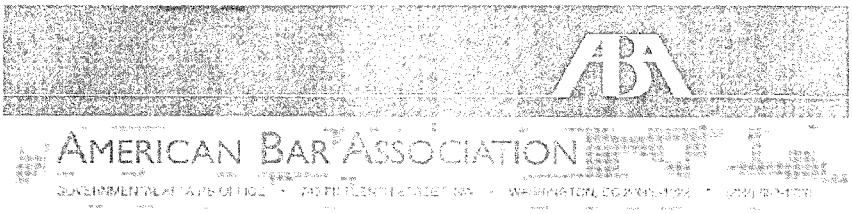

STATEMENT OF

KAREN J. MATHIS

PRESIDENT OF THE AMERICAN BAR ASSOCIATION

before the

COMMITTEE ON THE JUDICIARY

of the

UNITED STATES SENATE

concerning

"THE THOMPSON MEMORANDUM'S EFFECT ON THE RIGHT TO COUNSEL IN CORPORATE INVESTIGATIONS"

SEPTEMBER 12, 2006

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

My name is Karen J. Mathis. I am the President of the American Bar Association (ABA) and a practicing attorney with the firm of McElroy, Deutsch, Mulvaney & Carpenter, LLP in Denver, Colorado. Thank you for the opportunity to testify before you today on behalf of the ABA and its more than 410,000 members on the critical issues surrounding "the Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations."

The ABA strongly supports preserving the attorney-client privilege and the work product doctrine. We are concerned about language in the Department of Justice's Thompson Memorandum—and other related federal governmental policies and practices—that have begun to seriously erode these fundamental rights.[1] We also are concerned about the separate provision in the Thompson Memorandum that erodes employees' constitutional and other legal rights, including the right to effective legal counsel and the right against self-incrimination.

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-

[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/acprivilege.htm.

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.

The Thompson Memorandum's Erosion of the Attorney-Client Privilege and the Work Product Doctrine

A number of federal governmental agencies—including the Department of Justice and the U.S. Sentencing Commission—have adopted policies in recent years that weaken the attorney-client privilege and work product doctrine in the corporate context by encouraging federal prosecutors to routinely pressure companies and other organizations to waive these legal protections as a condition for receiving credit for cooperation during investigations.

The Department of Justice's privilege waiver policy is set forth in a January 2003 memorandum written by then-Deputy Attorney General Larry Thompson entitled "Principles of Federal Prosecution of Business Organizations."[2] The so-called "Thompson Memorandum" instructs federal 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 the Thompson Memorandum is the organization's willingness to waive attorney-client 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,

[2] 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, available at http://www.usdoj.gov/dag/cftf/business_organizations.pdf.

> 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 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.

The Thompson Memorandum expanded upon a similar directive that a previous Deputy Attorney General, Eric Holder, sent to federal prosecutors in 1999.[3]

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. It relied on the prosecutor's discretion to determine whether waiver was necessary in the particular case.

While the Department's privilege waiver policy was established by the 1999 Holder Memorandum and expanded by the 2003 Thompson Memorandum, the issue of coerced waiver was further exacerbated in November 2004 when the U.S. Sentencing Commission added language to the Commentary to Section 8C2.5 of the Federal Sentencing Guidelines that, like the Department's policy, authorized and encouraged prosecutors to seek privilege waiver as a condition for cooperation.[4]

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[3] *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.usdoj.gov/criminal/fraud/policy/Chargingcorps.html. The so-called "Holder Memorandum" stated in pertinent part as follows:

> 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, to disclose the complete results of its internal investigation, and to waive attorney-client and work product privileges.

[4] The 2004 amendment to the Sentencing Guidelines added the following language to the Commentary:

In an attempt to address the growing concerns expressed about government-coerced waiver, then-Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Heads in October 2005 instructing each of them to adopt "a written waiver review process for your district or component," and local U.S. Attorneys are now in the process of implementing this directive.[5] The McCallum Memorandum does not establish any minimum standards for, or require national uniformity regarding, privilege waiver demands by prosecutors. As a result, the McCallum Memorandum is likely to 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 government-coerced waiver.

Unintended Consequences of Prosecutor Demands for Privilege Waiver

The American Bar Association is concerned that the Department of Justice's privilege waiver policy—like the 2004 privilege waiver amendment to the Sentencing Guidelines—has brought about a number of profoundly negative, if unintended, consequences.

First, the ABA believes that these waiver policies adopted by the Department of Justice and the Sentencing Commission have resulted routinely in the compelled waiver of attorney-client privilege and work product protections. Although the Thompson Memorandum and the privilege waiver language in the Sentencing Guidelines state that waiver is not mandatory and should not be

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> Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score [for cooperation with the government]...unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.

While this language begins by stating a general rule that a waiver is "not a prerequisite" for a reduction in the culpability score—and leniency—under the Guidelines, that statement is followed by a very broad and subjective exception for situations where prosecutors contend that waiver "is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." As a result, the exception essentially swallows the rule. Prior to the change, the Commentary was silent on the issue and contained no suggestion that such a waiver would ever be required. For a detailed discussion of the 2004 privilege waiver amendment, please see the ABA's March 28, 2006 written comments to the U.S. Sentencing Commission, available at www.abanet.org/poladv/abaussc32806.pdf.

[5] A copy of the McCallum Memorandum of October 21, 2005 is available online at http://www.abanet.org/poladv/mccallummemo212005.pdf.

required in every situation, these policies have led many prosecutors to pressure companies and other entities to waive their privileges on a regular basis as a condition for receiving cooperation credit during investigations. From a practical standpoint, companies have no choice but to waive when requested to do so, as the government's threat to label them as "uncooperative" will have a profound effect not just on charging and sentencing decisions, but on each company's public image, stock price, and credit worthiness as well.

The growing trend of government-coerced waiver was confirmed by a recent survey of over 1,200 in-house and outside corporate counsel that was completed by the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, and the ABA in March 2006.[6] According to the survey, almost 75% of corporate counsel 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. In addition, 52% of in-house respondents and 59% of outside respondents have indicated that there has been a marked increase in waiver requests as a condition of cooperation in recent years. Corporate counsel also indicated that when prosecutors give a reason for requesting privilege waiver, the Thompson/Holder/McCallum Memoranda and the 2004 amendment to the Sentencing Guidelines were among the reasons most frequently cited.

One example of this growing "culture of waiver" came to light last year when then-U.S. Attorney (and current Deputy Attorney General) Paul McNulty met with approximately fifty corporate general counsel to discuss the growing erosion of the attorney-client privilege. The former General Counsel of a now defunct steel company was one of those attending the meeting, and his story follows.

[6] The detailed Survey Results are available online at http://www.acca.com/Surveys/attyclient2.pdf.

When Bethlehem Steel was still in existence, a disgruntled former employee told authorities that the company was burying toxic waste at one of its sites in Texas. Fifty federal agents arrived at the company with a search warrant and backhoes and started digging up the yard. No buried drums were ever found, but, in the course of the search, the investigators found evidence of garden variety environmental violations that, in most circumstances, likely would have been pursued as civil violations. Perhaps understandably, the Department of Justice did not want to drop the matter altogether, and decided to pursue a criminal investigation.

At its very first meeting with the General Counsel, the Department of Justice demanded the privileged internal report prepared by outside counsel and sought cooperation from the company in pursuing charges against individual employees. No middle-ground alternative was entertained. Firmly believing that no knowing or intentional violation had occurred, the General Counsel declined the request, and the company prepared its defenses. In the end, the Department did not charge a single individual; the company negotiated a plea and paid a fine.

The Bethlehem Steel example exemplifies a situation where prosecutors—operating under an increasingly expansive interpretation of the Thompson Memorandum—do not wait for a company to volunteer waiver, but rather seek internal investigation reports and privilege waivers even in cases that arguably never should have been prosecuted. When the other general counsels in the room were asked if they had had similar experiences, 75% of the attendees said they had.

Second, the ABA believes that these governmental policies 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 managers and the board, and must be provided with all relevant information necessary to properly

represent the entity. By requiring routine waiver of an entity's attorney-client and work product protections, these governmental policies discourage entities from consulting with their lawyers, thereby impeding the lawyers' ability to effectively counsel compliance with the law. This harms not only companies, but the investing public as well.

Third, while these waiver policies were intended to aid government prosecution of corporate criminals, they are likely 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, any attempt to require routine waiver of attorney-client and work product protections will 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 privilege waiver policy and the 2004 privilege waiver amendment to the Sentencing Guidelines 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 ABA's Response to the Privilege Waiver Problem

The ABA is working to protect the attorney-client privilege and the work product doctrine in a number of ways. In 2004, the ABA Task Force on Attorney-Client Privilege was created to study and address the policies and practices of various federal agencies that have eroded attorney-client privilege and work product protections. The Chair of our Task Force, Bill Ide, is a prominent corporate attorney, a former president of the ABA, and the former senior vice president, general

counsel, and secretary of the Monsanto Corporation. The ABA Task Force has 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—unanimously adopted by our House of Delegates—supporting the attorney-client privilege and work product doctrine and opposing government policies that erode these protections.[7] The ABA's policy and other useful resources on this topic are available on our Task Force website at http://www.abanet.org/buslaw/attorneyclient/.

The ABA and our Task Force are also working in close cooperation with a broad and diverse coalition of influential legal and business groups—ranging from the U.S. Chamber of Commerce and the Association of Corporate Counsel to the American Civil Liberties Union and the National Association of Criminal Defense Lawyers—in an effort to modify both the Department of Justice's waiver policy and the 2004 privilege waiver amendment to the Sentencing Guidelines to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining cooperation.[8] The remarkable political and philosophical diversity of that coalition shows just how widespread these concerns have become in the business, legal, and public policy communities.

After receiving extensive written comments and testimony from the ABA, the coalition, numerous former senior Department of Justice officials, and other organizations,[9] the Sentencing Commission voted unanimously on April 5, 2006, to reverse the 2004 privilege waiver amendment

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

[8] 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.

[9] These statements and other useful resources on the topic of privilege waiver are available at www.abanet.org/poladv/acprivilege.htm.

to the Sentencing Guidelines. The change was included in the package of amendments that the Commission sent to Congress on May 1, 2006. Unless Congress acts to modify or reverse the change, it will become effective on November 1, 2006.

While the Commission's vote to remove the privilege waiver language from the Guidelines is a very positive and encouraging development, the Department of Justice has not yet taken steps to reexamine and remedy its role in the growing problem of government-coerced waiver. As a result, many federal prosecutors continue to demand that companies waive their privileges on a routine basis as a condition for receiving cooperation credit. In addition, the McCallum Memorandum, which requires all 93 U.S. Attorneys around the country to adopt their own local privilege waiver review procedures, will further complicate this issue.

In an effort to address the problems created by the Department's waiver policies, the ABA sent a letter to Attorney General Alberto Gonzales on May 2, 2006. In that letter, which is attached to this written statement as Appendix A,[10] the ABA expressed its concerns over the Department's privilege waiver policy and urged it to adopt specific revisions to the Thompson Memorandum that were prepared by the ABA Task Force and the coalition.

These suggested revisions to the Department of Justice's policy would help remedy the problem of government-coerced waiver while preserving the ability of prosecutors to obtain the important factual information they need to effectively enforce the law. To accomplish this, our proposal would amend the Department's policy by prohibiting prosecutors from seeking privilege waiver during investigations, specifying the types of factual, non-privileged information that prosecutors may request from companies as a sign of cooperation, and clarifying that any voluntary waiver of privilege shall not be considered when assessing whether the entity provided effective

[10] The ABA's May 2, 2006 letter to Attorney General Gonzales also is available at www.abanet.org/poladv/acprivgonz5206.pdf.

cooperation. This new language would strike the proper balance between effective law enforcement and the preservation of essential attorney-client privilege and work product protections.

The Department of Justice formally responded to the ABA's May 2 letter on July 18, 2006, and a copy of that letter is attached to this written statement as Appendix B. This response failed to address many of the specific concerns raised by the ABA and simply reasserted the Department's existing policy of coerced waiver. The ABA and the coalition were very disappointed by the Department's response.

Former Senior Justice Department Officials' Opposition to the Thompson Memorandum's Privilege Waiver Provisions

On September 5, 2006, a group of ten prominent former senior Department of Justice officials from both parties—including three former Attorneys General, three former Deputy Attorneys General, and four former Solicitors General—submitted a letter to Attorney General Gonzales expressing their opposition to the privilege waiver provisions of the Thompson Memorandum.[11] A copy of the correspondence is attached to this statement as Appendix C. In this letter, 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.

[11] A similar comment letter was submitted to the U.S. Sentencing Commission by many of these former Department of Justice officials—and former Attorney General Edwin Meese—on August 15, 2005, and that letter is available at http://www.abanet.org/poladv/acpriv_formerdojofficialstletter8-15-05.pdf.

Congressional Review of the Department's Waiver Policy and Suggested Reforms

In addition to the ABA, the coalition, and former Department of Justice officials, many Congressional leaders have also 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.[12] The Justice Department and several representatives of the coalition appeared and testified, while the ABA submitted a written statement for the record.[13] 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.

Although the ABA and the coalition are very encouraged by the Sentencing Commission's recent decision to reconsider and reverse its 2004 privilege waiver amendment to the Federal Sentencing Guidelines, the Department of Justice has declined to modify its privilege waiver policy as stated in the Thompson Memorandum. As a result, many federal prosecutors continue to demand that companies waive their privileges as a condition for receiving cooperation credit. In addition, in response to the 2005 McCallum Memorandum, local U.S. Attorneys are now in the process of adopting local privilege waiver review procedures, which will likely result in numerous different waiver policies throughout the country.

For these reasons, the ABA urges the Committee, in the course of exercising its oversight authority, to send a strong message to the Department of Justice that the attorney-client privilege and the work product doctrine are fundamental principles of our legal system that must be protected, and that the Thompson Memorandum and other related Department directives to its prosecutors are improperly undermining those fundamental rights. The ABA urges the Committee

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

[13] The written statements of the ABA and the witnesses appearing at the hearing are available at http://www.abanet.org/poladv/testimony306.pdf

to encourage the Department to modify the Thompson Memorandum to: (1) prohibit federal prosecutors from demanding, requesting, or encouraging, directly or indirectly, that companies waive their attorney-client or work product protections during investigations, (2) specify the types of factual, non-privileged information that prosecutors may request from companies during investigations as a sign of cooperation, and (3) clarify that any voluntary decision by a company to waive the attorney-client privilege and the work product doctrine shall not be considered when assessing whether the entity provided effective cooperation.

The Thompson Memorandum's Erosion of Employees' Constitutional and other Legal Rights and Suggested Reforms

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. In addition to its privilege waiver provisions, the Thompson Memorandum also contains language directing prosecutors, in determining cooperation, to consider an organization's willingness to take certain punitive actions against its own employees and agents during investigations. In particular, the Thompson Memorandum encourages 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.[14]

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

> ...a corporation's promise of support to culpable employees and agents, either through the advancing of

The ABA strongly opposes these provisions in the Thompson Memorandum[15] for a number of reasons.

First, the Department of Justice's policy is 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 Thompson Memorandum, prosecutors often 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. The Department's policy stands the presumption of innocence principle on its head. In addition, the policy overturns well-established corporate governance practices by forcing companies 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.

> 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 4 *supra*, at pgs. 7-8. The Thompson Memorandum does 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 may feel compelled either to defer to the government investigators' initial judgment or to err on the side of caution.

[15] 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/.

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. The fiduciary duties of the directors in making such decisions are clear, and they are in the best position to decide what is in the best interest of the shareholders.

Third, these provisions of the Thompson Memorandum 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.[16] The Thompson Memorandum seeks to undermine the ability of employees and other personnel to defend themselves, by seeking to prevent companies from sharing 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.[17] The language in the Thompson Memorandum undermines these rights by encouraging prosecutors to penalize companies that provide legal counsel, information or other assistance 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.

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[16] *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.").

[17] *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.").

Therefore when government prosecutors—citing the Thompson Memorandum's directives—succeed in pressuring a company not to pay for the employee's legal defense, the employee typically may 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 with whom the company has a common interest in defending against the investigation 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 Thompson Memorandum 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 of this year, 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 and their Sixth Amendment right to counsel.[18] 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.[19]

For all of these reasons, the ABA urges the Committee to encourage the Department of Justice to modify the Thompson Memorandum to prohibit prosecutors from demanding, requesting,

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[18] *United States v. Stein*, No. S1 05 Crim. 0888 (LAK) (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 15, *supra.* The background report is available online at http://www.abanet.org/buslaw/attorneyclient/materials/hod/emprights_report_adopted.pdf.

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

or encouraging that companies take any of these four types of punitive action against employees or other corporate agents as a condition for receiving cooperation credit.

The ABA believes that these changes, and the other proposed changes to the Thompson Memorandum discussed earlier in our testimony, would strike the proper balance between effective law enforcement and the preservation of essential attorney-client, work product, and employee legal protections.

We appreciate the opportunity to appear before the Committee and present our views on these subjects, which are of such vital importance to our system of justice, and I look forward to your questions.

- APPENDIX A -

Michael S. Greco

AMERICAN BAR ASSOCIATION

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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.

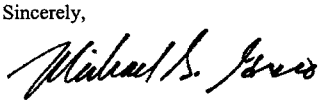
The ABA Task Force on Attorney-Client Privilege and the coalition have prepared suggested revisions to the Holder/Thompson/McCallum Memoranda that would remedy the problem of government-coerced waiver while preserving the ability of prosecutors to obtain the important factual information

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]

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[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 -

U.S. Department of Justice

Office of Intergovernmental and Public Liaison

Office of the President
JUL 24 2006
RECEIVED

950 Pennsylvania Avenue, NW, Room 1629 *(202) 514-3465*
Washington, DC 20530 *http://www.usdoj.gov/oipl/oipl.html*

July 18, 2006

Mr. Michael S. Greco
President
American Bar Association
Governmental Affairs Office
321 North Clark Street
Chicago, IL 60610

Dear Mr. Greco:

Thank you for your May 2, 2006, letter to Attorney General Gonzales outlining the American Bar Association's views on the use of waivers of the attorney-client privilege. The Department of Justice shares your commitment to the attorney-client privilege and work product doctrines as fundamental elements of our legal system. We are also committed to encouraging responsible corporate stewardship and corporate governance, a goal the ABA no doubt shares as well. We appreciate the opportunity to respond to your proposed revision to the Thompson Memorandum as part of our continuing dialogue on the issue of corporate cooperation in corporate fraud investigations.

As you are aware, President Bush, Congress, and the American people have all embraced a zero tolerance policy when it comes to corporate fraud. The Department of Justice is committed to fully and fairly enforcing the landmark Sarbanes-Oxley legislation of 2002 and prosecuting those in corporate America who would abuse their positions to enrich themselves unlawfully. We seek to protect the American public and to restore confidence in our financial markets. And we are proud of our record in that regard—from July 2002 through March 2006, the Department secured well over 1000 corporate fraud convictions.

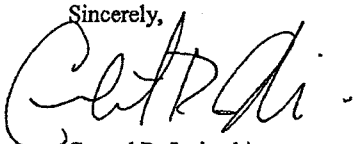
One key element of our success has been the ability to secure the corporation's cooperation. Our policy, as set forth in the Thompson Memorandum, provides that the degree to which a corporation cooperates with a criminal investigation may be a factor to be considered by prosecutors when determining whether or not to charge the corporation. There are numerous ways in which a corporation may indicate and provide a degree of cooperation that, under the Thompson Memorandum, will impact a decision on the charging of the corporation. One such factor, but certainly not the only factor, can be whether the corporation has waived its attorney-client and work product protections. In

such circumstances, corporations are generally represented by sophisticated counsel and make informed and considered decisions on whether to offer such waivers, to agree to requests for them from prosecutors, or to refuse such requests.

Although some have suggested that prosecutors routinely seek waivers of privileges, giving rise to a "culture of waiver," that should not occur under our guidelines, and we believe it does not routinely occur. Instead, waivers should be sought only when based upon a need for timely, complete, and accurate information and only with supervisory approval after a review of the underlying facts and circumstances. As we have recently confirmed through the McCallum Memorandum, clear guidelines for and supervisory oversight of any waiver requests are critical.

Thank you again for contacting the Department and for sharing your concerns. We hope to address the concerns you have raised, and view our previous meetings and the open lines of communication as important steps toward that goal. We can all agree that the Department should support both the societal benefits provided by traditional privileges, such as the attorney-client privilege, and those arising from the vigorous enforcement of the criminal laws against wrongdoers regardless of their stature or status. We look forward to continuing to work with you on these efforts. Please do not hesitate to contact this office if we may be of assistance with this or other matters.

Sincerely,



Crystal R. Jezierski
Director

- APPENDIX C -

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,
Civil Division (1989-1993)

Dick Thornburgh
Attorney General
(1988-1991)

Carol E. Dinkins
Deputy Attorney General
(1984-1985)

Jamie Gorelick
Deputy Attorney General
(1994-1997)

George J. Terwilliger III
Deputy Attorney General
(1991-1992)

Walter E. Dellinger III
Acting Solicitor General
(1996-1997)

Theodore B. Olson
Solicitor General
(2001-2004)

Kenneth W. Starr
Solicitor General
(1989-1993)

Seth P. Waxman
Solicitor General
(1997-2001)

Department of Justice

STATEMENT

OF

PAUL J. MCNULTY
DEPUTY ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

"THE *THOMPSON* MEMORANDUM'S EFFECT ON THE RIGHT TO COUNSEL IN CORPORATE INVESTIGATIONS"

PRESENTED ON

SEPTEMBER 12, 2006

Testimony of
Deputy Attorney General Paul J. McNulty
Senate Judiciary Committee
"The *Thompson* Memorandum's Effect on the Right to Counsel in Corporate Investigations"
September 12, 2006

Chairman Specter, Senator Leahy, and Members of the Committee, thank you for the opportunity to be here today to talk about the *Thompson* memo, an important criminal charging policy at the Department of Justice.

To begin, I want to take us back to 2002. It was a time of great concern to all of you in Congress and to American workers and investors. The public's trust in corporate America was deeply shaken by the large-scale bankruptcies of companies like Enron. The American people and their representatives here in Congress demanded that those responsible for corporate malfeasance be brought to justice. Senator Leahy captured the prevailing mood on Capitol Hill and in the country when he observed during a hearing of this Committee in July 2002 that "We cannot have a system where a pickpocket who steals 50 dollars faces more jail time than a CEO who steals 50 million dollars. The integrity of our judicial system depends on accountability. In addition, as the mounting scandals and declining stock market have demonstrated, the integrity of our public markets depends on the same accountability."

The Department of Justice responded to this crisis in corporate America with vigor and action. We prosecute gangsters, drug traffickers, and felons with guns -- corporate criminals are treated no differently. As these various scandals emerged, the American public needed to know that a CEO or a CFO of a Fortune 500 company was not immune from prosecution because of his wealth, position, or friends. They needed to know that the companies in which they invested their hard-earned savings were not above the law and that the managers of those companies

could not lie, cheat or steal, or tolerate those who do. What were the results of our efforts? Since 2002, the Department of Justice obtained more than 1000 corporate fraud convictions and convicted more than 160 corporate presidents and executive officers. In Adelphia, we obtained convictions of John Rigas and his sons and obtained an order for $1.5 billion in forfeited assets. In Worldcom, we obtained the conviction of the CEO Bernie Ebbers, who was sentenced to a substantial prison term and ordered to pay up to $45 million in fines and restitution with companion civil recoveries of many millions more. AIG was ordered to pay $25 million in penalties and to pay fines and disgorge profits of $800 million. In the Enron investigation, we obtained 25 convictions of corporate executives and recovered assets of more than $162 million for Enron's victims.

These prosecutions - when combined with reforms that Congress passed in the aftermath of the scandals - have helped to instill a climate of accountability in corporate boardrooms, and to restore investors' confidence in the integrity of our markets. These prosecutions were tough, complicated and resource-intensive.

The guidance contained in the *Thompson* Memorandum, the successor to the *Holder* Memorandum, must be viewed in the context of these massive corporate scandals. And what gets lost in the dialogue about the *Thompson* Memo is a very important threshold point. We must start with the fact that corporations are considered "legal persons" capable of being sued and capable of committing crimes. Corporate criminal liability is a form of vicarious liability – a doctrine that imposes criminal liability on one for the actions of another. Simply put, a corporation is criminally liable for the acts of its employees. In fact, the acts of employees are the acts of the corporation if the corporation's officers, agents and employees committed the

fraud within the scope of their employment for the benefit of the corporation. And a corporation doesn't even have to profit from the acts of its agent to be held criminally responsible. The government just has to prove that the agent *acted with intent* to benefit the corporation even if the agent himself also received a substantial personal benefit. *United States v. Automated Medical Laboratories*, 770 F.2d 399 (4th Cir. 1985). The threshold for charging a corporation is fairly low.

But in most cases we don't have to rely on that low threshold because the fraudulent conduct usually does benefit a corporation in some concrete way. For instance, a company benefits if its stock price rises because of the false statements of its CEO. Even if the CEO makes millions at the same time through his corporate compensation plan, that CEO's motive to make a personal profit in falsifying results to the marketplace does not relieve the corporation of criminal liability for the CEO's actions. In short, federal law favors charging a corporation, not allowing it to escape the consequences of its employee's misdeeds. Federal prosecutors could lawfully exercise their discretion to charge a corporation in many instances where we have stayed our hand.

Why stay our hand? Because a corporation, while legally a person, also represents a unique entity in which many have a stake – shareholders, employees and customers to name but three. Those kinds of considerations are taken into account, along with others in the *Thompson* Memo. The memo was drafted to look beyond the case law that favored the government and supported charging the corporate entity. It guides our federal prosecutors to consider not simply the legally possible and traditional factors like the harm done by the crime, but the collateral consequences of their charging decisions - such as the impact to innocent shareholders,

pensioners, employees. Prosecutors only begin an evaluation of the *Thompson* Memo factors after they have already determined that a corporation is vicariously liable and can be charged.

For both the Department of Justice and for corporate counsel and their clients, the benefit of a clear, multi-factor guidance memo is superior to any alternative. For example, would the critics of this guidance prefer strict adherence to a "zero tolerance" policy? Would they prefer that the Department abbreviate the *Thompson* Memo and simply direct prosecutors to consider only whether the corporation can be held vicariously liable for the actions of its employees, and if there is vicarious liability, to charge in every instance? Alternatively, would they prefer a world in which the *Thompson* guidance is eliminated entirely, leaving each individual prosecutor free to exercise his own unguided discretion about which corporation to charge and which not to? The irony of the attacks on the *Thompson* Memo is that the federal criminal justice system would be a much harsher, less predictable, and less transparent environment for corporations and their counsel in the absence of this guidance.

As Deputy Attorney General, I support the principles articulated in the *Thompson* Memorandum. In my experience as a former United States Attorney supervising prosecutors in the trenches, this guidance provides a road map to prosecutors and corporate counsel to ensure reasoned, thoughtful decision-making in the charging process. The *Thompson* Memorandum was prepared with the benefit of years of experience and the expertise of white collar prosecutors throughout the country. It is a time-tested and fair summary of the factors a prosecutor considers in charging a corporate entity, and it commits to paper what good prosecutors have been doing for decades.

Most important, the memo promotes transparency in the one area that a prosecutor can exercise the most individual choice and judgment — the charging process. Our critics should welcome the Department's efforts to shed light on what was once hidden from public view. The charging analysis in the *Thompson* Memo is nothing more than a structured recitation of what common sense would lead a prosecutor to consider. It tells a prosecutor, in determining whether to charge a corporation, to consider nine factors, including the nature and severity of the alleged conduct, its pervasiveness, a corporation's history of similar conduct, the existence and adequacy of the corporation's compliance program, and whether the corporation cooperated in the course of the government's investigation.

With respect to one of the nine factors listed in the *Thompson* Memo – cooperation – one factor or element a prosecutor may weigh in assessing the adequacy of cooperation is the completeness of the company's disclosure, including, whether the company identified the culprits, made witnesses available, disclosed the results of any internal investigation, and, if necessary, waived attorney-client and work product protections. Waiver then is one sub factor or element that might come into play in evaluating one of the nine factors in the *Thompson* analysis. Thus, recent criticisms of our position on waiver tend to distort its importance in the overall charging decision by inaccurately describing waiver as essential or the only thing prosecutors consider. Let me be very clear: a corporation that chooses not to waive the privilege will not necessarily be charged. 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.

Let me step back for a minute to put this in context. The Department opens an investigation of a corporation and the company tells us it wants to fully cooperate. We ask the

company to tell us the facts: what happened, who did it and how did they do it. Often, the company has hired attorneys to conduct an internal investigation, and it has learned the facts through the interviews conducted during that investigation, interviews covered by the attorney client and work product protections. If the company wants to cooperate, it has to tell us the facts and identify the wrongdoers. If the company can do that without waiving the privilege, the Department is satisfied and we are happy to work with the company to eliminate or minimize any need for privilege waivers. But if the company can't get us the facts and identify the culprits without waiving the privilege, for whatever reason, then prosecutors may ask the company – which has volunteered to cooperate – to waive the privilege in certain respects. That, Senators, is what this is all about. Frankly, I have a hard time understanding the criticisms from corporations which claim they want to cooperate, and then complain when we ask them to disclose the facts and evidence they have uncovered.

Corporations under investigation sometimes profess factual and legal corporate innocence. A prosecutor cannot take that claim at face value. The government has a duty to conduct an independent investigation in that circumstance as well, but diligent counsel on both sides often realize that access to the results of an internal investigation would obviously assist the government in conducting a more streamlined inquiry, which would benefit everyone. We see nothing wrong in asking a corporation to disclose to us the results of their internal investigation to assist us in investigating a corporation's claim of innocence. Indeed, we believe it is good practice because it conserves public and private resources and, if the corporation's claim is well-founded, it brings a quick conclusion to the government's investigation.

Prosecutors do not make a determination on whether to charge a corporation based solely

on the corporation's willingness to waive attorney-client or work product protections. In fact, we do not ask for waiver in every investigation. In those cases where it is appropriate to waive attorney-client privilege, the company often makes the offer without a government request. The guidance specifically cautions prosecutors to seek waiver only in appropriate circumstances – and then goes on to limit those circumstances to the facts obtained in an internal investigation and any *contemporaneous* advice given to the corporation concerning the conduct at issue. The *Thompson* Memo is clear that waiver of attorney-client privilege is "not an absolute requirement" and that prosecutors should consider it as "one factor" in evaluating a corporation's cooperation. So the claim that *Thompson* compels a waiver in every corporate investigation is contradicted by the plain language of the memo itself.

What is not often discussed in this debate is that a privilege waiver is often volunteered or agreed to by a company for specific, business reasons. When a criminal investigation is launched, receipt of subpoenas must be publicly reported, stock prices fall, and the company undergoes the protracted and disruptive process of responding to multiple document subpoenas and providing employees to the government for interviews or grand jury testimony. At the same time, the company's lawyers are conducting their internal investigation or have already completed it. If the company decides to cooperate, it can face additional delay while the government duplicates the company's efforts in collecting documents and interviewing witnesses, or it may choose to waive privilege and offer the results of its internal investigation so that the government moves faster. The choice to waive often allows the government to make a charging decision within months rather than years, and saves the company money and employee time and protects the value of its stock. So waiver often occurs solely because the corporation wants something from the government – a speedy resolution – not because the government acts

unilaterally.

Of course, waivers can be obtained for other reasons. In the course of an investigation, companies oftentimes identify an "advice of counsel" defense to the contemplated charges. That is, the company argues it relied on the advice of its attorneys in committing what the government now alleges is a fraudulent act. Without a waiver, documents related to that defense are ordinarily produced to the government after the case has been indicted and is in litigation. If a company is trying to convince the government not to charge the corporation or its principals because of reliance on this defense prior to indictment, it must waive its privilege. Otherwise, the government has no other means to obtain this information and evaluate the viability of the defense. Corporations often offer to make privileged documents and attorney witnesses available in these circumstances.

Along with criticisms of the guidance itself, you also hear criticisms that individual prosecutors are too aggressive in seeking privilege waivers. But in evaluating what is being said, you must also look to the other side of the counsel's table - the government's side. Prosecutors complain to me that in some instances, corporate counsel run virtually every document through the corporation's legal department just so that they can assert attorney-client privilege or work product protection. Some attorneys assert privilege like that famous scene of Lucille Ball gobbling chocolates off of a conveyor belt. Everything is swallowed up by the in-house legal department. Memos about routine business activities are claimed as privileged. Accounting or financial records are similarly hidden. Yet the law is clear that documents are not confidential attorney-client communications just because they are copied to or sent through a lawyer. Too often, we have seen the privilege claimed for documents that are, on their face, just not

privileged.

In a criminal investigation, if the privilege is used in this fashion, it is not only meaningless; it obstructs the government's efforts to discover the truth. And many U.S. Attorneys' Offices have spent tens of thousands of dollars in taxpayer money in years of senseless litigation over pretrial privilege matters, delaying justice and accountability. I don't need to tell you that justice delayed is justice denied. The *Thompson* Memo offers us an alternative. With its offer of a cooperation benefit for above-board disclosures, it creates a disincentive to engage in these tactics.

That is not to say that the Department of Justice does not recognize and honor the importance of the attorney-client privilege. The Department supports the protection of that privilege. For example, as I have already said, prosecutors are willing to work with companies to minimize the need for any waiver by permitting the company to provide the relevant facts by other means. In addition, with respect to the recently proposed revisions to the Federal Rules of Evidence, we have supported the concept of selective waiver, so that disclosure to the government is not necessarily a waiver of the privilege from which third parties can benefit. (Proposed FRE 502) We have worked diligently with corporate counsel and attorneys in private practice and met with them at their request numerous times to consider their views. It was these discussions, together with substantial input from our field offices, which led the Department to issue the *McCallum* Memo. That memo provides that prosecutors seeking waivers must first obtain supervisory approval before making such a request. Offices throughout the country have adopted local policies to put this memo into effect.

Like the *Thompson* Memo, the *McCallum* Memo has been distorted by the critics. They suggest that it has been used to create 92 different and inconsistent policies throughout the nation. However, the memo is a strong and fair response to corporate counsel's complaints that individual AUSAs had too much autonomy in making waiver requests during an investigation. We listened to them and issued that supplemental guidance even though, to date, no critic has produced any empirical data demonstrating that prosecutors are routinely requesting, let alone coercing waivers. And contrary to criticism, the *McCallum* Memo does not promote the development of different policies in field offices. It simply created a supervisory review process for AUSA waiver requests governed by the *Thompson* Memorandum. This ensures proper oversight of these requests and promotes a uniform and consistent waiver policy throughout the country.

Recently, attention has also been focused on the *Thompson* Memo's reference to the payment of attorneys' fees by a corporation as a factor or element to consider when assessing cooperation. This reference, like that of waiver, is a small part of the overall assessment as to whether a corporation cooperated. The guidance discusses certain actions that may "depending on the facts and circumstances" relate to the "extent and value of a corporation's cooperation" and thus may reflect upon the authenticity of the company's cooperation. More specifically, we look at whether the company "appears to be protecting culpable employees and agents" through (1) the corporation's promise of support to culpable employees and agents through the advancing of attorneys' fees; (2) retaining the employees without sanction for their misconduct; or (3) providing information to the employees about the government's investigation pursuant to a joint defense agreement – all legitimate areas of inquiry by the government. The minor reference to advancement of fees in this context has been misconstrued.

A corporation that chooses to advance attorneys' fees to its employees who are under government investigation is not branded a non-cooperator because of that choice. The payment of legal fees may be fully consistent with the corporation's cooperation and, in fact, desired by government counsel. The untold story is that the government's investigation is generally enhanced when experienced and informed defense counsels represent targeted employees.

However, a corporation's advancement of legal fees can concern prosecutors where that fact, taken with other facts, gives rise to a real concern that the corporation is "circling the wagons," or, in other words, is using or conditioning the payment of attorneys' fees as a tool to limit or prevent the communication of truthful information from current and former employees to the government, in order to protect either the employees or the corporation itself. You typically see this in combination with other indicators of non-cooperation – overly broad assertions of corporate representation of its employees, a refusal to sanction wrongdoers, a failure to comply with document subpoenas and a failure to preserve documents. In contrast, where those factors aren't present --- the corporation does not make overbroad assertions regarding representation, takes quick action against culpable employees, and promptly responds to requests for information -- a company's advancement of legal fees will not cause the same concerns.

This is most often true where a corporation's policies about the advancement of legal fees are applied consistently across the entire range of employees and agents – witnesses, subjects, and targets of the government's investigation – and where other non-cooperative factors are not present. In that case, there is no cause for government concern based on the advancement of fees alone. And the *Thompson* Memo specifically instructs prosecutors not to consider advancement

of fees at all when it is done pursuant to governing state law.

Like waiver, a corporation may make a decision not to advance fees, if it has the discretion to do so, but it is the company's choice alone. It is a business decision we do not control. Experienced and sophisticated counsels weigh what is in the best interests of the corporation and its shareholders. Sometimes, because of legal requirements, a longstanding corporate practice, or even the corporation's concern in protecting its ability to attract the right kind of employee, a corporation will advance fees. Other times, it chooses not to. In short, the Department's reference to attorneys' fees as one small element that may, in limited cases, affect the cooperation analysis under the *Thompson* Memo does not, and could not, drive corporate policy or practice. With the level of skill of opposing counsel we have in these cases, it is wrong to suggest that we make their decisions for them.

The *Thompson* Memo is a set of principles, the basic structure of which is used every day in the criminal justice system. We ask cooperating drug dealers, bank robbers and gun-toting felons to waive their Fifth Amendment privilege against self-incrimination all the time – and the vast majority of them do not have access to the high-priced legal talent corporations do. If a corporation has committed a crime, it is no more deserving of special treatment than any of these defendants. The American public rightly demands that we judge all defendants by the severity of their crimes, not the size of their pocketbooks.

In closing, let me reiterate that the Department continues to listen and is always open to considering opposing views. I pledge to keep the dialogue open about the *Thompson* Memo and I welcome constructive criticism of this, and any other, policy. The time may come when

revisions are needed to this policy and I will gladly make them when I am convinced they are necessary and in the public interest. In the meantime, I support our prosecutors in their charging decisions and their use of these guidelines. The guidance is consistent with long-standing charging practices and is fair to corporations under investigation and to the current and former officers and employees. I believe that the *Thompson* Memorandum strikes an effective balance between the interests of the business community and the investing public.

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

STATEMENT OF

EDWIN MEESE III

RONALD REAGAN DISTINGUISHED FELLOW IN PUBLIC POLICY AND CHAIRMAN, CENTER FOR LEGAL AND JUDICIAL STUDIES THE HERITAGE FOUNDATION[1]

214 MASSACHUSETTS AVENUE, NE WASHINGTON, DC 20002

BEFORE THE UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

REGARDING THE THOMPSON MEMORANDUM'S EFFECT ON THE RIGHT TO COUNSEL IN CORPORATE INVESTIGATIONS

SEPTEMBER 12, 2006

[1] The title and affiliation are for identification purposes only. Staff of The Heritage Foundation testify as individuals. The views expressed are our own and do not reflect an institutional position for The Heritage Foundation or its board of trustees. The Heritage Foundation is a public policy, research, and educational organization. It is privately supported, receives no funds from government at any level, and performs no government or other contract work. The Heritage Foundation is the most broadly supported think tank in the United States. During the past two years, it had approximately 275,000 individual, foundation, and corporate supporters representing every State in the nation. Its 2005 contributions came from the following sources: individuals (63%), foundations (21%), corporations (4%), investment income (9%), publication sales and other sources (3%).

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

Thank you for inviting my views on the United States Department of Justice's policies and procedures for investigating suspected financial crimes by business organizations, including the Justice Department's January 2003 memorandum, *Principles of Federal Prosecution of Business Organizations*, commonly referred to as the Thompson Memorandum.[2] For the record, I served as the United States Attorney General from 1985-1988. I am currently the Ronald Reagan Distinguished Fellow in Public Policy at The Heritage Foundation and also serve as Chairman of The Heritage Foundation's Center for Legal and Judicial Studies.

The subject of today's hearing raises important questions that reach beyond waivers of the attorney-client privilege, beyond employers' payments of their employees' legal defense fees, and beyond even the Thompson Memorandum itself.[3] Thus, I am grateful to the Committee for addressing these issues, including in today's hearing.

Judge Lewis Kaplan of the United States District Court for the Southern District of New York framed the issue well in his written opinions this summer delivering two important rulings in *United States v. Stein et al.*,[4] a case involving the Justice Department's investigation and prosecution of KPMG's now-admitted tax-shelter abuses. At the outset of the first of Judge Kaplan's two opinions finding that the Thompson Memorandum, coupled with the specific conduct of the federal prosecutors, violated the Fifth and Sixth Amendment rights of twelve former KPMG employees, he addressed the fundamental duties of the government whenever it exercises its law enforcement power.

> Those who commit crimes – regardless of whether they wear white or blue collars – must be brought to justice. The government, however, has let its zeal get in the way of its judgment. It has violated the Constitution it is sworn to defend.[5]

Judge Kaplan's observation reminds me of key points made in a speech by Robert Jackson, who would later serve as an associate justice of the Supreme Court. Before he became a justice, and before he served as the chief prosecutor in the Nuremberg trials of Nazi war criminals, Robert Jackson served in President Franklin Roosevelt's Administration as Attorney General of the United States. I used this speech by Attorney General Jackson during my tenure as Attorney General because I believe its analysis and principles are timeless.

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[2] Memorandum from Larry D. Thompson, Deputy Attorney General, Department of Justice, to Heads of Department Components and United States Attorneys (January 20, 2003) ("Thompson Memorandum") (*located at* www.usdoj.gov/dag/dftf/business_organizations.pdf).

[3] I direct the Committee's attention to a forthcoming publication by my colleague at The Heritage Foundation on the subject of today's hearing. Brian W. Walsh, *What We Have Here, Is a Failure to Cooperate: The Thompson Memorandum and Federal Prosecutions of Business Organizations* (The Heritage Foundation, forthcoming).

[4] *United States v. Stein*, No. S1 05 Crim. 0888, 2006 WL 2060430 (S.D.N.Y. July 25, 2006); *United States v. Stein* ("*Stein I*"), 435 F. Supp. 2d 330 (S.D.N.Y. June 26, 2006).

[5] *Stein I*, 435 F. Supp. 2d at 336.

When he addressed a meeting of all United States Attorneys at the Justice Department in Washington in April 1940, Attorney General Jackson started by putting them in mind of the great power they wielded in their offices. "The prosecutor has more control over life, liberty, and reputation than any other person in America," Jackson said. "His discretion is tremendous." Jackson went on to enumerate some of the temptations that confront a prosecutor to misuse his power, often in subtle manners that no one would ever be able to prove wrongful even if all the objective facts were known. He admonished them to rededicate themselves "to the spirit of fair play and decency that should animate the federal prosecutor" and not to measure their success based primarily on convictions or similar statistics.

> Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done. The lawyer in public office is justified in seeking to leave behind him a good record. But he must remember that his most alert and severe, but just, judges will be the members of his own profession, and that lawyers rest their good opinion of each other not merely on results accomplished but on the quality of the performance.[6]

The tension that Attorney General Jackson identified between obtaining impressive conviction statistics and taking care to do justice has always confronted prosecutors and probably always will.

What does change is the type of crimes a federal prosecutor is asked to focus on. In the 1960s and 1970s, the focus was on violent crime that was increasingly making it unsafe in America to walk the streets. In the 1980s and 1990s, it was on the destructive effects illicit drugs and drug-dealing organizations were having upon our inner cities and families.

In this decade the focus is necessarily on terrorism and, particularly after the collapses of Enron and WorldCom, on white-collar crime. Nevertheless, it remains necessary to ensure that members and suspected members of whatever criminal class that the public most wants punished still receive the full benefit of the constitutional rights and fairness considerations that belong to every American.

Deferring to others to engage in a more detailed analysis of Judge Kaplan's legal conclusions, I will focus primarily on the facts of the *Stein* case as well as the relevant Justice Department policies and practices.

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[6] Robert H. Jackson, The Federal Prosecutor, Address to the United States Attorneys (Apr. 1, 1940), *available at* http://www.roberthjackson.org/Man/theman2-7-6-1/ (*originally published at* 31 J. OF CRIM. L. & CRIMINOLOGY 3 (1940)).

When an individual's constitutional rights are implicated, the government may not do indirectly – through others – what it is forbidden to do directly.[7] The Constitution would not have allowed the prosecutors in the *Stein* case to, for example, subject the KPMG defendants' bank accounts to forfeiture with the sole justification and for the sole purpose of depriving them of the money they needed to retain competent legal counsel. The Constitution would not allow the prosecutors to threaten the KPMG defendants with the loss of employment if they refused to proffer testimony during the investigation or invoked their Fifth Amendment rights.

Instead of accomplishing these ends directly, Judge Kaplan found that the prosecutors made keen use of the enormous pressure placed upon KPMG by the existence of the Thompson Memorandum and the realities of what a federal indictment may mean to a financial services firm. The indictment and swift demise of the Arthur Andersen accounting firm has taught every business organization a stern lesson: Failure to meet federal prosecutors' expectations for your cooperation in the government's criminal investigation of your employees could result in a death sentence, well before a jury is ever impaneled or opening statements are delivered at trial.

Before being indicted for its alleged wrongdoing in the Enron scandal, Arthur Andersen was an 89-year-old accounting powerhouse with annual worldwide revenues of $9.3 billion and 28,000 employees. Long before the Supreme Court reversed Andersen's conviction, the firm was gone, its partners and employees dispersed. All that remained were relatively paltry assets against which numerous litigants have asserted claims, most of which piggy-back on Justice Department allegations of Enron-related wrongdoing.

The Thompson Memorandum understandably sought to achieve the effective prosecution of white-collar crime and to prevent companies from deliberately or inadvertently obstructing the investigation and prosecution of criminal offenses by misusing the attorney-client privilege or through the payment of employees' attorney fees. Nevertheless, experience has shown that the Memorandum has resulted in the dilution of essential rights encompassed by the attorney-client relationship.

For example, the pressure on KPMG apparently came from two sources. First, the Thompson Memorandum itself pressures companies to fulfill its nine factors, including by waiving their attorney-client privilege and cutting off their employees' attorney fees. Even if no prosecutor ever mentions either factor to a company, the fact that the Thompson Memorandum requires federal prosecutors to take all nine of its factors into consideration when deciding whether to indict a business organization necessarily places great pressure on the company to

[7] *Cf. Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77-78 (1990) ("What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly."); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government 'to produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible." (internal citation omitted)).

take these two steps.[8] As the Thompson Memorandum itself emphasizes, a "prosecutor generally has wide latitude in determining when, whom, how, and even whether to prosecute" a business organization.[9] The company and its counsel know that the prosecution team will eventually go through each of the nine factors point-by-point. Any outright 'No' in response to whether the company has cooperated with one of the factors will be glaringly apparent.[10] In light of these realities, it is no wonder that KPMG's chief in-house counsel testified at a deposition that "KPMG's objective was 'to be able to say at the right time with the right audience, we're in full compliance with the Thompson Guidelines.'"[11] Anything less might well have constituted legal malpractice.

The second source of pressure on KPMG to persuade its employees to forego their rights and cooperate with the government was the Thompson Memorandum itself. Much of the Memorandum's coercive power lies in its lack of specific, concrete language explaining how the prosecutors will decide whether to indict and what weight they will assign to the various factors. Justice Department officials may point to this lack of specificity as illustrating that the Thompson Memorandum's factors are voluntary rather than mandatory. The Memorandum does not, they might suggest, state that a company will definitely be indicted if it chooses not to waive its attorney-client privilege or to pay attorney fees for employees the Department suspects of wrongdoing.

However, the Memorandum also fails to specify which of the examples under each of its nine factors prosecutors can or may ignore, and in what circumstances. It is axiomatic that when a governmental body or agency defines rules for its own conduct that are vague and indefinite, it thereby retains to itself near-absolute discretion to act as it may choose in any given circumstance. No independent third-party is available to an indicted business organization to review whether prosecutors applied the factors in a fair and rational manner.

Companies reasonably consider each of the Thompson Memorandum factors to be mandatory. Given the Thompson Memorandum's indefiniteness about how the government will weigh its nine factors and the examples provided for each, in my judgment, corporate counsel would be irresponsible to advise their clients otherwise.

Not only are the Department's written policies on indicting business organizations coercive in their own right, Judge Kaplan found that the conduct of the prosecutors in the KPMG tax-shelter case parlayed that pressure into a method for using the firm to do what the Department could not do directly, including pressuring KPMG's partners and employees into

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[8] As one commentator recently noted, "The mandatory nature of the Thompson Memo is not lost on defense counsel, and the evidence in *Stein* illustrated this point." Stephanie A. Martz, *Report from the Front Lines: The Thompson Memo and the KPMG Tax Shelter Case*, 10 WALL ST. LAWYER No. 8, at 5, 6 (Aug. 2006).

[9] Thompson Memorandum, *supra* note 2, § II.B.

[10] *See* Martz, *supra* note 8, at 6 ("[I]t cannot be gainsaid that if a company decides to ignore any individual factor set forth in the Thompson Memo, or any subset of factors, it does so at its own peril.").

[11] *Stein I*, 435 F. Supp. 2d at 348 & n.78 (quoting deposition testimony of KPMG's chief legal officer, former United States District Judge Sven Erik Holmes).

forfeiting constitutional rights. The prosecution team planned before its first meeting with KPMG's counsel to ask several questions about the firm's plans for paying its employees' attorney fees. During the first meeting, prosecutors repeatedly returned to the subject, mentioned the Thompson Memorandum as something that must be considered in the firm's decision whether to pay fees, and at the very least strongly suggested that any decision that KPMG made to pay fees would be scrutinized closely in the prosecution team's decision whether to indict the firm.

KPMG's counsel made it clear from the start that the firm would do anything the government wanted in order to avoid indictment and that its objectives did not include protecting any current or former employees. As Judge Kaplan noted,[12] KPMG no doubt had taken to heart the lesson of Arthur Andersen. This should have caused the prosecution team to tread lightly and ensure that KPMG did not overstep the bounds of fairness or use its economic leverage over its employees in an improper manner.

Instead, when KPMG told the government that it would like to be informed whenever one of its employees was not cooperating so that, the implication was clear, KPMG could pressure them to do so, the government did just that. Judge Kaplan found several instances in which KPMG employees changed their course after the firm stated that it would cut off their attorney fees, strongly implied that it would fire them, or both. When recalcitrant witnesses whom the government reported to KPMG suddenly decided to be cooperative, prosecutors could not have failed to notice that the system was working.

The judge asserted that the government nevertheless asked for more. Dissatisfied with the language and tone of KPMG's form letter encouraging its employees to cooperate with the government investigation, prosecutors went so far as to craft language that it wanted the firm to use. The language the government wanted KPMG to use emphasized that the employees were free to meet with government investigators "without the assistance of counsel." KPMG used a version of this language in a follow-up document to its employees.

The government apparently did not encourage KPMG to inform its employees that the firm's objectives did not include protecting its employees or that KPMG and the government were, in effect, working as a team. In light of the prosecutors' expressions of displeasure that KPMG's initial form letter did not go far enough, the firm itself certainly could not afford to inform its employees of these important facts affecting their essential rights and interests.

Judge Kaplan concluded that this conduct violated the KPMG defendants' Fifth and Sixth Amendment rights. This is a simple application of the rule that prosecutors must be careful not to accomplish through others what they are forbidden to do directly.

There is now widespread feeling among business counsel that methods and tactics similar to those engaged in by the prosecutors in the KPMG tax-shelter investigation are frequently part

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[12] *Id.* at 341.

of the Justice Department's standard procedures and practices in white-collar criminal investigations. A few days after the first *Stein* ruling, the Justice Department sent Judge Kaplan a short letter that speaks volumes. The media focused on the letter's request that, in order to protect the individual prosecutors' professional reputations, Judge Kaplan remove their names from his opinion. But the first sentence of the letter's second paragraph is more relevant here. It states:

> The Government appreciates the Court's acknowledgement that the prosecutors' conduct in this case was in accordance with established Department of Justice policy that had never before been addressed by a court.[13]

This admission is not surprising given recent surveys of corporate attorneys, including both in-house and outside counsel. In a survey conducted by the Association of Corporate Counsel (ACC), the National Association of Criminal Defense Lawyers (NACDL), and several other organizations that have joined together to defend the attorney-client privilege from encroachments by the federal government, approximately 75% of respondents agreed that a "culture of waiver" exists "in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive [its] attorney-client privilege."[14] This survey demonstrates that waiver is at least common.

The Justice Department has criticized this survey, including in testimony by then-Deputy Associate Attorney General Robert McCallum before a House judiciary subcommittee in March. McCallum claimed that the survey's results could not be trusted because the respondents were self-selected.

Nevertheless, only the Justice Department has access to the actual numbers regarding how frequently federal prosecutors request privilege waivers and how many times companies have in fact waived, either upon request or "voluntarily." The Department has not been willing to date to collect and publish its own statistics that would allow interested parties to determine how prevalent waiver is.

The McCallum Memorandum

The Department of Justice has represented that the directive it issued in 2005 to all U.S. Attorneys and all Heads of Department Components through a memorandum from Robert McCallum[15] is a significant reform by the Justice Department to the Thompson Memorandum

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[13] Letter from Michael J. Garcia, United States Attorney, to Hon. Lewis A. Kaplan, United States District Judge 1 (June 30, 2006) (*available at* http://online.wsj.com/public/resources/documents/kpmg-20060630-letter.pdf).

[14] *White Collar Enforcement (Part I): Attorney-Client Privilege and Corporate Waivers Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the House Comm. on the Judiciary*, 108th Congress 109-112 (app., *The Decline of the Attorney-Client Privilege in the Corporate Context: Survey Results*, at 69, 71-72) (*also available at* http://www.acca.com/Surveys/attyclient2.pdf).

[15] Robert McCallum was then the Acting Deputy Attorney General.

policies in response to concerns and criticism of those policies by the legal profession and business community. I greatly appreciate the Justice Department's willingness to listen to and engage in discussion with those who disagree with or fault its policies as well as the Department's willingness to make changes that reflect the legitimate concerns that are being raised. I believe such openness has served the Department and the nation well and will continue to do so as we work toward a common solution to these concerns.

Nevertheless, it appears that the McCallum Memorandum does not represent a sufficient improvement. The main objectives of the Memorandum included providing greater uniformity, predictability, and transparency to the process that federal prosecutors use when requesting a waiver of a business organization's attorney-client privilege. But the McCallum Memorandum does nothing to address the inherently coercive nature of the Thompson Memorandum factors that take into account whether a company has waived its privilege.

As to the specifics, because the McCallum Memorandum does not require the written waiver processes established by each U.S. Attorney to be made publicly available to business organizations, companies have no better understanding today than they did before October 2005 as to whether and when they must waive privilege in order to satisfy prosecutors' expectations. Justice requires citizens to be fully informed of what the law and law enforcement officials expect so that citizens may conform their conduct to those expectations.

The McCallum Memorandum similarly fails to require any uniformity in the waiver request process among the 93 U.S. Attorneys Offices. Rather, it encourages each U.S. Attorney to adopt the procedures that he or she deems best for that local office. Presumably, at least the waivers requested in that office will conform to a fixed set of principles and procedures, but even that is not assured because the Memorandum neither requires nor recommends that a U.S. Attorney put in place any oversight or accountability mechanisms to ensure that individual prosecutors conform their practices for requesting waiver to the Office's policies.

Recommendations

- My primary recommendation on the subject of today's hearing is that the Thompson Memorandum be amended to eliminate any reference to the waiver of attorney-client privilege or work-product protections in the context of determining whether to indict a business organization. In the same manner and same context, all references in the Memorandum to a company's payment of its employees' legal fees should be eliminated. In my experience, justice is always best served when all parties to litigation are well-represented by experienced, diligent counsel. We should be deeply suspicious of anything that undermines such representation. If government action is involved, as the *Stein* case illustrates, it may well violate fundamental Fifth and Sixth Amendment rights.

- Further, the Justice Department's written policies should explicitly state that requests for waiver will not be approved apart from exceptional circumstances. Exceptional

circumstances should be limited to those that would bring into operation the well-established crime-fraud exception to the attorney-client privilege.

- In the meantime, in order for any interim reforms – such as those attempted by the McCallum Memorandum – to be meaningful, the Justice Department must make available to the public specific, uniform national policies and procedures governing waiver requests. All requests for waiver by federal prosecutors and other Justice Department officials should require approval at the national level. Only published national procedures and national oversight can ensure that the waiver request process is uniform, predictable, and transparent.

- In order to promote the responsible use of waiver requests – as well as to counter the culture of waiver – the Justice Department should collect and publish statistics on how often waiver is requested, how often business organizations agree to such requests, and how often organizations waive even apart from any request from prosecutors.

Hearings such as this are of great value. They convey the sense of Congress's views to the Justice Department on the inestimable importance of the attorney-client relationship as it has been constituted by centuries of Anglo-American law and on the proper policies and practices for enforcing our white-collar criminal laws.

Thank you for inviting me to share my views.

Testimony of Mark B. Sheppard, Esquire
Before the Senate Committee on the Judiciary regarding
The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations.
Tuesday, September 12, 2006

Good morning Chairman Specter, Ranking Member Leahy, and distinguished members of the Judiciary Committee. My name is Mark Sheppard. I practice white collar criminal defense and complex civil litigation at the Philadelphia law firm of Sprague & Sprague, where I have the privilege of practicing with noted trial attorney Richard Sprague. Before joining the firm, I was a partner in the firm of Duane Morris LLP. Over the last 19 years, I have represented both corporations and individual directors, officers and employees in federal grand jury investigations and related enforcement matters.

I want to begin my remarks by thanking you for the opportunity to voice my concerns, as a practitioner, about the deleterious effect of the "cooperation" provisions of the Thompson Memorandum[1] and similar federal enforcement policies such as the Securities Exchange Commission's Seaboard Report.[2] These policies have so drastically altered the enforcement landscape that they threaten the very foundation of our adversarial system of justice.

This threat is brought about by the confluence of two recent trends: increasing governmental scrutiny of even routine corporate decision making and untoward prosecutorial

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[1] Memorandum from Deputy Attorney General Larry D. Thompson to U.S. Attorneys of January 20, 2003 regarding "*Principles of Federal Prosecution of Business Organizations*"Section VI, at pages 6-8.

[2] 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, Exch. Act Rel. No. 44969 (Oct. 23, 2001)

emphasis upon waiver of long recognized legal protections as the yardstick by which corporate cooperation is measured. These policies and, in particular, those provisions which inexorably lead to waiver of the attorney-client and work product privileges, upset the constitutional balance envisioned by the framers, impermissibly intrude upon the employer/employee relationship, and in real life, result in the coerced waiver of cherished constitutional rights.

The Thompson Memorandum sets forth the "principles to guide (federal) prosecutors as they make the decision whether to seek charges against a business organizations." While the majority of the stated principles are minor revisions of prior DOJ policy, the Memorandum makes clear that corporate enforcement policy in the post-Enron era will be decidedly different in one very important respect: The preamble to the Memorandum states:

> The main focus of the revisions is increased emphasis on and scrutiny of the *authenticity* of a corporation's cooperation.

According to the Memorandum, "authentic" cooperation includes the willingness to provide prosecutors with the work product of corporate counsel from an internal investigation undertaken after a problem was detected. Authentic cooperation also includes providing prosecutors with the privileged notes of interviews with corporate employees who may have criminal exposure, yet have little or no choice to refuse any request to speak with corporate counsel. This means that employees effectively give statements to the government without ever having had a chance to assert their Fifth Amendment right against self-incrimination. Incredibly, the Thompson Memorandum is explicit in this goal of performing an end-run around the Constitution. It states, "Such waivers permit the government to obtain statements of possible witnesses, subjects and targets without having to negotiate individual cooperation or immunity

agreements."[3] Even further, "authentic" cooperation includes disclosure of the legal advice provided to its corporate executives before or during the activity in question. Lastly, and most troubling, is the impact that the Thompson Memo has upon the ability of corporate employees to get access to and secure separate and competent counsel. The Memo specifically denounces long recognized corporate practices such as the advancement of legal fees, the use of joint defense agreements and even permitting separately represented employees to access the very records and information necessary to defend themselves.

Despite these draconian outcomes, corporations are complying with these demands in ever increasing numbers. Following the precepts of the Thompson Memorandum is mandatory for federal prosecutors. And while no "one" of the 9 elements of cooperation outlined in the Memorandum purports to be dispositive of cooperation, in practice, each is mandatory. In the current climate few, if any, public companies can afford the risk of possible indictment and the myriad of collateral consequences, not the least of which is the diminution of shareholder value. Indeed, the words from the front lines are frightening, as one attorney recently noted:

> The balance of power in America now weighs heavily in the hands of government prosecutors. Honest, good companies are scared to challenge government prosecution for fear of being labeled uncooperative and singled out for harsh treatment... .[4]

The results of a recent survey of attorneys from around the country composed of the private criminal defense bar and in-house corporate counsel completed by *inter alia*, the Association of Corporate Counsel, the American Bar Association and National Association of

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[3] Thompson Memorandum, *supra* note 1, at 5.

[4] The Decline Of the Attorney-Client Privilege in the Corporate Context–Survey Results, *http://www.nacdl.org/public.nsf/whitecollar/wcnews024/$FILE/A-C_PrivSurvey.pdf*, at p. 18

Criminal Defense Lawyer bear this out. Among its findings:

- 52 percent of in-house respondents and 59 percent outside respondents confirmed that they believe that there has been a marked increase in waiver requests as a condition of cooperation.;
- Of the respondents who confirmed that they or their clients had been subject to investigation in the last five years, approximately 30 percent of in-house respondents and 51 percent of outside respondents said that the government expected waiver in order to engage in bargaining or to be eligible to receive more favorable treatment. [5]

Even before Sarbanes-Oxley, internal corporate investigations were standard operating procedure whenever a potential compliance issue came to light. Incident to these investigations, internal and confidential documents are reviewed and all employees who may have knowledge of the particular incident are interviewed. The reports generated by these investigations, including analysis by the company's counsel and statements of employees who may not choose to speak with prosecutors are a veritable road map. As such, they are simply too tempting a source of information for prosecutors to ignore.

It is my experience that occasionally – although not routinely – federal prosecutors can be convinced to conduct their investigations without these privileged "roadmaps." Indeed, law enforcement needs can surely be met with non-privileged documents, access to witnesses, and plenty of assistance from the company in understanding the chain of events in question. However, the Thompson Memo itself makes clear that these standard elements of cooperation are not always enough. Prosecutors are now empowered to expect corporate counsel to act as their deputies. Counsel is expected to encourage employees to give statements without asserting their Fifth Amendment rights and without obtaining independent counsel, despite the potential conflict of interest it poses for both the attorney and the employee. If the employee refuses, he or she

[5] *Id.*

faces termination with no apparent recognition of the inherent unfairness of meting out punishment for the mere invocation of a constitutional right. To make matters worse, in two recent cases, the employees of separate cooperating corporations were indicted for allegedly provided misleading information *to the cooperating corporation* and its outside law firm. [6] Thus, the employee may be "damned if he does and damned if he doesn't." Internal investigations that yield accurate, reliable results are severely diminished in this coercive environment.

Too often, employees must face this Hobson's Choice with out the benefit of separate counsel. That is because individual employees also face the prospect that the corporation will refuse to advance or reimburse the employee's legal fees if they refuse to cooperate with the government. Representation by experienced counsel in corporate fraud cases could bankrupt an individual. For some individuals that I have represented, advancement of fees was essential to having any representation, let alone effective representation of counsel. Further, most white collar practitioners recognize that their cases are often won or lost pre-indictment. Effective assistance of counsel in the investigatory stage is essential. The government knows this. I fear that under the guise of cooperation, prosecutors are seeking to deprive employees of counsel of their choosing, in the hope that counsel chosen by the corporation may be more inclined to tow the party line. Indeed, this thinking has spread to other areas of white collar enforcement. For example, in a political corruption investigation, prosecutors have challenged the Senate of Pennsylvania's decision to advance legal fees to two Pennsylvania Senate employees, claiming

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[6] *United States v. Kumar and Richards,* 2004Cr.02094 (E.D.N.Y. 2004); *United States v. Singleton*, Crim. 4:06CR080 (S.D.Texas, Houston Div.) (March 8, 2006).

that the payment of fees may constitute a conflict of interest for their counsel.[7]

All of this is done at the behest of prosecutors and in the name of authentic cooperation in the laudable effort to combat corporate fraud. Lost in the stampede to the prosecutor's door however, is the employee's right to counsel and her right not to be a witness against herself. The recent KPMG decisions are indeed encouraging. [8] Unfortunately, the violence to the right to counsel in corporate investigations occurs in the earliest stages of the investigation, where little or no judicial review of these practices is possible.

I can still vividly recall a conversation that I had as a young associate with one of the recognized deans of the Philadelphia federal defense bar. He told me, much to my dismay at the time, that much of white collar criminal practice is "done on bended knee." The statement was a recognition of the awesome power and resources that the federal government may bring to bear upon an individual or entity it believes may have violated the law. It was possible, however, to effectively represent your client and by so doing assure that the government followed the rules and respected constitutional and well settled legal protections. That is the essence of our adversarial system of justice. In today's corporate environment, I and many of my fellow white collar practitioners feel that may no longer be possible.

Finally, the Thompson memorandum and like pronouncements are simply bad policy. Encouraging employees to be proactive in seeking legal counsel is a key component of any

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[7] *United States v. Luchko*, Government Motion For Hearing Regarding Potential Conflict of Interest, filed August 10, 2006. CR No. 06-0319 (EDPA, 2006)

[8] *United States v. Stein, et al.*, No. S1 05 Crim. 0888 (LAK),2006 WL 1735260 (SDNY June 26,. 5. 2006), 2006 WL 2060430, (SDNY, July 25, 2006).

corporate compliance strategy. Corporations and the people they act through must feel free to discuss difficult issues in an ever increasing regulatory environment. Rather than encourage this, these policies will inevitably chill communications with corporate counsel impugning meaningful corporate governance practices. Thus rather than achieving the salutary effects sought, the Thompson Memorandum will increase the likelihood of potentially illegal conduct by undermining meaningful corporate compliance. Prosecutorial expediency is simply not worth it.

Again, I thank the Chairman and the Committee for this opportunity and I look forward to responding to any questions you may have.

Testimony of Dick Thornburgh
Kirkpatrick & Lockhart Nicholson Graham LLP
Former Attorney General of the United States
before the
Senate Committee on the Judiciary
regarding
"The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations"
Tuesday, September 12, 2006

Good morning, Chairman Specter, Ranking Member Leahy and members of the Committee, and thank you for the invitation to speak to you today about the grave dangers posed to the right to counsel by the Justice Department's Thompson Memorandum. This is an issue of Constitutional dimensions, and I commend you for holding this hearing.

As you know, the Thompson Memo establishes a number of criteria for federal prosecutors to use in assessing whether a business organization has been "cooperative."[1] Cooperating status is important since, under the Thompson Memo, it may lead to lesser charges or no charges at all. It is certainly reasonable for prosecutors to expect cooperation from a business seeking favorable treatment. But several of the Thompson Memo's cooperation criteria overstep the bounds of fairness and good public policy, and implicate rights secured by the Constitution. In my view, they are not necessary for effective law enforcement and they can actually undermine corporate compliance. Accordingly, these criteria should be dropped or substantially revised.

Let me focus first on the provision of the Thompson Memo that says cooperation credit may depend on a corporation's willingness to waive attorney-client privilege and work product protections. The Washington Legal Foundation has just published a monograph that I wrote on

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[1] Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components and United States Attorneys re *Principles of Federal Prosecution of Business Organizations* (January 20, 2003), available at www.usdoj.gov/dag/cftf/business_organizations.pdf.

the topic, which, Mr. Chairman, I would ask to be included in the record of this hearing.[2] As my monograph explains, the privilege is a fundamental element of the American system of justice.[3] In the words of the Supreme Court, the privilege encourages "full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice."[4] The attorney-client privilege is thus a core element in a law-abiding society and a well-ordered commercial world.

My monograph also discusses the negative effect that a policy of waiver has on corporate compliance programs, corporate efforts to investigate possible noncompliance, and individual employees.[5] No matter how conditionally it is couched or how reasonably Department of Justice officials may promise to implement it, a waiver policy poses overwhelming temptations to prosecutors seeking to save time and resources and to organizations desperate to save their very existence. And each waiver has a "ripple effect" that creates more demands for greater disclosures, both in individual cases, and as a matter of general practice. What's worse, the Thompson Memo's focus on waivers as a measure of cooperation has led to the adoption of policies or practices by the Securities and Exchange Commission,[6] the U.S. Sentencing Commission,[7] state law enforcement officials, self-regulatory organizations and the auditing profession.[8]

The result, documented in a survey to which over 1,200 in-house and outside counsel responded, is the emergence of a "culture of waiver" in which governmental agencies believe it

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[2] Dick Thornburgh, WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE: A BALANCED APPROACH (2006).
[3] *Id.* at 6-10.
[4] *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981).
[5] *Waiver of the Attorney-Client Privilege, supra* note 2, at 22-25, 28-29.
[6] *See 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*, SEC Release Nos. 34-44969 and AAER-1470 (Oct. 23, 2001) (the "Seaboard Report"), available at http://www.sec.gov/litigation/investreport/34-44969.htm.
[7] United States Sentencing Commission, GUIDELINES MANUAL, § 8C2.5(g), comment 12 (Nov. 2004).
[8] *See* NYSE Information Memorandum No. 05-65, *Cooperation* (Sept. 14, 2005).

is reasonable and appropriate for them to expect a company under investigation to provide broad waivers of both the attorney-client privilege and work product protections. I practice at a major law firm with significant practices representing clients in government investigations. My colleagues in the firm, and at other law firms, report that they now commonly encounter waiver requests when an organization is under scrutiny.

Opposition to the Thompson Memo's waiver policy has been strong and impassioned. Last summer, the American Bar Association unanimously passed a resolution that "strongly supports the preservation of the attorney-client privilege" and "opposes policies, practices and procedures of government bodies that have the effect of eroding the attorney-client privilege . . . ."[9] This March, a House Judiciary subcommittee heard testimony strongly opposing government waiver policies. Those of us who testified were impressed by the complete, bipartisan agreement among subcommittee members that the Thompson Memo needed to be changed, by legislation if necessary. I was also one of ten former senior Justice Department officials, from both Republican and Democratic administrations, who sent a letter to the Attorney General on September 5 asking him to revise the Thompson Memo. Even the Conference of state Chief Justices has endorsed the creation of state and local bar committees devoted to preserving the privilege.

As you know, I served as a federal prosecutor for many years, and I supervised other federal prosecutors in my capacities as U.S. Attorney, Assistant Attorney General in charge of the Criminal Division and Attorney General. Throughout those years, requests to organizations we were investigating to hand over privileged information never came to my attention. Clearly, in order to be deemed cooperative, an organization under investigation must provide the

[9] This resolution, drafted by the ABA's Task Force on the Attorney-Client Privilege, is available at http://www.abanet.org/buslaw/attorneyclient/materials/hod/recommendation_adopted.pdf. The supporting report is available at http://www.abanet.org/buslaw/attorneyclient/materials/hod/report.pdf.

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 be required to reveal privileged communications or attorney work product in order to establish its good faith. This balance is one I found workable in my years of federal service, and it should be restored.

Until recently, the Thompson Memo's waiver requirement has received most of the attention. But there is another problematic "cooperation criterion" in the Memo that instructs prosecutors to consider whether an organization "appears to be protecting its culpable employees and agents." While this sounds reasonable in theory, in practice, this provision has led to government pressure on companies to refuse to pay the legal expenses of employees or former employees, to withdraw from joint defense agreements with them, to refuse to share even historical information with them, and to fire employees who assert their Fifth Amendment rights in government interviews. While a company might justifiably take any of these actions in appropriate circumstances, it is improper for the government, using the enormous leverage it has through its charging power, to coerce companies to take these steps.

Opposition to this practice is also widespread. In a decision rendered this June involving former employees of KPMG, Judge Lewis A. Kaplan of the United States District Court for the Southern District of New York declared that the Thompson Memo's provisions concerning legal fees violated the rights to due process and effective assistance of counsel guaranteed, respectively, by the Fifth and Sixth Amendments.[10] Just last month, the ABA again adopted a unanimous policy opposing the practices I've just noted.[11] Fundamentally, the ABA noted that

[10] *See United States v. Klein*, 435 F. Supp. 2d 330, 356-73 (S.D.N.Y. 2006).
[11] This recommendation is available at http://www.abanet.org/buslaw/attorneyclient/materials/hod/emprights_recommendation_adopted.pdf. The

"culpability" is something to be proven by the government beyond a reasonable doubt, not determined prematurely by it or by an employer.[12]

In May, Ms. Mathis's predecessor sent Attorney General Gonzales a revision of the Thompson Memo that would meet the legitimate needs of prosecutors and yet protect the attorney-client privilege. I have seen the Department's reply, and I was frankly disappointed by its non-responsive tone. This spring, the Sentencing Commission, after considering the views expressed by numerous commentators, practitioners and former government officials, voted – over the objection of the Justice Department – to delete the reference to waiver from its commentary on cooperation. I would hope the Justice Department will display a similar willingness to do so as well.

Thank you, and I look forward to your questions.

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supporting report is available at http://www.abanet.org/buslaw/attorneyclient/materials/hod/emprights_report_adopted.pdf.

[12] ABA report, *supra* note 11, at 12.

Written Testimony
United States Senate Committee on the Judiciary
"The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations"
September 12, 2006

Mr. Andrew Weissmann
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Good morning Chairman Specter, Ranking Member Leahy 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 the Director of the Department of Justice's Enron Task Force and Special Counsel to the Director of the FBI.

I will make three main points regarding the Thompson Memorandum's effect on the right to counsel in corporate investigations.

A. A Lack of Uniform Standards Regarding Requests for Waivers of the Attorney-Client Privilege

First, there have been and still are wide differences across the country regarding when and how to seek a waiver of the attorney-client privilege in white collar investigations. The Thompson Memorandum gives federal prosecutors a green light to seek waivers of the attorney-client privilege. It offers no guidance, however, about when it is appropriate to do so and when the government should consider a corporation's failure to waive as a sign of non-cooperation.[1] The considerable variances in implementation of the Thompson Memorandum often subject corporations, many of which are national and even international in scope, to the vagaries and unreviewed decisions of an individual prosecutor. This problem can be exacerbated by the tradition of independence of each of the 93 United States Attorneys across the country, whose offices in practice often run quite autonomously of Main Justice here in Washington, D.C. Indeed, even though then-Acting Deputy Attorney General Robert McCallum, in a memorandum issued eleven months ago called for each Office to implement a written review process governing the request for waivers of the attorney-client privilege by individual federal prosecutors, I understand this process is not yet complete. But more to the point, even if the McCallum directive reaches successful completion, its positive effects will be limited. Individual written policies within a particular U.S. Attorney's Office may alleviate variations of interpretation within that same prosecutor's office, but do nothing to advance a national policy on the issue. Thus, although the theory of the Thompson Memorandum is a good one -- setting forth the criteria that should guide all federal prosecutors in deciding when to seek to charge

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[1] "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." Memorandum from Deputy Attorney Gen. Larry D. Thompson, to Heads of Dept. Components, U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) [hereinafter Thompson Memorandum], *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (last visited September 9, 2006), § VI cmt.

corporations -- in practice the interpretation and implementation of its "factors" is left to the determination of individual prosecutors. Even assuming good faith and dedication to public service by all federal prosecutors, they are not receiving the necessary guidance to diminish the wide variations that currently exist.

It is important to discuss specifics in order to understand the scope of the problem. There are two areas that I think are not of particular controversy in practice. First, it is quite common for prosecutors to request and corporations to agree to a waiver of attorney-client communications made at the time of the transaction that is under investigation. So, for instance, a prosecutor may examine, such as I did, a transaction at Enron that appears to be undertaken to manipulate earnings by transferring losses from a failing business segment to a profitable one. What Enron employees were saying to internal and outside counsel at the time regarding the legality of such a transaction would be particularly important in determining the intent of the employees who were responsible for the transaction. If the lawyers blessed the transaction, with full knowledge of the transaction and its purpose, the requisite criminal intent would likely not exist. On the other hand, if the lawyers were given less than the full factual picture, then the evidence from those attorneys becomes powerful proof that the employees were hiding facts precisely because they were conscious of the wrongfulness of the transaction. Corporations will generally waive the privilege in those situations both because the government's need for such information can be particularly strong and because the company itself may seek to rely on an advice of counsel defense, and thus a waiver would occur anyway.

Conversely, the Thompson Memorandum makes clear that it is generally inappropriate to seek a waiver with respect to communications between the corporation and its counsel regarding the company's defense of a current criminal investigation.[2] Such communications are rarely if ever necessary to determine the legality of the underlying transactions, even though they may in fact be quite relevant to the government's investigation.

There is, however, a wide area in the middle where the practices of federal prosecutors vary considerably. Prosecutors have interpreted -- and unless someone intervenes will continue to interpret -- the Thompson Memorandum to mean that it is appropriate at the very outset of a criminal investigation involving a corporation to seek a blanket waiver of all attorney-client communications, other than current communications regarding how to defend the case. That waiver can include the disclosure of all reports prepared by counsel of its interviews of employees as part of a company's internal investigation as well as production of counsel's notes taken at any interviews (whether of a company employee or a third party) -- even when the government attorneys and agents can interview the witnesses themselves or were present at the interviews. In other words, disclosure is sought even though the government could replicate the information by rolling up its sleeves and interviewing the witnesses.[3]

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[2] Thompson Memorandum, § VI n.3 ("This waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation.").

[3] For example, the Thompson Memorandum acknowledges that waivers "permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements." Thompson Memorandum, § VI cmt.

On the other hand, other prosecutors take a more surgical approach and proceed incrementally—only seeking a full waiver where it is truly important to the investigation and other interim steps have failed. This latter approach is of course far more responsible. Indeed, the Thompson Memorandum itself, insofar as it generally places off limits current communications with counsel regarding the company's defense, suggests such an approach. Those communications could be highly relevant to the investigation -- but disclosure would cut to the core of the attorney-client privilege, and they are rarely if ever necessary to an investigation. In my opinion, DOJ in Washington should promulgate guidance strictly cabining prosecutors' discretion to seek immediate blanket waivers and curtailing the solicitation of waivers that are simply a shortcut where the government can obtain the information directly.

B. Penalizing Assertions of a Constitutional Right

The second point I would like to make concerns the credit given under the Thompson Memorandum to companies that fire or do not pay legal fees for employees who refuse to speak with the government based on the Fifth Amendment.[4] These aspects of the Thompson Memorandum have garnered significant attention recently by virtue of two decisions by Judge Lewis Kaplan of the Southern District of New York, in the so-called KPMG tax shelter case.[5] 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 retains personnel who assert the Fifth Amendment privilege against self-incrimination during a criminal investigation.

Judge Kaplan's opinions highlight that the Thompson Memorandum -- and the way it is wielded by federal prosecutors -- is causing companies to fire employees for merely asserting their constitutional right to remain silent, and is interfering with the ability of employees to mount a defense by essentially restricting the employee's access to counsel that the corporation would otherwise have funded.

In the first *Stein* decision, Judge Kaplan found that prosecutors had invoked the Thompson Memorandum at the very outset of its investigation to pressure KPMG to break its long-standing tradition of paying its employees' legal fees. KPMG's payment of legal fees was at the top of the prosecutors' agenda from their very first discussions with KPMG, and the court found that the prosecutors had indicated that the government would not look favorably on the voluntary advancement of legal fees. Judge Kaplan concluded that by causing KPMG to cut off legal fees

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[4] Thompson Memorandum, § VI ("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; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection."); *id.* § 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.").

[5] 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).

to employees, the Thompson Memorandum violated the Fifth Amendment's due process clause and the Sixth Amendment right to counsel.

In the second *Stein* decision, issued one month later, 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 such an identity existed between the government and KPMG that KPMG's conduct could be legally attributed to the government. Because he found that the government had coerced the pre-trial proffer statements of two defendants, Judge Kaplan suppressed them.[6]

The factual situation in KPMG is not unique. Across the country corporations have instituted strict policies that call for firing employees or refusing to advance legal fees to 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 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 or having payment of their defense fees cut off.

Regardless of the legal firmness of the *Stein* decisions and of Judge Kaplan's attribution of state action to KPMG, the case underscores the need to reevaluate the Thompson Memorandum as a policy matter. It should be revised so that it no longer encourages an environment where employees risk losing their jobs or legal defense merely for exercising their constitutional right

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[6] 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.

not to speak to the government. In determining whether to indict a company, the DOJ should not permit consideration of the company's treatment of an employee who has asserted her Fifth Amendment right. This factor should simply not come into play in the analysis of whether a corporation has or has not cooperated. Although a company itself can properly fire an employee or cut off legal fees based on whether she cooperates with an investigation, the DOJ should not weigh in on this determination -- and not because a court may ultimately deem the company's actions as government conduct. Rather, for policy reasons, the DOJ should simply not base its decision to prosecute a company on whether a person has been punished by her employer for asserting a constitutionally guaranteed right.[7]

Moreover, with respect to a corporation's advancement of employees' legal fees, the Thompson Memorandum should be revised to make mandatory the current approach employed by cautious prosecutors. The wary prosecutor, for instance, will raise the issue of whether a company is paying for its employees legal fees only *after* the government has determined it has a prosecutable case against the company and only if that factor could make a difference in the calculus of whether to charge the company. And even then, the advancement of legal fees should only count against a company if the payment is part of a scheme to obstruct the government's investigation.

C. Rethinking Criminal Corporate Liability

The issues being addressed today by this Committee are symptoms of a larger problem with the current state of the law of criminal corporate liability. To understand what is wrong with the Thompson Memorandum and how the guidelines for prosecutorial decision-making can be improved, we need first to consider the context in which the Thompson Memorandum operates. There are two principal forces at work.

The first is the prevailing understanding that a corporate indictment could be the equivalent of a death sentence. 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 potentially devastating consequences, including 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 Department of Justice. The financial risks are simply too great.

[7] 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.

The second principle at work is the current 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.[8]

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 -- the Thompson Memorandum offers prosecutors 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 two decisions by Judge Kaplan in the *United States v. Stein* case.

Although the Thompson Memorandum has recently received significant negative attention, and is in some ways an easy target, it is not the real source of the problem. The root cause that renders the Thompson Memorandum such a sharp weapon is the standard for criminal corporate liability and the absence of systemic checks to restrict the government's power to charge corporations whenever an employee strays. The current standard for corporate criminal responsibility affords prosecutors enormous -- and unduly disproportionate -- leverage and power. In this climate, a corporation has little choice but to conform its conduct to the Thompson Memorandum factors, even in the absence of a prosecutor's overt threats.

A rethinking of criminal corporate liability is in order. The standard for criminal liability should take into account a company's attempts to deter the criminal conduct of its employees.[9] Holding the government to the additional burden of establishing that a company did not implement reasonably effective policies and procedures to prevent misconduct would both dull the threat inherent in the Thompson Memorandum as well as help correct the imbalance in power between the government and the corporation facing possible prosecution for the acts of an errant employee. A more stringent criminal standard, one that ties criminal liability to a company's lack of an effective compliance program, would have the added benefit of maximizing the chances that criminality will not take root in the first place -- since corporations will be greatly

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[8] New York Central & Hudson River Railroad v. United States, 212 U.S. 481 (1909) (holding that illegal rebates granted by agents and officers of a common carrier could be imputed to create criminal liability for the carrier itself); 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) (clerical worker); Texas-Oklahoma Express, Inc. v. United States, 429 F.2d 100 (10th Cir. 1970) (truck driver); United States v. Dye Constr. Co., 510 F.2d 78 (10th Cir. 1975).

[9] Notably, in the civil corporate liability context the Supreme Court has restricted agency principles along these lines. *See e.g.*, Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999); Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).

incentivized to create and monitor a strong and effective compliance program. The objectives of law-abiding society, the criminal law, and even of the DOJ Thompson Memorandum itself, would then be well served.

Thank you for this opportunity to testify today.

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