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

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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CONTENTS

MARCH 8, 2007

OPENING STATEMENT

Page

The Honorable Robert C. Scott, a Representative in Congress from the State of Virginia, and Chairman, Subcommittee on Crime, Terrorism, and Homeland Security 1

The Honorable J. Randy Forbes, a Representative in Congress from the State of Virginia, and Ranking Member, Subcommittee on Crime, Terrorism, and Homeland Security 3

WITNESSES

Mr. Barry M. Sabin, Deputy Assistant Attorney General, U.S. Department of Justice, Washington, DC
Oral Testimony 14
Prepared Statement 17

Mr. Andrew Weissmann, Partner, Jenner and Block, New York, NY
Oral Testimony 24
Prepared Statement 26

Mr. William M. Sullivan, Jr., Partner, Winston and Strawn, LLP, Washington, DC
Oral Testimony 33
Prepared Statement 35

Ms. Karen J. Mathis, President, American Bar Association, Chicago, IL
Oral Testimony 45
Prepared Statement 47

Mr. Richard T. White, Senior Vice President, Secretary, and General Counsel, The Auto Club Group, Dearborn, MI
Oral Testimony 75
Prepared Statement 77

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Prepared Statement of the Honorable Sheila Jackson Lee, a Representative in Congress from the State of Texas, and Member, Subcommittee on Crime, Terrorism, and Homeland Security 4

APPENDIX

Material Submitted for the Hearing Record 113

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

THURSDAY, MARCH 8, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:33 a.m., in Room 2141, Rayburn House Office Building, the Honorable Bobby Scott (Chairman of the Subcommittee) presiding.

Mr. SCOTT. The Subcommittee will come to order.

I am pleased to welcome you today to this hearing before the Subcommittee on Crime, Terrorism, and Homeland Security, on "The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations."

As noted in the U.S. Supreme Court in *Upjohn Company v. United States,* the attorney-client privilege is the oldest of privileges for confidential communications known to common law. The purpose of the privilege is to encourage full and frank communications between attorneys and their clients, so that sound legal advice and advocacy can be given by counsel.

Such advice of counsel depends upon the lawyer being fully informed by the client. And as the court noted in *Trammel v. U.S.* in 1980, the lawyer-client privilege rests on the need for the advocate and the counselor to know all that relates to the client's reasons for seeking representation, if the professional mission is to be carried out.

And this purpose can only be effectively carried out if the client is free from consequences or apprehensions regarding the possibility of disclosure of the information.

This is not the case when waivers are coerced or obtained under duress. And there is certainly a coercive situation where there is fear or concern by a defendant in a criminal case, that he or she may not receive full leniency without a waiver of attorney-client privilege.

As long as there is reason for concern that full leniency may not be granted without a waiver of attorney-client privilege, the fact that the department does not specifically require a waiver is of little consolation.

As the court noted in the *Upjohn* case, an uncertain privilege, or one which purports to be certain but results in widely varying applications by courts, is little better than no privilege at all.

The attorney-client privilege is a privilege of the client, not the lawyer, and lawyers have an absolute responsibility to protect a client's privilege. Corporations are persons relative to constitutional rights of persons.

Coercing waivers of corporate attorney-client privilege has not always been the practice among Federal prosecutors. Formerly, a company could evidence its cooperation with such prosecutors by providing insight and access to 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 or attorneys' litigation work product material.

Memoranda issued by the Department of Justice over the past several years, however, reveal that policies which suggest that corporations face an increased risk of prosecution, if they claim such constitutionally protected privileges.

The first such memorandum was issued by former deputy attorney general, Eric Holder in 1999. That memorandum was designed to provide prosecutors with factors to be considered when determining whether to charge a corporation with criminal activity, and to specifically allow prosecutors engaging the extent of a corporation's cooperation to consider the corporation's willingness to waive attorney-client and work product privileges.

The Holder memorandum was then superseded in 2003 by another memorandum issued by former deputy attorney general, Larry Thompson. The Thompson memo contained the same language regarding the waiver of attorney-client and work product privileges and also addressed the adverse weight that might be given to a corporation's participation in a joint defense agreement with its officers or employees and its agreement to pay their legal fees.

Today, the current department policies relating to corporate attorney-client and work product privilege waivers are embodied in the McNulty Memorandum issued in December of 2006 by current deputy attorney general, Paul McNulty.

So, this new memorandum does state that waiver request be the exception rather than the rule. It continues to threaten the viability of the attorney-client privilege in business organizations by allowing prosecutors to request a waiver of privilege upon finding of legitimate need.

I fully recognize that the department faces many hurdles when undertaking the investigation and prosecution of corporate malfeasance. We only need to look at victims of the Enron collapse, where nearly 10,000 individuals lost their jobs, their pensions, their plans for the future. And we know that it is vital that prosecutors have the tools necessary to prosecute these crimes and hold accountable wrongdoers who profit at the expense of ordinary working Americans.

I also know, however, that facilitating and encouraging such investigations must not occur at the cost of vital constitutional rights of corporations or their employees.

I firmly believe that by protecting these well established and essential constitutional interests, we can only facilitate legitimate investigations by encouraging corporate offices and employees to consult with their attorneys regarding corporate wrongdoing in a confidential setting, but also ensure fairness of our criminal justice system for all Americans.

It is now my privilege to recognize my colleague from Virginia, the Ranking Member of the Committee, Randy Forbes, for his opening statement.

Mr. FORBES. Thank you, Chairman Scott. And I want to thank you for scheduling this important hearing.

I also want to thank our distinguished panel of witnesses for taking your time and giving us your expertise and advice today.

One year ago, on March 7, 2006, this Subcommittee conducted an oversight hearing on just this issue. At first glance, the landscape surrounding the issue of corporate waivers of attorney-client privilege appears to have changed with the Justice Department's issuance of the so-called McNulty Memorandum governing criminal prosecutions of corporations.

But a closer examination of the McNulty Memorandum shows that many of the same questions and concerns that were raised at last year's hearing remain. This is disturbing to all of us.

I remain concerned that prosecutors may be overreaching by demanding that corporations waive their attorney-client privilege as a condition of cooperation and a decision not to indict a company.

The attorney-client privilege is deeply rooted in our jurisprudence and the legal profession. It encourages frank and open communication between clients and their attorneys, so that clients hopefully can receive effective advice and counsel.

In the corporate context, as we saw in the case of Arthur Andersen, the life of a corporation can turn on a prosecutor's exercise of discretion whether or not to charge a corporation. That decision can have profound consequences to our economy, the employees and the community, and should not turn on whether or not a company waives its attorney-client privilege.

I know that cooperation of the criminal justice system is an important engine of truth. To me, the important question is whether prosecutors seeking to investigate corporate crimes can gain access to the information without requiring a waiver of the attorney-client privilege. There is simply no reason for prosecutors to require privilege waivers as a routine manner.

I look forward to hearing from today's witnesses and to working with my colleague, Mr. Scott, on this important issue, and I yield back the balance of my time.

Mr. SCOTT. Thank you.

Without objection, all Members may include opening statements in the record at this point.

We have been joined by the Chairman of the full Committee, Mr. Conyers, and also Mr. Coble, Mr. Sensenbrenner and Mr. Chabot, at this point.

And, without objection, Members may include opening statements.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

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CONGRESSWOMAN SHEILA JACKSON LEE, OF TEXAS

STATEMENT BEFORE THE

JUDICIARY SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OVERSIGHT HEARING: "MCNULTY MEMORANDUM"

MARCH 8, 2008

Thank you, Mr. Chairman for holding this hearing to explore the important legal and policy issues that have arisen from what is commonly referred to as the "McNulty Memorandum." I also thank the Ranking Member, Mr. Forbes.

I am confident that working together, we can achieve great things for the American people. We have much work to do and I look forward to working with all members of the subcommittee to address the real challenges facing our country in the areas of administration of justice and corporate accountability.

Let me also welcome each of our witnesses:

1. Mr. Barry M. Sabin, Deputy Assistant Attorney General U.S. Department of Justice, Washington, DC
2. Mr. Andrew Weissmann, Partner, Jenner and Block, New York, NY
3. Mr. Richard White, Senior Vice President, Secretary, and General Counsel The Auto Club Group, Dearborn, Michigan
4. Mr. William M. Sullivan, Jr., Partner, Winston & Strawn, DC
5. Ms. Karen J. Mathis, President, American Bar Association

I look forward to their testimony.

The subject of today's hearing is "The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations." This hearing explores important legal issues and is very timely.

Mr. Chairman the Department of Justice policy promulgated in 2003 in known as the "Thompson Memorandum" was an initiative undertaken to respond to the shocking events at Enron and WorldCom. Issued by Larry Thompson, then the Deputy Attorney

General, the policy governs the factors that federal prosecutors must follow in deciding whether to charge a corporation with a crime. The policy was intended to put teeth in a company's claim to being a responsible corporate citizen. The Thompson Memorandum was undertaken in all good faith, but its critics claim that its provisions have not all proved beneficial in practice.

The DOJ has sought to remedy certain problematic provisions of the Thompson Memorandum through the so-called McNulty Memorandum, named after the current Deputy Attorney General, Paul McNulty. But again, critics allege that real problems still remain. Broadly speaking, those criticisms fall into three categories: (1) penalizing assertions of a constitutional right; (2) infringement on the attorney-client privilege; and (3) lack of oversight in corporate charging decisions.

Penalizing Assertions of a Constitutional Right

The Department of Justice's McNulty Memorandum, like the Thompson Memorandum before it, permits prosecutors to penalize a company that does not take punitive action against employees for asserting a constitutional right to remain silent, and reward those companies that do take such action. Under the McNulty

Memorandum companies may be deemed by the Department of Justice as uncooperative simply because they do not fire employees who refuse to speak with the government based on the Fifth Amendment.

In contrast, the bill introduced by Senator Specter in December 2006 and reintroduced this January would appropriately prohibit the government from considering an employee's assertion of the Fifth Amendment in evaluating whether to charge the individual's employer. That bill is a recognition that the issue raised by current DOJ policy is not about how "Big Business" behaves; it is about how the government does.

Indeed, the current DOJ policy should be of concern to all of us, because it impacts the rights of all employees, not just employers. Any person who is employed by a public or private company, a partnership, or a non-profit could get caught up in an investigation into possible infractions as serious as embezzlement and market manipulation or as murky as alleged violations of arcane contracting rules. The government should not lightly be given the power to influence an employee's assertion of the Fifth Amendment.

Infringement Of The Attorney-Client Privilege

A second critism of the McNulty Memorandum is that companies will continue to feel pressure to waive the privilege because the McNulty Memorandum permits a prosecutor to consider a company's refusal to waive in various circumstances and also still gives "credit" to those companies that do waive. Although the McNulty Memoranudm states that a refusal to disclose legal advice and attorney-client communications cannot count against a company, the same does not hold true for information the government deems "purely factual." Critics claim that in practice, however, the line between what is "purely factual" and what contains attorney work product is rarely clear-cut.

Additionally, critics of the policy contend that information that is deemed by the McNulty Memornadum to be allegedly "purely factual" is in fact usually clearly protected by the attorney-client and/or work product privileges. Thus, the McNulty Memorandum in reality does little to protect the privilege with respect to a large category of important privileged information.

Critics point to some of the examples cited in the McNulty Memorandum to illustrate the problem. As examples of "purely factual" material, the memorandum lists: "copies of key documents,

witness statements, or purely factual *interview memoranda* regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, *factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel."*

Mr. Chairman, this is troubling to me because who an attorney interviews, what questions an attorney asks, and what information is chosen as important to memorialize often can and does reveal important information about the attorney's defense strategy and her evaluation of the strength and weaknesses of the issues in a particular case. For this reason, courts have repeatedly held that how a party, its counsel and agents choose to prepare their case, the efforts they undertake, and the people they interview is not factual information to which an adversary is entitled.

The McNulty Memorandum seems to ignore the case law and the policy underlying the attorney-client and work product privileges. By continuing to allow prosecutors to base their charging decisions on whether a corporation discloses this sensitive information, the McNulty Memoranum allegedly deprives the attorney client relationship of the protection it needs to serve its important role in

our justice system.

Oversight of Corporate Charging Decisions

The last major criticism of the McNulty Memorandum is that the decision to charge a corporation is not required to be reviewed in Washington at Main Justice. Critics claim that the lack of national oversight is bewildering given the wide array of relatively minor decisions that are overseen by Main Justice and the enormity of the potential consequences of charging a corporation. They contend that since there is considerable expertise at Main Justice in examining these issues, that knowledge and guidance should be brought to bear on the difficult judgment calls regarding how to prosecute corporate crime.

Although the McNulty Memoranda sets forth the criteria that should guide all federal prosecutors in deciding when to seek to charge corporations, critics allege that in practice individual prosecutors have virtually unfettered discretion in interpreting and implementing those "factors" in making the ultimate decision as to how to deal with corporate criminality. This has led to wide variations in enforcement.

Critics argue that more guidance and oversight from Main Justice is needed in this area. They point out that the determination whether to charge a company is critically important because the mere indictment of a company can lead to serious consequences for hundreds or thousands of innocent people. Although not always the case, a corporate indictment carries with it the *risk* of being the equivalent of a death sentence.

It is largely for this very reason that the DOJ has special guidelines for charging a corporation. 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. The financial consequences are likely to be too great to subject the company and its shareholders to that risk. That is why one important aspect of this hearing is to explore the need for greater oversight of the decision to charge a corporation with criminal wrongdoing.

Thank you Mr. Chairman for holding this hearing. I look

forward to hearing from our distinguished panel of witnesses. I yield back my time.

Mr. SCOTT. We will now go on to our witnesses.

Our first witness is Mr. Barry Sabin, from the Department of Justice. He is the deputy assistant attorney general in the Criminal Division for the United States Department of Justice. Since January of 2006, he has been responsible for overseeing the fraud, criminal appellate section, gang squad and capital case unit.

Prior to his current appointment, he served as a chief of the Criminal Division's counterterrorism section and has been a Federal prosecutor since 1990. He received his bachelor's and master's degrees from the University of Pennsylvania, his law degree from New York University Law School.

Our next witness will be Mr. Andrew Weissmann, a partner in the law firm of Jenner and Block's New York office, where he specializes in white-collar criminal and regulatory matters. Prior to his current position, he served for 15 years with the Department of Justice where he worked as assistant U.S. attorney and was selected to serve as the director of a special task force created to investigate the Enron corporate scandal.

Previously, he was selected by the director of the FBI to be a special counsel, and served as chief of the Criminal Division of the U.S. Attorney's Office in the Eastern District of New York. In recognition of his efforts in the Department of Justice, he received numerous awards including the Attorney General's Award for Exceptional Service, the highest award given to Federal prosecutors.

He is a graduate of Princeton University, a recipient of a Fulbright Fellowship at the University of Geneva and a graduate of the Colombia Law School.

Next, William Sullivan, a litigation partner at the law firm of Winston and Strawn. In this capacity he concentrates on corporate internal investigations, white-collar criminal defense and complex civil and securities litigation. He previously served over 10 years as assistant U.S. attorney for the District of Columbia. He also worked in the Manhattan district attorney's office and in private practice as a litigator in New York City.

He has spoken on the Government's insistence on the waiver of attorney-client privilege for corporations under investigation in front of the American Bar Association, and has also addressed the World Trade Organization on Sarbanes-Oxley issues. He received his bachelor's and master's degrees from Tufts University and his law degree from Cornell University.

Next we have Karen Mathis, president of the American Bar Association, and partner in the Denver office of McElroy, Deutsch, Mulvaney and Carpenter.

Prior to holding her current position with the ABA, she served as the association's second-highest elected office, the chair of its house of delegates, where she served as a member since 1982. She has been active in the Denver Bar Association and the Colorado Bar Association for many years, where she held offices in the young lawyers section in both associations and served as vice president of the Colorado Bar Association.

She earned a law degree from the University of Colorado School of Law and bachelor's from the University of Denver.

Our next witness will be introduced by the Chairman of the full Committee, Mr. Conyers.

Mr. CONYERS. Thank you. Good morning, ladies and gentlemen.

It is great to see the president of the bar here again. She is becoming more and more regular in her appearances.

I am delighted to just bring to the Committee's attention the presence of an old friend and a distinguished witness, Richard White.

He currently is the general counsel for the Auto Club Group of Companies in Dearborn, Michigan, and was a founding partner in, I think, the largest, predominantly African-American firm in Michigan, Lewis, White and Clay. David Baker Lewis is still the head of that firm.

And we are delighted that you are here today.

He has come up from Morehouse College, Harvard University Law School, has been very active in the civil rights community in the State, and has also been commissioner of Foreign Claims Settlement Commission, and serves as a member of the executive committee and board of directors of the American Corporate Counsel Association.

I am very happy to introduce to the Committee Richard White.

Glad you are here.

And we look forward to some very important testimony on a subject that could be ignored. What we are finding out, Chairman Scott, is we are having legislation by memorandum, and we have gone through quite a few of them.

And I think the combination of civil rights, civil liberties, chamber of commerce, defense lawyers all coming together makes this an obvious subject for our attention and your scrutiny. And I thank you for the opportunity to introduce Richard White.

Mr. SCOTT. Well, thank you.

Each of our witnesses' written statements will be made part of the record in its entirety.

I would ask each of the witnesses to summarize his or her testimony in 5 minutes or less. To help you stay within that time, there is a timing light on the table. When you have 1 minute left, the light will switch from green to yellow. And when finally the red light comes up, we would ask you to complete your testimony.

Deputy Assistant Attorney General Sabin?

TESTIMONY OF BARRY M. SABIN, DEPUTY ASSISTANT ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. SABIN. Chairman Scott, Ranking Member Forbes, Members of the Subcommittee, thank you for the opportunity to be here today to discuss the Department of Justice's corporate criminal charging policies and its respect for the attorney-client privilege.

These policies have been articulated in a memorandum issued by Deputy Attorney General Paul McNulty 3 months ago.

In connection with my testimony today regarding the McNulty Memorandum, I would like to underscore five key points that are fundamental to the department's corporate criminal charging policies: one, the tone of the McNulty Memorandum and its respect for the importance of the attorney-client privilege; two, developing concrete data to uniformly consider and implement the McNulty Memorandum; three, establishing a legitimate need for requesting

a waiver of the attorney-client privilege; four, instituting a meaningful consultation and approval process to ensure consistent application of department practices; and five, an incremental approach to seeking information—first factual information and then legal opinions—from the corporate entity, if appropriate.

The tone of the McNulty Memorandum is critical to an understanding of the department's approach to corporate criminal charging policies. It is a tone of respect for the importance and longstanding nature of the attorney-client privilege. The department helps protect investors and ensure public confidence in business entities and the markets in which those entities participate.

The Department shares this common goal with the vast majority of corporate leaders who believe in and work hard to maintain integrity and honesty in corporate governance.

The attorney-client and work product protections serve an extremely important function in the U.S. legal system and can help responsible corporations in their efforts to comply with applicable law.

At the same time, waiver of the privilege may advance important interests. As articulated in the McNulty Memorandum, a company's disclosure of privileged information may permit the Government to expedite its investigation. Indeed, this may assist the Government and the corporation.

The principles of charging business organizations, now embodied in the McNulty Memorandum, establish a nine-factor test that prosecutors consider in determining, in their discretion, whether to charge a corporation.

A prosecutor must consider and weigh all of the relevant factors. The issue regarding cooperation is one of nine factors, and the waiver issue is a subfactor of cooperation.

It is important that this Subcommittee understand that the department has never instructed prosecutors to seek routine requests for waiver of privilege. Nor is waiver of privileged information a prerequisite to getting credit for cooperation by a corporation. Indeed, the policy now makes clear that legal advice, mental impressions and conclusions by counsel are protected and should only be sought in rare circumstances.

Any request for such materials must be in writing and seek the least intrusive waiver necessary to conduct a complete and thorough investigation. This means that the request must be narrowly tailored to meet the specific investigation need. The United States attorney considers that request in consultation with the Assistant Attorney General of the Criminal Division. The request and approval must be in writing, and those records must be maintained.

Prosecutors must establish a legitimate need for that specific information. The four-pronged test is set forth in my written statement.

This test ensures that evaluating the need for waiver is a thoughtful process, and that prosecutors are not requesting it without examining the quantum of evidence already in their possession and determining whether there was a real need to request privileged information.

Prosecutors must take preliminary investigative steps to determine whether a corporation and its employees have engaged in

criminal activity before seeking waiver, thereby ensuring that prosecutors cannot seek waiver at the outset of the investigation.

To be clear, a prosecutor must take an incremental approach, first establishing a legitimate need and then submitting a narrowly tailored, written request.

The United States attorney, in consultation with the assistant attorney general of the Criminal Division, approves a request for factual information; the deputy attorney general approves requests for legal information.

In light of the substantial and thoughtful revisions contained in the McNulty Memorandum, the Department urges this Subcommittee, at a minimum, to allow the guidance a chance to work before considering any legislation.

In the approximately 3 months since the memorandum was issued, the deputy attorney general's office has not received a single request seeking a waiver of legal advice and strategy. Moreover, the Criminal Division has only received a few requests to seek purely factual information. In each of these instances, the Criminal Division has engaged in a meaningful dialogue regarding the requests with the district.

Our prosecution efforts confirm that corporate fraud is not a historical relic. The Department of Justice continues to devote significant time and resources to protecting our financial markets and the American investor. We remain committed to investigating and prosecuting corporate matters.

The Department's past and current efforts to combat corporate fraud have assisted in some part, I believe, to supporting compliance in the business community. Since the president established the Corporate Fraud Task Force, many corporations have implemented effective compliance programs, and corporations are quicker to respond when they find fraud committed by the corporation.

It is this common ground—prosecutors committed to the fair administration of justice and responsible business leaders fulfilling their duties of honest dealing to corporate shareholders—that unites us in our determination that eliminating fraud is good for business.

We appreciate the opportunity to share our views with this Subcommittee.

Thank you.

[The prepared statement of Mr. Sabin follows:]

PREPARED STATEMENT OF BARRY M. SABIN

Statement of
Barry M. Sabin
Deputy Assistant Attorney General
Criminal Division
Department of Justice

Before the
Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
United States House of Representatives

Concerning
The Right to Counsel in Corporate Investigations

March 8, 2007

Thank you for the opportunity to be here today to discuss with you the Department of Justice's corporate criminal charging policies and its respect for the attorney-client privilege. These policies have been articulated in a memorandum issued by Deputy Attorney General Paul McNulty on December 12, 2006 (referred to as the "McNulty Memorandum"). In connection with my testimony today regarding the *McNulty Memorandum*, I would like to underscore five key points that are fundamental to the Department's corporate criminal charging policies: (1) the tone of the *McNulty Memorandum* and its respect for the importance of the attorney-client privilege; (2) developing concrete data to uniformly consider and implement the *McNulty Memorandum*; (3) establishing a legitimate need for requesting a waiver of the attorney-client privilege; (4) instituting a meaningful consultation and approval process to ensure consistent application of Department practices; and (5) an incremental approach to seeking information – first factual information and then legal opinions – from the corporate entity, if appropriate.

The Department Shares a Common Goal With Responsible Corporate Leaders and Recognizes the Importance of the Attorney-Client Privilege

The tone of the *McNulty Memorandum* is critical to an understanding of the Department's approach to corporate criminal charging policies. It is a tone of respect for the importance and long-standing nature of the attorney-client privilege. The Department helps protect investors and ensure public confidence in business entities and the markets in which those entities participate. The Department shares this common goal with the vast majority of corporate leaders who believe in and work hard to maintain integrity and honesty in corporate governance.

The Department has long recognized that the attorney-client and work product protections serve an extremely important function in the U.S. legal system and can help responsible corporations in their efforts to comply with applicable law. We acknowledge that the purpose of these privileges "is to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn v. United States*, 449 U.S. 383, 389 (1976). At the same time,

waiver of the privilege may advance important law enforcement interests. As articulated in the McNulty Memorandum, "[a] company's disclosure of privileged information may permit the government to expedite its investigation. In addition, the disclosure of privileged information may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure."

The Department's Corporate Criminal Charging Policy

Many positive benefits flow from criminal enforcement against corporations, including increased compliance and restoring the confidence of the investing public in the capital markets. At the same time, due to the nature of a corporation, certain additional considerations are present. For this reason, and to ensure consistency in corporate charging decisions, the Department of Justice initially memorialized the principles governing the Federal Prosecution of Business Organizations in the *Holder Memorandum* issued in 1999. That document, as well as the various iterations that followed – the *Thompson Memorandum* and *McNulty Memorandum* – established a nine-factor test that prosecutors consider in determining whether to charge a corporation or other business entity. A prosecutor must consider and weigh all of the relevant factors in order "to ensure that the general purposes of the criminal law – assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitations of offenders, and restitution for victims and affected communities – are adequately met, taking into account the special nature of the [corporation]." The nine factors are:

(1) the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;

(2) the pervasiveness of wrongdoing within the corporation, including the complicity in, or condoning of, the wrongdoing by corporate management;

(3) the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;

(4) the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;

(5) the existence and adequacy of the corporation's pre- existing compliance program;

(6) the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;

(7) collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution;

(8) the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and

(9) the adequacy of remedies such as civil or regulatory enforcement actions.

A corporation's cooperation is just one of the nine factors a prosecutor must consider in determining whether to charge a corporation, and a company's willingness to waive the attorney-client privilege is just one sub-factor in gauging cooperation. To make it clear that waiver of the attorney-client privilege is never mandatory, the *McNulty Memorandum* expressly provides that waiver of the privilege is not a pre-requisite to a finding that a company has cooperated. Moreover, a company that has not cooperated may still not be charged criminally, depending on the other factors enumerated above.

The Department Has Engaged in a Dialogue With Critics of its Policy and Has Taken Reasonable and Measured Steps to Address the Criticism

The Department published the principles of charging corporations – which are the factors that prosecutors have long informally considered – to ensure consistency and transparency. We at the Department are aware that, despite the Department's successes, some in the business community and criminal defense bar had expressed dissatisfaction arising out of a perception that federal prosecutors were "coercing" corporations to provide privileged materials in criminal investigations. However, no concrete information was provided to the Department to support these types of allegations and it was inconsistent with the findings of the Deputy Attorney General's office.

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

The *McNulty Memorandum* Establishes an Exacting Procedure for Requesting a Waiver of the Attorney-Client Privilege

For instance, the most often-heard criticism was that prosecutors routinely sought waivers of privilege in corporate criminal investigations and that a "culture of waiver" had developed. The Department has never instructed prosecutors to seek routine requests for waiver of privilege. However, in order to address the perception that routine waivers were being sought, the new policy now makes clear that legal advice, mental impressions and conclusions and legal determinations by counsel are protected and should only be sought in rare circumstances. Any request for such materials must be in writing and "seek the least intrusive waiver necessary to conduct a complete and thorough investigation." If such materials are requested, approval to make such a request must come from the second highest ranking official in the Department, the Deputy Attorney General. This requirement demonstrates the importance that we have placed in making certain that requests for attorney-client communications are tightly controlled and reviewed at the highest levels.

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

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

The privilege is protected to such an extent in this approval process, that even if the prosecutors have established a legitimate need and the Deputy Attorney General approves the request for the waiver, if the request is made and the corporation declines to give the information, the Department will not hold it against the corporation or view it negatively in making a charging decision. This is to ensure that where a valid privilege is asserted for legal advice or strategy, that the corporation and its lawyers are not penalized for deciding that they want to preserve the confidentiality of their communications.

If the corporation decides to give us the information, we will consider it favorably. The government wants to encourage cooperation and the production of information where requested, and certainly a corporation would want to receive a benefit for production if the decision is made to waive the privilege. It would not make sense for the corporation to voluntarily provide information to the government and not receive some credit for it. There would be no incentive to cooperate if that were the case, and cooperation of corporate entities is often a crucial part in early identification of a corporate fraud.

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

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

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

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

These process requirements only apply to requests from the government. Where the corporation makes a voluntary and unsolicited offer to give us documents which may be privileged, *e.g.*, its internal investigation, no approval to accept those documents is needed. But even in those instances, United States Attorneys must be notified that the prosecutor has accepted privileged documents and a record of those notifications must be kept at the United States Attorney's Office. This allows us to maintain data regarding the frequency of voluntary waivers and underscores the seriousness with which we take <u>any</u> production of privileged materials.

<u>The *McNulty Memorandum* Provides that Prosecutors Generally Cannot Consider Whether a Corporation is Advancing Fees to Its Employees</u>

Another part of the *McNulty Memorandum* revised the way in which prosecutors can consider the advancement of attorneys' fees by the corporation. In general, the *Thompson Memorandum* simply directed that a federal prosecutor, as part of assessing whether a corporation cooperated with a government investigation, may look at whether the company is paying the attorneys' fees of individuals alleged to have committed the fraud. The new guidance

generally prohibits prosecutors from considering whether a corporation is advancing attorneys' fees to employees or agents under investigation or indictment.

The Department's Revised Policy Should Be Given Time to Work

In light of the substantial and thoughtful revisions contained in the *McNulty Memorandum*, the Department urges this Subcommittee, at a minimum, to allow the guidance a chance to work before considering any legislation. The guidance was recently issued and it is much too early to assess its effect.

There are preliminary indications that the policy is working. In the nearly three months since the *McNulty Memorandum* was issued, the Deputy Attorney General's office has not received a single request seeking a waiver of legal advice and strategy. Moreover, the Criminal Division has received only a few requests to seek purely factual information since the *Memorandum* was issued. In each of those instances, the Criminal Division, which must consult with the district requesting the waiver, has engaged in a meaningful dialogue regarding the request.

The Battle Against Corporate Fraud Remains a Priority of the Department of Justice

In discussing the Department's corporate criminal charging policy in speeches and testimony, Department officials often underscore the corporate scandals of 2000-2002. Certainly, we should be mindful of these past occurrences. However, I want to conclude with a different focus – a focus not on Enron, but where we are today. Our recent cases confirm that corporate fraud is not a historical relic. Federal prosecutors continue to investigate inflated revenue schemes, market manipulation, self-dealing by corporate executives, insider trading, and stock option backdating. The Department of Justice continues to launch large-scale corporate investigations and to devote significant time and resources to protecting our financial markets and the American investor. We remain committed to investigating and prosecuting corporate matters, as evidenced in the recent trial of Enterasys executives in New Hampshire for fraudulently inflating earnings or the plea of guilty recently in New York of the former general counsel of Monster.com for fraudulent stock options backdating. The Department's efforts have not abated.

I believe that our past and current efforts to combat corporate fraud have helped to create a culture of compliance in the business community. Many corporations have implemented effective compliance programs and corporations are quicker to respond when they find fraud committed by the corporation. These are positive effects that should not be ignored or forgotten. It is this common ground – prosecutors committed to the fair administration of justice and responsible business leaders fulfilling their duties of honest dealing to corporate shareholders – that unites us in our determination that eliminating fraud is good for business.

Conclusion

The Department remains hopeful that once Congress examines the revised guidance in detail and allows it to take root, it will recognize that the Department's policies and practices are sound. The charging factors in the *McNulty Memorandum* are prudent, necessary and time-tested. The revisions that address waiver are reasonable and will protect privileged materials. Taking away the Department's ability to request a waiver and our ability to make the right charging decisions by severely restricting what we can consider in determining whether a corporation is cooperating, not only hamstrings federal prosecutors, it will ultimately discourage corporate self-policing. We respectfully suggest that this is not the message we should be sending to corporate leaders or the investing public.

We appreciate the opportunity to share our views with this Subcommittee. With your assistance, the Department will continue to prosecute corporate wrongdoers and protect the American investor, while maintaining its respect and protection of the attorney-client privilege.

Thank you.

TESTIMONY OF ANDREW WEISSMANN, PARTNER, JENNER AND BLOCK, NEW YORK, NY

Mr. WEISSMANN. Good morning, Chairman and Members of the Subcommittee and staff. I will make three points regarding the McNulty Memorandum.

The memorandum leaves completely intact the Government's ability to penalize a company that does not take punitive action against employees for the mere assertion of their constitutional right to remain silent.

Under the McNulty Memorandum, companies may be deemed by the Department of Justice as uncooperative, simply because they do not fire employees who refuse to speak with the Government, based on the fifth amendment.

By contrast, the Senate bill reintroduced this past January would appropriately prohibit the Government from considering an employee's assertion of the fifth amendment in evaluating whether to charge the individual's employer.

The issue raised by current DOJ policy is not about how so-called "big business" behaves; it is about how the Government does. Indeed, the current DOJ policy was recently found by Judge Lewis Kaplan, in the so-called KPMG tax shelter case, to be constitutionally impermissible. And the factual situation in KPMG is not unique.

Across the country, numerous corporations have instituted strict policies that call for firing employees who do not "cooperate" with the Government.

Ironically, now that the McNulty Memorandum has largely eliminated the ability of prosecutors to weigh in on an employer's decision to advance legal fees, but left intact the ability to reward a company that fires employees who assert the fifth amendment, the Government can encourage employers to take the more draconian corporate measure against its employees, but not the lesser.

As a simple policy matter, whether a company punishes employees who assert the fifth amendment is a poor proxy for determining whether the entire company should be charged with a crime. Other factors—such as the level and pervasiveness of wrongdoing, a history of recidivism—are far more accurate measures of corporate culpability.

But more importantly, the DOJ policy should be altered, because the Government should not be fostering an environment where the employees risk losing their job merely for exercising their constitutional right.

A second problem is that, although the McNulty Memorandum states that refusal to disclose legal advice and attorney-client communications cannot count against a company, the same does not hold true for information the Government deems to be purely factual.

But information that is deemed by the McNulty Memorandum to be allegedly purely factual is, in fact, usually clearly protected by the attorney-client privilege and/or work product privilege. The McNulty Memorandum's examples illustrate this problem.

As examples they list as purely factual information, witness statements, factual interview memoranda and investigative facts documented by counsel.

But who an attorney interviews, what questions an attorney asks and what information is chosen as important to memorialize can reveal significant information about the attorney's defense strategy. And for this reason, courts have repeatedly held—and I am quoting now from one of the cases—"how a party, its counsel and agents choose to prepare their case, the efforts they undertake and the people they interview, is not factual information to which an adversary is entitled."

The McNulty Memorandum simply ignores this case law and its unassailable logic and abrogates to itself the determination that material that has heretofore been widely deemed to be privileged is not entitled to protection under the memorandum.

Finally, one of the main flaws in the McNulty Memorandum is that the decision to charge a corporation is not required to be reviewed by Main Justice. In practice, wide variations in the field currently exist regarding the United States Attorney's Office's corporate charging practices.

But the lack of oversight is bewildering, given the wide array of relatively minor decisions that are overseen by Main Justice and the enormity of the potential consequences of charging a corporation. And this lack of oversight is unfortunate, since there is considerable expertise at main justice in examining these issues.

Again, it is ironic that one of the key innovations in the McNulty Memorandum was to have national oversight of decisions regarding requests for waiver of the attorney-client privilege in corporate investigations.

Yet the final decision regarding whether to charge the company receives no such scrutiny.

In conclusion, although DOJ has acted to remedy certain problems in its corporate charging policy, many remain. There is no reason to believe that those problems will disappear with the passage of time, since they are embedded in the McNulty Memorandum itself.

Thank you for the opportunity to address this Committee.

[The prepared statement of Mr. Weissmann follows:]

PREPARED STATEMENT OF ANDREW WEISSMANN

Written Testimony
United States House of Representatives Subcommittee on Crime, Terrorism, & Homeland Security of the Committee on the Judiciary
"The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations"
March 8, 2007

Mr. Andrew Weissmann
Partner, Jenner & Block LLP

Good morning Chairman Scott, Ranking Member Forbes, 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.

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

The DOJ policy promulgated in 2003 as the "Thompson Memorandum" was one such initiative undertaken to respond to the shocking events at Enron and WorldCom; it governs the factors that federal prosecutors must follow in deciding whether to charge a corporation. It was intended to put teeth in a company's claim to being a responsible corporate citizen. The Thompson Memorandum was undertaken in all good faith, but its provisions have not all proved beneficial in practice.

Although the DOJ has sought to remedy certain provisions of the Thompson Memorandum through the so-called McNulty Memorandum, real problems still remain. I will make three main points regarding the new McNulty Memorandum.

A. Penalizing Assertions of a Constitutional Right

The Department of Justice's McNulty Memorandum, like the Thompson Memorandum before it, leaves completely intact the government's ability to penalize a company that does not take punitive action against employees for asserting a constitutional right to remain silent, and reward those companies that do take such action. Under the McNulty Memorandum companies may be deemed by the Department of Justice as uncooperative simply because they do not fire employees who refuse to speak with the government

based on the Fifth Amendment.[1] By contrast, the bill introduced by Senator Specter in December 2006 and reintroduced this January would appropriately prohibit the government from considering an employee's assertion of the Fifth Amendment in evaluating whether to charge the individual's employer.[2]

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

The ability of the DOJ to weigh in on an employee's assertion of the Fifth Amendment has garnered significant attention recently by virtue of the second of two decisions by Judge Lewis Kaplan of the Southern District of New York, in the so-called KPMG tax shelter case.[3] Judge Kaplan addressed two of the Thompson Memorandum factors that govern whether to indict a company -- whether a company elects to pay the legal fees of its employees and whether it punishes personnel who assert the Fifth Amendment privilege against self-incrimination during a criminal investigation. The McNulty Memorandum addressed to a large degree the legal fees issue; it did nothing to protect the

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

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

[3] 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).

constitutional rights of employees by prohibiting prosecutors from goading companies to fire employees who assert their Constitutional rights.

Judge Kaplan's opinion highlights that this DOJ policy -- and the way it is wielded by federal prosecutors -- is causing companies to punish employees for merely asserting their constitutional right to remain silent. In the second *Stein* decision, issued in July of last year, Judge Kaplan concluded that certain statements made to the government by KPMG employees had been coerced and thus obtained in violation of the Fifth Amendment. KPMG had threatened certain employees that if they did not cooperate with the government's investigation they would be fired or their legal fees would not be paid. The court concluded that KPMG took those steps at the behest of the government and that the Thompson Memorandum precipitated KPMG's use of economic threats to coerce statements from its employees. Of note, the prosecution raised this issue *prior* to determining it had a prosecutable case against the company and *prior* to determining that this factor could make a difference in the calculus of whether to charge the company. In other words, the government used this factor with the goal of altering corporate behavior by causing the company to punish employees who refused to speak to the prosecution. 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.[4]

The factual situation in KPMG is not unique. Across the country numerous corporations have instituted strict policies that call for firing employees to employees who do not

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[4] 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.

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

Regardless of the validity of the specific facts and inferences that led Judge Kaplan to attribute state action to KPMG, that case underscores the continued need to reevaluate the McNulty Memorandum. Senator Specter's bill recognizes that as a simple policy matter whether a company is willing to punish employees who assert their Fifth Amendment rights not to talk to the government is a poor proxy for determining whether the entire company should be charged with a crime. Other factors, such as the level and pervasiveness of the wrongdoing, a history of recidivism, and the presence of compliance measures, are far more accurate measures of corporate culpability.

More importantly, the DOJ policy should be altered because the government should not be fostering an environment where employees risk losing their jobs merely for exercising their constitutional right not to speak to the government. A company itself can properly decide on its own to fire an employee or cut off legal fees based on whether she cooperates with an investigation. But the DOJ should simply not base its decision to prosecute a company on whether it has punished an employee for asserting a constitutionally guaranteed right.[5]

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

A second problem under the new DOJ policy is that companies will continue to feel pressure to waive the privilege because the McNulty Memorandum still permits a prosecutor to consider a company's refusal to waive in various circumstances and also still gives "credit" to those companies that do waive. Although the McNulty Memoranudm states that a refusal to disclose legal advice and attorney-client communications cannot count against a company, the same does not hold true for information the government deems "purely factual." In practice, however, the line between what is "purely factual" and what contains attorney work product is rarely clear-cut. Moreover, information that is deemed by the McNulty Memornadum to be allegedly

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[5] *See also The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the Senate Comm. on the Judiciary* (Sept. 12, 2006) (testimony of Andrew Weissmann), *available at* http://judiciary.senate.gov/testimony.cfm?id=2054&wit_id=5743; 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.

"purely factual" is in fact usually clearly protected by the attorney-client and/or work product privileges. Thus, the McNulty Memorandum in reality does little to protect the privilege with respect to a large category of important privileged information.

The McNulty Memorandum's examples illustrate the problem. As examples of "purely factual" material, the memorandum lists: "copies of key documents, *witness statements*, or purely factual *interview memoranda* regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, *factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel*."[6] But who an attorney interviews, what questions an attorney asks, and what information is chosen as important to memorialize can reveal important information about the attorney's defense strategy and her evaluation of the strength and weaknesses of the issues in a particular case. For this reason, courts have repeatedly held that "[h]ow a party, its counsel and agents choose to prepare their case, the efforts they undertake, and the people they interview is not factual information to which an adversary is entitled."[7] Yet the McNulty Memorandum simply ignores this case law and its unassailable logic and abrogates to itself the determination that material that has heretofore been widely deemed to be privileged is not entitled to protection under the Memorandum.

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

C. Lack of Oversight of Corporate Charging Decisions

Finally, one of the main flaws in the McNulty Memorandum, which was equally true of the Thompson Memorandum and the Holder Memorandum before it, is that the decision to charge a corporation is not required to be reviewed in Washington at Main Justice. Such a lack of national oversight is bewildering given the wide array of relatively minor decisions that are overseen by Main Justice and the enormity of the potential consequences of charging a corporation. This lack of oversight is unfortunate, since there is considerable expertise at Main Justice in examining these issues. That knowledge and guidance should be brought to bear on these difficult judgment calls regarding how to prosecute corporate crime.

Thus, although the theory of the McNulty, Thompson, and Holder Memoranda is a good one -- setting forth the criteria that should guide all federal prosecutors in deciding when to seek to charge corporations -- in practice individual prosecutors are left to interpret and implement its "factors" in making the ultimate decision as to how to deal with corporate

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[6] McNulty Memorandum § 7.B.2 (emphasis added).

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

criminality. Wide variations currently exist. Indeed, even after the passage of the McNulty Memorandum there is reason to believe that little has been done to train federal prosecutors on its dictates and to measure compliance with its provisions. Even assuming good faith and dedication to public service by all federal prosecutors, they are not receiving the necessary guidance.

National guidance and oversight in this area is needed. The determination as to whether to charge a company has unique challenges. The mere indictment of a company can lead to serious consequences for hundreds or thousands of innocent people. Indeed, it is largely for this very reason that the DOJ has special guidelines for charging a corporation. Although by no means always the case, it is undeniable that a corporate indictment carries with it the *risk* of being 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. The financial consequences are likely to be too great to subject the company and its shareholders to that risk.

Moreover, under 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. 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 McNulty 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.

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[8] N.Y. Cent. & Hudson River R.R. 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); Tex.-Okla. 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).

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

This lack of oversight is particularly problematic since there have been and still are wide differences across the country regarding when and how to prosecute corporate crime. The considerable variances in implementation of the DOJ policy can 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. Some offices look first to trying to charge a company and use the easy threshold for corporate liability to insist on exacting a plea to a criminal charge; others are satisfied to pursue culpable executives and consider deferred prosecution agreements with a company rather than insisting on a guilty plea that might lead to enormous collateral consequences to innocent employees and shareholders. These two different approaches currently co-exist, with no uniform review at Main Justice.

In short, although DOJ has acted to remedy certain problems in its corporate charging policy, many remain. There is no reason to believe those problems will disappear with the passage of time since they are still embedded in the McNulty Memorandum. Hearings like these are a useful tool at the very least to bring to light and ideally to address policies and practices that serve to undermine important constitutional rights we all should enjoy.

Thank you for the opportunity to address this committee on this topic.

TESTIMONY OF WILLIAM M. SULLIVAN, JR., PARTNER, WINSTON AND STRAWN, LLP, WASHINGTON, DC

Mr. SULLIVAN. Good morning, Chairman Scott, Ranking Member Forbes and Subcommittee Members and staff.

One year ago yesterday, this Subcommittee held hearings on this very issue. It stimulated an important dialogue. I was privileged to testify then.

While the McNulty Memorandum is a commendable effort to regulate and, perhaps, restrict Government waiver requests, it remains to be seen whether it constitutes a real departure from existing practice. I am gravely concerned that the memorandum's nonbinding guidelines may only serve to entrench and expand an internal deliberative process, predisposed to request attorney-client privileged information and attorney work product.

I urge the Members of this Subcommittee to consider how these policies have given Government prosecutors unnecessary, unconstitutional and unfair advantages when pursuing corporate entities, and to perhaps craft an enforceable legislative response to not only restore balance, but to continue to foster an environment in which corporations can properly rely on counsel in order to follow the rule of law.

The traditional protections for business organizations supported by the attorney-client privilege and work product doctrine are further eroding as prosecutors and regulators continue to demand participation in internal investigations and the submission of detailed reports in exchange for the mere prospect of leniency.

In my experience, waiver requests are made even before I have completed my client's internal investigation and, thus, even before I have determined that a waiver is in my client's best interests.

Prosecutors' requests for information in a factual road map form would also encompass a broad subject matter waiver, leading to possible disclosure of privileged information beyond the scope of the investigation, to not only law enforcement officials, but also to future third parties, including other Government agencies or opportunistic plaintiffs' attorneys.

The corporate clients with whom I work unequivocally desire to identify and eliminate suspected criminal conduct occurring within their ranks. They come to me, their lawyer, seeking advice and guidance in abiding with internal corporate governance policies and external laws and regulations.

In such discussions, I may be compelled to determine the existence, nature and extent of potential criminal activity. My obligation to the client is to make the best choice, based upon an informed understanding of the law and the facts.

The presumption of innocence should never be forgotten or ignored. And counsel's first responsibility should be to inquire as to whether misconduct in fact took place, and if so, whether there might exist a credible defense.

Naturally, clients are fearful of sharing all pertinent information when they believe that the details of an attorney-client conversation may be turned over the Justice Department as part of a current or future investigation into these activities.

In the worst cases, the current policies of the Department only serve to dampen the aggressive repression of criminal behavior

within companies, because they, in fact, serve to inhibit the candid disclosure and remediation efforts by responsible corporate citizens and their counsel.

In conclusion, while ultimately the McNulty Memorandum's limited revisions may have been designed to appease some critics and potentially forestall imminent judicial and congressional action, they do not demonstrate an earnest reevaluation of Department policies regarding corporate criminal enforcement.

In fact, legislation such as the Attorney-Client Privilege Protection Act, recently introduced by Senator Specter, may now be required. But there is certainly something to be said for our elected representatives taking the laboring or in resolving policy questions.

Senator Specter's bill seeks to protect the attorney-client relationship by prohibiting all Federal agents and attorneys in a civil or criminal case from demanding such waivers. While the idea encompassed by the bill is sound, it lacks an enforcement mechanism to ensure meaningful restraint.

I encourage the consideration of a sanctions provision to deter the willful Government violator.

Ultimately and finally, perhaps the time has come for us to expend the same amount of energy spent on this privilege dialogue in establishing the standards and means with which to measure corporate compliance, governance and ethics programs and their adherence to the objectives of the Federal sentencing guidelines as legitimate factors for purposes of determining a corporation's cooperation instead of its willingness to jeopardize its future ability to conform to law through its renunciation of the attorney-client and work product privileges.

Thank you, and I look forward to your questions.

[The prepared statement of Mr. Sullivan follows:]

PREPARED STATEMENT OF WILLIAM M. SULLIVAN, JR.

WRITTEN TESTIMONY OF WILLIAM M. SULLIVAN, JR. ESQ.
PARTNER, WINSTON & STRAWN, LLP

BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

"The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations"

MARCH 8, 2007

Introduction

Good morning Chairman Scott, Ranking Member Forbes and subcommittee members and staff. Thank you for your invitation to address recent developments concerning the Department of Justice's policies and practices of seeking attorney-client privilege and work-product waivers from corporations, and in particular the McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations.

I am currently a partner at the law firm of Winston & Strawn, LLP where I specialize in white-collar criminal defense and corporate internal investigations. From 1991-2001, I served as an Assistant United States Attorney for the District of Columbia. In these capacities, I have been involved in virtually all facets of white-collar investigations and corporate defense: I have overseen both criminal investigations and internal corporate investigations, and I have represented both corporations and individuals in internal investigations, and before federal enforcement authorities and regulators, as well as in class action, derivative, and ERISA litigation. Since 2001, I have represented many companies, as well as officers and directors, in high profile, high stakes criminal investigations. My perspective on corporate cooperation and the waiver of attorney-client and attorney work product privileges has therefore been forged by my experiences on both sides of the criminal justice system.

One year ago yesterday, this Subcommittee held hearings on this very issue, and which stimulated an important dialogue. I was privileged to testify then. In response to concerns raised by this and other congressional, commercial and judicial bodies, last December, Deputy Attorney General Paul McNulty released revised Department of Justice guidelines regarding the federal prosecution of business organizations. The reconfigured policies, which are embodied in an internal Department of Justice memorandum (the "McNulty Memorandum"), supersede and replace earlier guidelines issued in 2003 by then-Deputy Attorney General Larry Thompson.

While the McNulty Memorandum is a commendable effort to regulate and perhaps restrict government waiver requests, it remains to be seen whether it constitutes a real departure from existing practice. I am gravely concerned that the Memorandum's non-binding guidelines may only serve to entrench and expand an internal deliberative process pre-disposed to request attorney-client privileged information and attorney work product. I urge the members of this subcommittee to consider how these policies have given government prosecutors unnecessary, unconstitutional and unfair advantages when pursuing corporate entities, and to perhaps craft an enforceable legislative response to not only restore balance, but to continue to foster an environment in which corporations can properly rely on counsel in order to follow the rule of law.

A. A Review of The Problem

The traditional protections for business organizations afforded by the attorney-client privilege and attorney work product doctrine are further eroding as prosecutors and regulators continue to demand participation in internal investigations and the submission of detailed reports in exchange for the mere prospect of leniency. In my experience, waiver requests are made even before I have completed my client's internal investigation, and thus even before I have

determined waiver is in my client's best interest. Prosecutors' requests for information in a factual "road map" form could encompass a broad subject matter waiver, leading to possible disclosure of privileged information beyond the scope of the investigation, to not only law enforcement officials, but also to all future third parties, including other government agencies or opportunistic plaintiffs' attorneys.

The corporate clients with whom I work unequivocally desire to identify and eliminate suspected criminal activities occurring within their ranks. They come to me, their lawyer, seeking advice and guidance in abiding with internal corporate governance policies and external laws and regulations. In such discussions, I may be compelled to determine the existence, nature, and extent of potential criminal activity. My obligation to the client is to make the best choice based upon an informed understanding of the law and facts. The presumption of innocence should never be forgotten or ignored, and counsel's first responsibility should be to inquire as to whether misconduct in fact took place, and if so, whether there might exist a credible defense.

Naturally, clients are fearful of sharing all pertinent information when they believe that the details of these conversations may be turned over to the Department of Justice as a part of a current or future investigation into these activities. In the worst cases, the current policies of the Department only serve to dampen the aggressive repression of criminal activity within companies because they serve to inhibit the implementation of remediation efforts by responsible corporate citizens and their counsel.

In addressing the practice of conditioning leniency for disclosure of otherwise privileged reports, I believe that a balance must be struck between the legitimate interests of law enforcement in pursuing and punishing illegal conduct, the benefits to be obtained by

corporations which determine to assist in this process and to take remedial action, and the rights of individual employees. It is imperative that we do not sacrifice accuracy and fundamental fairness for expediency and convenience. An equilibrium must be achieved between the aforementioned competing concerns, and the McNulty Memorandum fails to accomplish this goal.

B. The McNulty Memorandum Improperly Undermines A Corporations' Right to Counsel

In most respects, the revised charging guidelines in the McNulty Memorandum follow prior Department of Justice policies regarding corporate criminal prosecutions. Under the McNulty Memorandum, the Department of Justice, despite acknowledging a corporation's artificial nature and inability as an entity to form criminal intent, and while proclaiming the goal of protecting innocent investors, continues to insist on treating corporations as culpable individual defendants.

Notably, the McNulty Memorandum refines the Thompson Memorandum and earlier Department policies in only two substantive respects. First, the McNulty Memorandum sets forth internal procedures for seeking corporate waivers of attorney-client privilege and attorney work product protection. Second, it bars prosecutors, except in exceptional circumstances, from considering corporate payment or advancement of attorney fees in evaluating corporate cooperation. While these two changes are a step in the right direction towards protecting corporations' legal rights, they do not go far enough and in fact may perpetuate the problems underlying the prior guidelines.

1. Waiver of Attorney-Client Privilege and Attorney Work Product Protections

Under the McNulty Memorandum, the Department's practice of requesting and evaluating corporate waivers of attorney-client privilege and attorney work product will continue. Rather than eliminating waiver requests, the McNulty Memorandum provides a multi-tiered procedure for requesting business entities to disclose protected materials. Pursuant to this new approach, requests for protected materials will only be made where there is a "legitimate need" for privileged information, to be determined by: (i) the likelihood and degree to which the privileged information will benefit the government's investigation; (ii) whether the information can be obtained in a timely and complete fashion by using alternative means that do not require waiver; (iii) the completeness of a voluntary disclosure already provided; and (iv) the collateral consequences to a corporation resulting from a waiver.

These factors, however, provide little guidance (or clear, affirmative limits) on what will and will not constitute a "legitimate need" for purposes of requesting otherwise privileged and protected materials. Moreover, this "legitimate need" determination will be made by prosecutors in their sole discretion without any third party review or appeal process.

Once prosecutors themselves determine that a "legitimate need" exists, they are instructed to seek privileged information as divided into two categories. Category I information consists of factual information relating to the alleged misconduct and materials including witness statements, factual interview memoranda and factual materials (for example chronologies and organization charts) prepared by or at the request of counsel. Prosecutors are instructed to first request purely factual information, which may or may not be privileged, relating to the underlying misconduct. Before requesting waiver of attorney-client or work product protections for Category I information, prosecutors must obtain written authorization from the United States

Attorney ("USA") who, prior to authorizing the request, must provide a copy of the request to, and consult with, the Assistant Attorney General for the Criminal Division ("AAG-CD"). If authorized, the USA must communicate the request in writing to the corporation. It is unclear what it means for the AAG-CD to *consult* with the USA. It is not even clear whether the AAG-CD can overrule the USA's decision.

A corporation's response to the government's request for waiver of privilege and work product protection for Category I information may still be considered in evaluating its cooperation and in making charging determinations. While the Memorandum says that a corporation cannot be *required* to waive protections, because any corporation knows that refusal to waive may be adversely considered and result in charges being brought, the pressure to waive is undeniable. In effect, the Department of Justice controls the waiver process, rather than the corporation, whose privilege alone it is to waive in the first instance. This dynamic is the absolute reverse of what the practice should be. It may make sense for a corporation to waive in extreme circumstances when faced with strongly incriminating and pervasive facts. But it should be the corporation which volunteers and thereby deserves credit for the waiver; the government should be precluded from making the request, or in most cases, the demand, in the first instance.

In the "rare circumstances" where Category I information is viewed by prosecutors as providing an incomplete basis to conduct a thorough investigation, they are authorized to seek access to Category II information. Category II information is defined as attorney-client communications and opinion attorney work product. The McNulty Memorandum explicitly states that Category II information includes "legal advice given to the corporation before, during, and after the underlying misconduct occurred" as well as "attorney notes memoranda or reports containing counsel's mental impressions and conclusions, legal determinations reached as a

result of an internal investigation, or legal advice." Such information implicates at the very heart of the privilege, and the McNulty Memorandum fails to explain why this type of attorney advice and communication is necessary. In fact, the two types of attorney communications that seem most relevant to a criminal investigation (i.e., advice in furtherance of a crime, or advice put in issue by raising it as a defense) are specifically exempted.

2. Indemnification and Advancement of Attorneys Fee's

In a clear shift from earlier Department policy, the McNulty Memorandum instructs prosecutors that, as a general matter they cannot consider a business organization's indemnification or advancement of attorneys fee's to individual employees when evaluating corporation cooperation. The memorandum provides an exception to this rule such that in the "extremely rare" cases where "the totality of circumstances show that (indemnification or the advancement of attorney's fees is) intended to impede a criminal investigation" these matters may be considered. In such cases, the fee arrangement will be considered as a factor in making a determination that the corporation is acting improperly. Where prosecutors determine such circumstances do exist, approval must be obtained from the Deputy Attorney General before prosecutors may consider this factor for charging purposes.

Again, this prohibition falls short. The issue addressed in *Stein*[1] concerned not only the limited issue of indemnification. Rather the court was concerned more broadly with the governments' use of economic coercion generally to force employees and former employees to provide statements to investigators which might be incriminating. As Judge Kaplan stated, "proper respect for the individual prevents the government from interfering with the manner in which the individual wishes to present a defense. The underlying theme is that the government

[1] 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).

may not both prosecute a defendant and then seek to influence the manner in which he or she defends the case."[2] Under the McNulty Memorandum, the government maintains the power to decide if the company "shielded ... employees," forcing the corporation to predict the government's charging decisions, and encouraging it to compromise employee rights to protect itself.

Finally, in addition to the specific concerns raised above, there are process-related concerns surrounding the McNulty Memorandum. The internal policy guidelines are non-binding and unenforceable at law. Thus, there is little incentive for a prosecutor to strictly adhere to the guidelines and there is no remedy for the corporate victim if a prosecutor fails to abide by the rules.

C. Rethinking Corporate Criminal Liability

While Department of Justice is to be commended for attempting to structure and refine its approach to compelled privilege waivers, what we are left with are non-binding internal guidelines that seem to merely entrench and even expand an internal deliberative process predisposed to request attorney-client privileged information and attorney work product.

Time will determine whether the requirements of high-level authorization and written requests will curb the frequency with which waivers are sought. It is alarming, however, that the Department is no longer restricting its waiver requests to merely factual information. The McNulty Memorandum formalizes procedures for penetrating the most sacrosanct of attorney-client communications and attorney opinion work product. In so doing, the Department is in fact inviting further erosion of the attorney-client privilege and attorney work product protections.

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[2] Stein, 435 F. Supp. 2d at 357.

Regrettably, the McNulty Memorandum represents a missed opportunity to conduct a broad re-assessment of the policies and procedures relating to the criminal prosecution of business organizations. Old, largely recycled rationales for corporate criminal liability no longer carry the same weight. The proliferation of emails and corporate controls means that, far more often than not, corporate misconduct leaves a well documented paper trail through which culpable individuals can be held directly responsible for their conduct. No public interest is served by holding an entire organization and its innocent shareholders responsible for the misconduct of identifiable individuals. Moreover, it is unclear what is gained by sanctioning business entities with steep criminal fines. In many cases, misconduct giving rise to criminal fines also compels substantial civil-administrative penalties and the prospect of civil class-action and derivative lawsuits.

We should not prosecute corporations simply because we can. The goal of a criminal prosecution should be to punish responsible individuals and not to hold an entire organization accountable, with the corresponding penalties that are inevitably suffered by innocent shareholders and employees, for the acts of a few. Consistent with this goal, criminal prosecution of business organizations should be an exceedingly rare undertaking and employed only in pursuit of vital, imperative social objectives. Moreover, the weighty and solemn decision to prosecute a business organization should only be made at the highest levels of the Justice Department, a protocol strikingly absent from the McNulty Memorandum.

Conclusion

Ultimately, while the McNulty Memorandum's limited revisions may have been designed to appease some critics and potentially forestall imminent judicial and congressional action, they

do not demonstrate an earnest re-evaluation of Department policies regarding corporate criminal enforcement, and fail to provide meaningful procedural change.

In fact, legislation such as the Attorney-Client Privilege Protection Act recently reintroduced by Sen. Arlen Specter may now be required. There is certainly something to be said for our elected representatives taking the laboring or to resolve difficult policy questions. Senator Specter's bill seeks to protect the attorney-client relationship by prohibiting *all* federal agents and attorneys in any civil or criminal case from demanding, requesting or in any way conditioning a company's treatment or charging decisions based upon a company's 1) valid invocation of a privilege assertion; 2) payment of employee legal fees; or 3) signing a joint defense agreement. While the idea encompassed by the bill is sound, it lacks an enforcement mechanism to ensure meaningful prosecutorial restraint, and I encourage the consideration of a sanctions provision to deter the willful government violator.

Ultimately, perhaps the time has come for us to expend the same amount of energy spent on this privilege dialogue in establishing the standards and the means with which to measure corporate compliance, governance and ethics programs, and their consistency with the objectives of the Federal Sentencing Guidelines, as factors for purposes of determining a corporation's cooperation, instead of a company's willingness to jeopardizes its future ability to conform to law through its renunciation of the attorney-client and work product privileges.

Thank you. I look forward to your questions.

Mr. SCOTT. Thank you.

We have been joined by the gentleman from California, Mr. Lungren, and the gentleman from Massachusetts, Mr. Delahunt. Thank you for joining us.

Ms. Mathis?

TESTIMONY OF KAREN J. MATHIS, AMERICAN BAR ASSOCIATION, CHICAGO, IL

Ms. MATHIS. Thank you. Good morning, Chairman Scott, Ranking Member Forbes, Members of the Committee and, of course, your staff members.

My name is Karen Mathis. I am the president of the American Bar Association. I practice law in Denver, Colorado, with McElroy, Deutsch, Mulvaney and Carpenter.

It is a great pleasure to be back with you today and to speak on this very important topic to all of us, on behalf of the American Bar Association and its 413,000 members, who feel very strongly that we must support the attorney-client privilege and the work product doctrine.

It is a concern that we have about the language of the Justice Department's new McNulty Memorandum, and other similar Federal policies, that have seriously eroded these fundamental rights about which I want to speak with you today.

We are concerned about the separate provisions in McNulty Memorandum that erode employees' constitutional and other legal rights, including the right to effective legal counsel.

We are working in close cooperation with a broad coalition of legal and business groups. They range from the United States Chamber of Commerce to the National Association of Criminal Defense Lawyers to the Association of Corporate Counsel. And this is in an effort to reverse what we feel are very damaging and harmful policies.

The Government's policy was established in 2003 in the Thompson Memorandum, modified, as you said, in 2006 in the McNulty Memorandum. And it does erode the attorney-client privilege and the related work product doctrine by pressuring companies to waive these protections—in most recent cases, in order to receive cooperation credit during investigations.

The ABA is concerned that the Department's new policy will continue to cause a number of profoundly negative consequences, and I would like to list some of those.

First, it will continue to lead to the routine compelled waiver of the attorney-client privilege and the work product protections. Instead of eliminating the improper practice of forcing companies to waive in return for cooperation credit, the McNulty Memorandum still allows prosecutors to demand waiver after receiving high-level Department approval.

And, like the Thompson Memorandum, it gives these companies credit, if they voluntarily waive without being asked.

Whether it is direct or indirect, these waiver demands are unjustified, as prosecutors only need the relevant facts to enforce the law, not the opinions and the mental observations of corporate counsel.

Second, the McNulty Memorandum continues to seriously weaken the confidential attorney-client relationship in the corporate context, by discouraging companies from consulting with their lawyers and impeding the lawyers' ability to effectively counsel compliance with the law.

Third, it will continue to undermine companies' internal compliance programs by discouraging them from conducting internal investigations designed to quickly detect and to remedy any misconduct.

For these reasons, the new memorandum will continue to undermine, rather than enhance, compliance with the law.

Last May, prior to the issuance of the McNulty Memorandum, the ABA sent a letter to Attorney General Gonzales, and we asked him to reform the Department's policies.

Again, last September, such concerns were conveyed to the Department by former senior Justice Department officials. Both letters are attached to our written statement. And many congressional leaders have also raised the issue.

Certainly in the hearings you referred to, Congressman Forbes, last March, virtually all the Members of this Subcommittee expressed strong concern about the preservation of the attorney-client privilege. And as you know, Senators Specter and Leahy have similarly echoed these concerns.

It became clear that the McNulty Memorandum would not solve the problem the Government and we are calling—or I should say, we are calling—coerced waiver. And as you know, Senator Specter has introduced legislation in January, Senate Bill 186. The ABA and this coalition strongly support that measure.

It is equally important that we enforce and protect employee legal rights, including the right to effective counsel and the right against self-incrimination. McNulty continues to erode these by pressuring the employers to take unfair punitive actions against employees during their investigations.

While the new memorandum now generally bars prosecutors from requiring companies to not pay their employees' attorney fees, in many cases it does carve out a broad exception, which I would be happy to address in your questions. And by forcing companies to punish their employees long before their guilt has been established, the Department's policies continue to stand the presumption of innocence on its head.

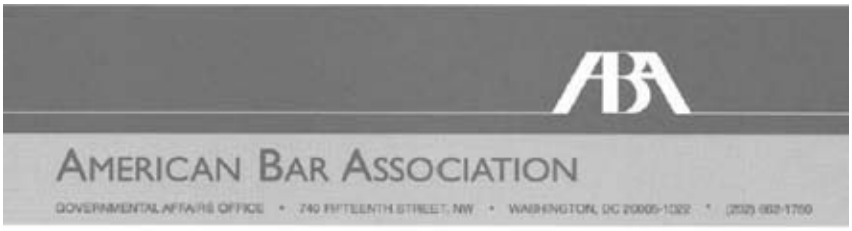
They overturn generally accepted corporate governance principles. And, as has previously been mentioned, they are constitutionally suspect under the KPMG case.

For all of these reasons, we urge this Subcommittee to investigate and to promulgate proposed legislation, similar to S. 186.

Thank you for your time.

[The prepared statement of Ms. Mathis follows:]

PREPARED STATEMENT OF KAREN J. MATHIS



STATEMENT OF

KAREN J. MATHIS

PRESIDENT OF THE AMERICAN BAR ASSOCIATION

before the

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

of the

COMMITTEE ON JUDICIARY

of the

UNITED STATES HOUSE OF REPRESENTATIVES

concerning

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

MARCH 8, 2007

Mr. Chairman, Ranking Member Forbes, and Members of the Subcommittee:

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 McNulty 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 2006 McNulty Memorandum and 2003 Thompson Memorandum—and other related federal governmental policies and practices—that have seriously eroded these fundamental rights.[1] We also are concerned about the separate provisions in the McNulty and Thompson Memoranda that erode employees' constitutional and other legal rights, including the right to effective legal counsel and the right against self-incrimination. Because of the serious and inherent problems with these and other federal agency policies, we urge members of the Subcommittee to introduce or support legislation that would reverse all such policies.

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

The attorney-client privilege—which belongs not to the lawyer but to the client—historically has enabled both individual and corporate clients to communicate with their lawyer in confidence. As such, it is the bedrock of the client's rights to effective counsel and confidentiality

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

in seeking legal advice. From a practical standpoint, the privilege also plays a key role in helping companies to act legally and properly by permitting corporate clients to seek out and obtain guidance in how to conform conduct to the law. In addition, the privilege facilitates self-investigation into past conduct to identify shortcomings and remedy problems as soon as possible, to the benefit of corporate institutions, the investing community and society-at-large. The work product doctrine underpins our adversarial justice system and allows attorneys to prepare for litigation without fear that their work product and mental impressions will be revealed to adversaries.

Justice Department and Other Federal Policies that Erode the Attorney-Client Privilege and the Work Product Doctrine

A number of federal governmental agencies—including the Department of Justice, the U.S. Sentencing Commission, and others—have adopted policies in recent years that weaken the attorney-client privilege and work product doctrine in the corporate context by encouraging federal prosecutors and other law enforcement officials to 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 was 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" instructed 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

[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.

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, 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.

See Thompson Memorandum at pg. 7. 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 originally 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

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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.

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]

On December 12, 2006, Deputy Attorney General Paul McNulty issued revisions to the Thompson Memorandum that modified, but did not reverse, the Department's privilege waiver policy. Instead of eliminating the improper practice of requiring or encouraging companies and other organizations to waive their attorney-client privilege and work product protections in return for cooperation credit, the new "McNulty Memorandum" merely requires high level Department approval before formal waiver requests can be made. The memorandum also continues to allow prosecutors to grant cooperation credit for "voluntary," unsolicited waivers. The McNulty Memorandum provides in pertinent part as follows:

> In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors must consider the following factors in reaching a decision as to the proper treatment of a corporate target: …4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents (see section VII, infra);…Waiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation. However, a company's disclosure of privileged information may permit the government to expedite its investigation. In addition, the disclosure of privileged information may he critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure. Prosecutors may only request waiver of attorney-client or work product protections when there is a legitimate need for the privileged information to fulfill their law enforcement obligations…Federal prosecutors are not required to ohtain

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

> 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 this issue, please see the ABA's March 28, 2006 written comments to the U.S. Sentencing Commission, available at http://www.abanet.org/poladv/letters/attyclient/060328letter_abaussc.pdf.

authorization if the corporation voluntarily offers privileged documents without a request by the government.[5]

In addition to the Justice Department and the Sentencing Commission, a number of other federal agencies have adopted similar privilege waiver policies as well, including the Securities and Exchange Commission (SEC)[6], the Commodity Futures Trading Commission (CFTC)[7], and the Department of Housing and Urban Development (HUD)[8].

Unintended Consequences of Prosecutor Demands for Privilege Waiver

The American Bar Association is concerned that the Department of Justice's new privilege waiver policy outlined in the McNulty Memorandum—like the previous Thompson Memorandum and similar policies adopted by other federal agencies—will continue to cause a number of profoundly negative, if unintended, consequences.

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[5] *See* Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (December 12, 2006), at pgs. 4, 8, and 11, available at http://www.abanet.org/poladv/priorities/privilegewaiver/2006dec12_privwaiv_dojmcnulty.pdf. The McNulty Memorandum also outlines four factors for determining whether prosecutors have a "legitimate need" to request privileged materials and requires prosecutors to obtain various types of high level Departmental approval before demanding either factual attorney-work product ("Category I") material or attorney-client communications or non-factual attorney work product ("Category II") material. *Id.* at pgs. 8-11.

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

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

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

First, the ABA believes that the new McNulty Memorandum and the other similar federal policies will continue to lead to the routine compelled waiver of attorney-client privilege and work product protections. During the four years it was in effect, the Thompson Memorandum and other similar federal policies led many prosecutors and other law enforcement officials 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. This growing "culture of waiver"—and the prominent role that the Department's policy has played in contributing to this trend—was confirmed by a recent survey of over 1,200 corporate counsel conducted by the Association of Corporate Counsel, National Association of Criminal Defense Lawyers, and the ABA.[9]

Instead of eliminating the improper practice of prosecutors demanding waiver, the McNulty Memorandum continues to allow such demands so long as prosecutors receive high level Departmental approval. These demands are unjustified, as prosecutors only need the relevant facts to enforce the law, not the opinions and mental observations of corporate counsel.

In addition, while the McNulty Memorandum imposes modest procedural limits on *formal* government requests for waiver, it continues to encourage companies to "voluntarily" waive their privileges without formally being asked in order to receive cooperation credit and less harsh treatment. Because companies will continue to feel extreme pressure to waive in virtually every case, the "culture of waiver" created by the Thompson Memorandum will continue under the

[9] According to the survey, 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 government officials give a reason for requesting privilege waiver, the policies adopted by the Justice Department, the Sentencing Commission, the SEC, and other agencies were among the reasons most frequently cited. The detailed survey results are available at http://www.acca.com/Surveys/attyclient2.pdf.

McNulty Memorandum. As a result, the applicability of the privilege will remain highly uncertain in the corporate context. This is unacceptable, because as the U.S. Supreme Court noted in the case of *Upjohn Co. v. United States,* 449 U.S. 383, 393 (1981), "an uncertain privilege…is little better than no privilege at all."

Second, the ABA believes that the McNulty Memorandum, like the previous Thompson Memorandum and the other similar federal policies, will continue to seriously weaken the confidential attorney-client relationship between companies and their lawyers, resulting in great harm both to companies and the investing public. Lawyers for companies and other organizations play a key role in helping these entities and their officials comply with the law and act in the entity's best interests. To fulfill this role, lawyers mnst enjoy the trust and confidence of tbe company's officers, directors, and employees, and must be provided with all relevant information necessary to properly represent the entity. By allowing prosecutors to continue to force companies to waive these fundamental protections in many cases—and more importantly, by continuing to provide cooperation credit to companies that "voluntarily" waive without formally being requested to do so—the new policy, like the Thompson Memorandum, will discourage company personnel from consulting with the company lawyers. This, in turn, will impede the lawyers' ability to effectively counsel compliance with the law, resulting in harm not only to companies, but to employees and investors as well.

Third, while the McNulty Memorandum and the other similar federal policies were intended to aid government prosecution of corporate criminals, they will continue to make detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures. These mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, are one of the most effective tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it

enacted the Sarbanes-Oxley Act in 2002. Because the effectiveness of these internal mechanisms depends in large part on the ability of the individuals with knowledge to speak candidly and confidentially with lawyers, policies such as the McNulty Memorandum that pressure companies to waive their attorney-client and work product protections seriously undermine systems that are crucial to compliance and have worked well.

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

The ABA's and the Coalition'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.[10] 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/.

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

The ABA and our Task Force also are 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 the Department of Justice's waiver policy and the similar policies adopted by other federal agencies to clarify that waiver of attorney-client privilege and work product protections should not be a factor in determining cooperation.[11] Towards that end, the ABA sent letters to the Justice Department, the Sentencing Commission, and other federal agencies urging them to modify their policies.[12]

In its May 2, 2006 letter to Attorney General Alberto Gonzales, which is attached to this written statement as Appendix A, 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

[11] 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.

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

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.

Former Senior Justice Department Officials Speak Out Against Privilege Waiver Policies

In addition to the ABA and the coalition, a prominent group of former senior Justice Department officials—including three former Attorneys General from both parties—submitted letters to the Sentencing Commission and the Justice Department on August 15, 2005 and September 5, 2006, respectively.[13] In their letter to Attorney General Gonzales, a copy of which is attached to this statement as Appendix B, the former officials voiced many of the same concerns previously raised by the ABA and the coalition and urged the Department to amend the Thompson Memorandum "...to state affirmatively that waiver of attorney-client privilege and work product protections should not be a factor in determining whether an organization has cooperated with the government in an investigation."

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

Congressional Reaction to the Department's Waiver Policy

In addition to the ABA, the coalition, and former Department of Justice officials, many Congressional leaders also have raised concerns over the privilege waiver provisions in the Department's Thompson Memorandum. On March 7, 2006, the House Judiciary Subcommittee on

[13] The former Justice Department officials' letters to the Sentencing Commission and to Attorney General Gonzales are available at http://www.abanet.org/poladv/documents/acpriv_formerdojofficialsletter8-15-05.pdf and http://www.abanet.org/poladv/priorities/privilegewaiver/2006sep05_privwaiv_fmrdojltr.pdf, respectively.

Crime, Terrorism, and Homeland Security held a hearing on the privilege waiver issue.[14] The Justice Department and several representatives of the coalition appeared and testified, while the ABA submitted a written statement for the record.[15] 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. Subsequently, during a Senate Judiciary Committee hearing on September 12, 2006, at which the ABA and various coalition representatives testified, both Chairman Arlen Specter (R-PA) and Ranking Member Patrick Leahy (D-VT) expressed serious concerns regarding the Department's waiver policy and urged Deputy Attorney General McNulty and the Department to adopt major changes to the policy.

Recent Justice Department and Other Agency Actions

After considering the concerns raised by the ABA, the coalition, former Justice Department officials, Congressional leaders, and others, the Sentencing Commission voted unanimously on April 5, 2006, to remove the privilege waiver language from the Sentencing Guidelines, and that change became effective on November 1, 2006. Similarly, the CFTC eliminated the privilege waiver language from its cooperation standards on March 1, 2007 and issued a new Enforcement Advisory that specifically recognizes the importance of preserving the privilege.[16] When it became apparent that the Justice Department would not agree to adopt similar changes to its own policy, however, legislation was introduced in the Senate last December that would bar the Department and

[14] 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/documents/attyp_transcript5/06.pdf.

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

[16] The CFTC's new cooperation standards of March 1, 2007 are available at http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html.

all other federal agencies from engaging in this conduct.[17] The ABA and the coalition promptly endorsed the legislation. When the McNulty Memorandum was finally issued on December 12, 2006 and it became clear that the new policy fell far short of what is needed to prevent further erosion of these fundamental legal rights, the Senate legislation was reintroduced on January 4, 2007 as S. 186.

Because the McNulty Memorandum fails to solve the problem of government coerced waiver, the ABA urges members of the Subcommittee to introduce or support legislation, like S. 186, that would: (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.

Justice Department and Other Federal Policies Erode 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. Unfortunately, in addition to its privilege waiver provisions, the McNulty and Thompson Memoranda also contain language directing prosecutors, in determining cooperation, to consider a company's willingness to take certain punitive actions against its own employees and agents during investigations. The Thompson Memorandum encouraged prosecutors to deny

[17] The "Attorney-Client Privilege Protection Act of 2006," was introduced by Sen. Arlen Specter (R-PA) on December 7, 2006 as S. 30.

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.[18]

Although the McNulty Memorandum bars prosecutors from requiring companies to not pay their employees' attorney fees in most cases, it continues to allow this practice in some situations.[19] In addition, the new memorandum continues to allow prosecutors to force companies to take the other three types of punitive action against employees outlined in the Thompson Memorandum in return for cooperation credit.[20] The ABA strongly opposes the Department's policy, even as modified by the McNulty Memorandum, for a number of reasons.[21]

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

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

See Thompson Memorandum, note 2 *supra*, at pgs. 7-8. The Thompson Memorandum 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.

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

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

[21] 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

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 McNulty and Thompson Memoranda, prosecutors take the position that certain employees and other agents suspected of wrongdoing are "culpable" long before their guilt has been proven or the company has had an opportunity to complete its own internal investigation. In those cases, the prosecutors often pressure the company to fire the employees in question or refuse to provide them with legal representation or otherwise assist them with their legal defense as a condition for receiving cooperation credit. 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 in certain cases to abandon the traditional practice of indemnifying their employees and agents or otherwise assisting them with their legal defense for employment-related conduct until it has been determined that the employee or agent somehow acted improperly.

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

Third, these provisions of the McNulty and Thompson Memoranda 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

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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/attorney client/.

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.[22] The McNulty and Thompson Memoranda seek 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.[23] The language in the Department's policies undermine these rights by encouraging prosecutors to penalize companies that provide information or, in some cases, legal counsel to their employees and agents during investigations.

The costs associated with defending a government investigation involving complex corporate and financial transactions can often run into the hundreds of thousands of dollars. Therefore when government prosecutors—citing the directives in footnote 3 of the McNulty Memorandum—succeed in pressuring a company not to pay for the employee's legal defense, the employee typically will be unable to afford effective legal representation. In addition, when prosecutors demand and receive a company's agreement to not assist employees with other aspects of their legal defense—such as participating in joint defense and information sharing agreements with the employees with whom the company has a common interest in defending against the

[22] *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.").

[23] *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.").

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 Justice Department's policy have been declared to be constitutionally suspect by the federal judge presiding over the pending case of *U.S. v. Stein,* also known as the "KPMG case." On June 26, 2006, U.S. District Court Judge Lewis A. Kaplan issued an extensive opinion suggesting that the provisions in the Thompson Memorandum making a company's advancement of attorneys' fees to employees a factor in assessing cooperation violated the employees' Fifth Amendment right to substantive due process and their Sixth Amendment right to counsel.[24] 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.[25] Because the McNulty Memorandum continues to permit these same practices in some instances, it remains constitutionally suspect as well.

For all of these reasons, the ABA urges the members of the Subcommittee to introduce or support legislation like S. 186 that would bar the Department and other federal agencies from demanding, requesting, or enconraging 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 legislation containing these reforms, and the other proposed reforms discussed earlier in our testimony, would strike the proper balance between effective law

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[24] *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/empriights_report_adopted.pdf.

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

enforcement and the preservation of essential attorney-client, work product, and employee legal protections.

We appreciate the opportunity to appear before the Subcommittee 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
President

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 -

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)

TESTIMONY OF RICHARD T. WHITE, SENIOR VICE PRESIDENT, SECRETARY, AND GENERAL COUNSEL, THE AUTO CLUB GROUP, DEARBORN, MI

Mr. WHITE. Good morning, Mr. Chairman, and thank you, Chairman Scott, Ranking Member Forbes, and Members of the Subcommittee and your staffs assembled. I want to thank you for the opportunity to appear before you this morning.

I am testifying both as general counsel and on behalf of the more than 20,000 in-house counsels from around the world who are my colleagues as members of the Association of Corporate Counsel.

The Association of Corporate Counsel members represent more than 9,000 corporate entities in the United States and in 55 countries abroad, including public and private companies, large and small, profit and non-profit.

I want to provide you the perspective of an in-house legal community on the current debate about Government policies that are eroding the attorney-client privilege, work product protections and individual rights in the corporate context. In particular, I want to make the following basic points.

First, these protections are crucial to effective corporate compliance and ethics programs. Second, the McNulty Memorandum does not substantively change the Department of Justice's abuse of practices that have eroded these protections. And third, in the face of the DOJ's repeated refusal to fix these problems, legislation is indeed warranted.

Mr. Chairman, from where I sit, these protections are essential to corporate compliance initiatives. As in-house counsel, we must gain the trust of employees and encourage them to routinely seek and follow our legal advice.

Certainly, when it comes to compliance, we all want lawyers actively engaged in counseling employees. If employees believe that corporate counsel are simply conduits for delivering confidential information to prosecutors, attorney-client communications will be chilled, and compliance will ultimately suffer.

For this reason alone, preservation of these fundamental protections and rights should be non-negotiable. Unfortunately, I believe that recent Government policies have given rise to a culture of waiver that has put the continuing vitality of these longstanding doctrines in serious jeopardy.

As noted in my written testimony, ACC finds fault with the McNulty Memorandum in the following respects.

One, the memorandum's focus on formal written waiver demands essentially misses the point. My corporate colleagues know from experience that many Federal enforcement officials rely almost exclusively, in practice, on informal demands to persuade—indeed, at times to coerce—corporations to waive the attorney-client and work product protections.

No formal demand is necessary, given this culture of waiver that the DOJ and other agencies have fostered in the past few years.

Two, the McNulty Memorandum's modest changes regarding reimbursement of attorneys' fees do not protect employees. As Karen has pointed out, the prosecutors are still permitted to trample on employee rights when it comes to effective assistance of counsel, when it comes to denying employees information for their defense,

and the refusal to allow joint defense arrangements with employees.

Three, the McNulty Memorandum's internal DOJ authorization procedures do not constitute meaningful and acceptable safeguards. On the rare occasion a prosecutor ever makes a written waiver demand, merely requiring authorization from another prosecutor in the same Department does not constitute a meaningful protection of the attorney-client and work product privileges.

Despite the desire and efforts of ACC members to have the Department of Justice itself fix the problem it created, the Department repeatedly has refused to address or even acknowledge that the problem exists.

Notably, even today, reports from in-house and outside counsel suggest that a prosecutor's conduct has not changed during the months since the issuance of the McNulty Memorandum. These reports at this juncture are anecdotal, but, indeed, from our standpoint, persuasive.

They suggest that there have been statements from a prosecutor that the request for a waiver predates the McNulty Memorandum and, therefore, is sort of grandfathered under Thompson. We do not believe that such artful dodges should be part of the system of justice that we all know and respect.

Above all, we strongly support a legislation that would prohibit Government officials from formally or informally requesting a waiver of these protections. There has been reference to Senate bill S. 186, which, as part of the coalition, we indeed support.

In the final analysis, whether the McNulty opinion and memorandum stands will depend on how you balance the real voluntary nature of the privilege in the first place. It is either voluntary or it is not, and should not be given up simply because the memorandum says that it is a precondition to cooperation.

Thank you very much.

[The prepared statement of Mr. White follows:]

PREPARED STATEMENT OF RICHARD T. WHITE

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STATEMENT OF

RICHARD T. WHITE

CHAIRMAN OF THE BOARD OF DIRECTORS OF THE ASSOCIATION OF CORPORATE COUNSEL (ACC)

before the

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELND SECURITY

of the

COMMITTEE ON JUDICIARY

of the

UNITED STATES HOUSE OR REPRESENTATIVES

concerning

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

MARCH 8, 2007

This document is available online at http://www.acc.com/public/policy/attyclient/richardwhitemcnultytestimony.pdf
More info on ACC's privilege protection work is online at: http://www.acc.com/php/cms/index.php?id=84

Testimony of Richard T. White, 2007 Chairman of the Board of the Association of Corporate Counsel
Hearing on the McNulty Memo: Subcommittee on Crime, Terrorism, and Homeland Security, House Judiciary Committee
March 8, 2007

Mr. Chairman, Ranking Member Forbes, and Members of the Subcommittee:

Thank you for the opportunity to testify before you today regarding "The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations." My name is Richard White, and I am the general counsel of the Auto Club Group in Dearborn, Michigan. More importantly for purposes of this hearing, I am the 2007 Chairman of the Board of the Association of Corporate Counsel, the bar association for lawyers who work as in-house counsel in all kinds of corporate entities.

Today I am here to bring you the perspectives and concerns of the more than 20,000 members of ACC, who collectively represent more than 9,000 companies, in the United States and abroad, including public and private companies, both large and small, as well as various not-for-profit organizations. Obviously, this testimony also reflects my own views, and the concerns I have as General Counsel of a non-profit membership organization, part of the AAA family; like most companies, we're focused on doing a great job for our members every day, and wish to be a good corporate citizen in the communities in which we work. The issue we are here to address is one that is of concern to corporate lawyers like me nationwide, who work in every size of company in every industry you can imagine. My point is that the ramifications of this issue affect the entire business community, not just the handful of largest corporations or those companies which are under investigation for some kind of failure or wrong-doing.

I. Overview of Testimony

The in-house legal community has strong and very clearly articulated positions on the current debate about government policies that erode the attorney client privilege, work product protections, and individual rights in the corporate context. As noted by ACC President Frederick J. Krebs, "the attorney-client privilege is fundamental to the fair operation of our system of justice." It is a doctrine older than the Constitution, and it supports rather than frustrates the best practices of companies engaged in promoting compliance and responsible behavior. This fight is not about protecting guilty company executives: those who fight to protect the privilege are not motivated by some perverse desire to protect them from the rightful consequences of their actions. Rather, our focus is on preventing the government from furthering the damage to innocent companies, employees, shareholders, and other stakeholders who've already been harmed enough by rogue executives who may be targeted by the government for prosecution.

In particular, I want to address two key points:

- The McNulty Memorandum does not substantively change DOJ's policies. Although DOJ suggests that changes it made to the Thompson Memorandum are a total fix to the problems of waiver we're here to address, the McNulty Memorandum offers only some surface, procedural changes and does nothing to address our larger concerns or abusive prosecutorial practices.

  DOJ's focus on standardizing formal, on-the-record waiver demands misses the point. My corporate colleagues know from experience that many federal enforcement officials rely almost exclusively on informal demands to coerce corporations to waive their

attorney client and work product protections. No formal demand is necessary given the culture of waiver that DOJ and other agencies have fostered in the past few years. Further, establishing a clearer policy on how privilege waivers should be sought by prosecutors requires one to buy into the basic premise that the DOJ, as opposed to the Courts, have a right to determine when a corporate client's privilege rights deserve protection and when they don't. The privilege belongs to the client, not the prosecutor who believes it might be convenient if it were waived.

Limited changes regarding reimbursement of attorneys' fees don't offer enough protection of employees' rights. Prosecutors are still permitted to trample on employees' rights by forcing corporations to terminate individual employees, to deny employees information shared with prosecutors and critical to their defense, and to refuse to enter into any joint defense arrangements with employees. Moreover, even the general rule in the McNulty Memorandum barring prosecutors from requiring companies to refuse to pay employees' legal fees can be circumvented by an exception that swallows the rule.

Internal DOJ authorization of waiver demands do not constitute meaningful safeguards. On the rare occasion a prosecutor ever makes a formal waiver demand, merely requiring authorization from another prosecutor in the same department does not constitute a meaningful protection of the attorney client and work product protections. Our surveys show that when prosecutors abuse their powers and coerce waiver of the privilege, it's happening in the field, and not at DOJ Main. Those prosecutors and offices that were unlikely to make privilege waiver a centerpiece in the determination of a company's cooperation, are still unlikely to demand waiver now; but those prosecutors who were inclined to require privilege waiver as a routine practice before, are still just as likely to require it now, post-McNulty. Yet DOJ Main continues to focus on self-policing in the field offices as a remedy.

- In the face of DOJ's repeated refusal to fix the problem, legislation is warranted. Despite the desire and efforts of ACC's members to grant the DOJ time and discretion to consider how it can fix these problems, the department repeatedly has refused to address (or even acknowledge) these problems until issuing the McNulty Memorandum (after the introduction of S. 186 to correct this problem through legislation). ACC issued its first letter requesting that DOJ reverse what was then known as the Holder Memorandum in 1999, when the policy was first introduced. We tried repeatedly to address privileges problems that got worse when the Holder Memorandum was replaced by the Thompson Memorandum: the Thompson Memorandum was designed to give greater teeth (not counter abusive practices) to policies employed by DOJ prosecutors in the charging process

  The McNulty Memorandum, which is DOJ's effort to finally address our concerns, completely misses the point. Indeed, while DOJ has announced that they're not getting many – if any – waiver requests rising up the ladder due to their new policy (and thus they claim that the problems of abusive waiver demands, if there ever were any, are "fixed"), reports from in-house and outside counsel in the months since the issuance of the McNulty Memorandum suggest that prosecutors who were likely to request or demand privilege waivers under Thompson, continue to make these demands under McNulty. Their conduct has not changed. Given DOJ's intransigence, and the fact that the McNulty Memo does not address our concern with their belief that they have any right to unilaterally require waivers

of the attorney-client privilege of their potential targets, ACC must conclude that legislation is necessary.

Our goal is to restore the important doctrines of attorney client privilege, work product protections, and individual rights in the corporate context to the place they existed before these federal policies and prosecutor practices created the current culture of waiver. Corporate crimes were successfully prosecuted before the Holder/Thompson/McNulty Memoranda, and the DOJ cannot explain what is stopping them from being successful in "getting the bad guys" with all of the tools that the legal system has always afforded them, *without privilege waiver involved.*

II. Background

A. Promoting corporate compliance

Any in-house lawyer will tell you that attorney-client privilege, attorney work product protections, and individual rights in the corporate context are essential to successfully counseling officers, directors, and employees on legal compliance issues that arise in the daily conduct of business and that require corporate employees to fully integrate lawyers into their daily work. 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 work with believe their jobs would be easier if they didn't have to take time out to consult a lawyer who might say no in the first place; if the confidentiality of corporate communications with the lawyer is attacked and the very communications an employee has with the company's counsel are likely to become the centerpiece of scrutiny by those looking for fodder to support allegations that a failure is the fault of some employee or another, a relationship that is important to encourage candid communications is further chilled, and the lawyer's pro-active role as a gatekeeper in the company is difficult to fulfill.

The DOJ repeatedly asserts that their waiver requests, when made, are requested as a part of their focus on "getting the bad guys." They suggest that companies asserting their privileges must be trying to protect guilty execs, since companies "volunteer" to waive their privileges to the government "all the time" because companies that have nothing to hide have nothing to lose. Such statements are facetious. While it is true that no one is more motivated than the company itself to get the investigation over and done, privilege waiver that is gained by brandishing the business end of the prosecutorial gun is not voluntary. Further, while companies wish to identify, ostracize, and punish rogue employees who do intentional great harm to the company and its reputation, it is equally true that privilege does not just protect "the bad guys" or the guilty. And it serves as a brake on the tendency to look for some employee to throw under the bus to take the fall and get the focus of the DOJ's wrath off the entity.

Privilege serves important public policy purposes: it encourages employees to speak candidly when problems arise, and report them through the company's formal or informal hotline or reporting processes. It also greases the important processes by which difficult and sometimes sensitive questions are asked as daily business is conducted: "How do I interpret this regulation?" " Can we try doing this if we can't do that?" "If this product is not outright outlawed, but may

push the edge of the envelope, should we produce it, or is the risk too high?" In today's complex, multi-jurisdicitonal, and fast-paced business environment, it's worth remembering that regulatory or other guidance does not always offer clear-cut answers.

We want lawyers present and actively counseling in all of these situations and more, but if employees think that their corporate lawyers are thinly disguised agents of the government, they will simply shut their company's lawyers out of the process entirely, and proceed without legal help.

Indeed, the Supreme Court openly recognizes that without predictable and enforceable confidentiality in lawyer-client communications, employees of a company will 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. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (protecting the confidentiality of attorney-client communications "promote[s] . . . the observance of law and administration of justice"). In *Upjohn*, the Court endorsed the concept of rewarding – not penalizing – employees for consulting a lawyer about a complex, sensitive, or troubling matter; to do so encourages well-informed and responsible corporate actions.

These conclusions are not just theoretical or off-the-cuff presumptions, as evidenced by the empirical results of the first of two surveys conducted by ACC of its members, one in 2005 and the other in 2006; our initial survey in 2005 found that:[1]

- *Clients rely on privilege*: In-house lawyers confirmed that their clients are aware of and rely on privilege when consulting them.
- *Absent privilege, clients will be less candid*: If the privilege does not offer protection, in-house lawyers document a "chill" in the flow or candor of information from clients.
- *Privilege facilitates delivery of legal services*: 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*: 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*: 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.

Given this reality, government policies that erode attorney-client privilege, attorney work product protections, and individual rights in the corporate context ultimately are self-defeating as law enforcement tools: 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; 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

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

protections we guarantee to any other person whose actions are under scrutiny as a result of a government investigation.

In sum, preservation of these fundamental protections and rights should be nonnegotiable because their erosion undermines corporate compliance programs by creating uncertainty that dissuades employees from participating. As the Supreme Court declared in the *Upjohn* case, "[a]n uncertain privilege . . . is little better than no privilege at all." *Upjohn*, 449 U.S. at 393.

B. Recent Government Policies Have Given Rise to a Culture of Waiver

Unfortunately, in the current environment my colleagues and I have seen just this type of erosion occurring. In their prosecutorial zeal, federal enforcement agencies have inappropriately claimed that it is within a government official's purview to decide when a corporate target's privilege should be waived. By unilaterally treating privilege as a bargaining chip to be played in the investigation and charging process (certainly well before any determination of guilt or even confirmation of wrongdoing), the government has created a "culture of waiver" that is dismissive of clients' rights to counsel and a balanced playing field for litigants in the adversarial process. In today's highly-charged legal compliance environment, some prosecutors routinely coerce corporations that wish to survive an investigation (let alone a prosecution) to abandon the fundamental protections previously guaranteed to every party participating in our justice system. The resulting "culture of waiver" has put the continuing vitality of attorney-client privilege, attorney work product protections, and individual rights in the corporate context in serious jeopardy.

We've heard DOJ repeatedly assert that they are only interested in getting to the facts. Well, if that were the case, there would be no need for a hearing today. What the DOJ calls facts are items that fall squarely within the protections of the privilege and work product doctrines, including lawyer notes from witness interviews, internal investigation reports, and documents that clearly disclose the company's legal assessments of issues and offer insight into their defense strategies as well as case weaknesses and strengths. The privilege does not protect facts, but corporate counsel ACC has talked to report that providing an internal investigation report that does not contain privilege documents, but whose contents contain all of the facts necessary for the prosecutor to "make" their case, are deemed insufficient. Indeed, if you look to the McNulty Memorandum and the executive summaries issued by DOJ to explain it, you'll see that the DOJ is unable to articulate when anything less than privileged materials by anyone else's definitions are required in order for disclosure to be deemed sufficient.

One must question, how did prosecutors do their work prior to 1999 and the issuance of these memos? According to a high-level group of former senior DOJ officials, the answer is "very well, thank you!" See the attached letter from these officials, which was prepared in anticipation of the September 2006 hearings in the Senate Judiciary Committee which lead to the introduction of what is now numbered as S. 186, the Attorney-Client Privilege Protection Act of 2007. These former prosecutors suggest that DOJ's current policies are not only unnecessary, but damaging to the integrity of our legal system and the DOJ's reputation as an agency that upholds the principles it seeks to enforce.

The mounting alarm and frustration in response to DOJ's coercion of clients' rights is clear to those of us connected to the in-house pipeline, but I thought it would be instructive to share with

the Subcommittee the heightened concern voiced by members of the in-house legal community in their own words:

- "Prosecutors act as if a claim of privilege were an implement of the crime itself or a legal concept without any historical or important basis in our jurisprudential system."
- "The government now expects a waiver as their inherent right."
- "It seems the government has taken the stand that because they are the government the rules do not apply to them and [they] can by force and intimidation take whatever they want."
- "[W]ithin a matter of a few years, these [government policies] have utterly eviscerated the attorney client privilege and undermined the most important aspect of the attorney client relationship."
- "We are forced to practice in a world where we cannot expect that any privilege will be respected by government investigators."
- "|T|he government's policy and position that companies should/must waive privilege and threatening criminal sanctions if they refuse to cooperate from the outset is frighteningly wrong, unconstitutional, over-reaching by the government, misguided, and is serving to undermine the efficacy of our system of jurisprudence and the assumption of innocent until proven guilty."
- "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. See Arthur Andersen for details . . . oh yeah . . . they cease to exist."
- "For all intents and purposes, there is no such thing as an attorney-client privilege or work product protection in a public company."

Coalition to Preserve the Attorney-Client Privilege, *The Decline of the Attorney-Client Privilege in the Corporate Context: Survey Results* at 14-22 (2006).[2]

The in-house legal community is not a monolith, but despite our diversity of backgrounds and points of view we have certain common experiences. One of them, unfortunately, is that we have seen the adverse effects of the "culture of waiver" that exists in the context of corporate prosecutions as a result of policies enacted within the past few years at DOJ and other federal agencies.

III. The McNulty Memorandum Does Not Substantively Change DOJ Policies

Clearly, DOJ has repackaged its policy in the McNulty Memorandum and made some superficial changes. Upon review, however, these changes have no substantive impact on the culture of waiver that has eroded attorney client privilege, work product protections, and individual rights in the corporate context.

A. Focus on formal, on-the-record waiver demands misses the point

[2] The summary of this survey, reflecting responses from over 1,200 in-house and outside corporate counsel, is available online at http://www.acca.com/Surveys/attyclient2.pdf.

The McNulty Memorandum addresses only *formal* waiver demands, but in the real world prosecutors' demands are more often informal and subtle. The in-house legal community knows from extensive experience that some prosecutors often couch a their demand for waiver as a "choice" that the company chooses to exercise or not (*as in.*, "it's your choice: you can waive or we'll indict"). Other prosecutors may toss a copy of the DOJ policy on the table with the privilege waiver section highlighted as a factor in determining corporate cooperation, and make a statement such as "you'd like to qualify for the benefits of cooperation in this investigation, correct?" While not formal "demands," the company and its lawyers get the message loud and clear.

As a technical matter, such informal prosecutorial "requests" or presentations of "choices" are not formal waiver demands – and therefore not covered by the McNulty Memorandum – but my colleagues and I know they are functional equivalents of a demand to the company facing possible indictment and a shutdown of the entity. By failing to address this pattern and practice of prosecutors requesting waiver only informally, the McNulty Memorandum does not – and cannot – have any substantive impact on reality faced by companies and their lawyers.

B. Limited changes regarding reimbursement of attorneys fees doesn't protect employees

The potential for DOJ's policies to abridge employees' individual rights was underscored by a decision in the Southern District of New York last summer regarding the cases of individual partners embroiled in the KPMG tax shelter cases. In *U.S. vs. Jeffrey Stein, et al.*,[3] Judge Kaplan held that prosecutors' 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 wished to be deemed cooperative and avoid indictment as an entity, it must sever all ties with the targeted partners.

As a direct result of Judge Kaplan's scathing opinion finding their practices unconstitutional, the McNulty Memorandum makes one small change regarding DOJ's coercion of individual rights in the corporate cooperation determination process, but this limited policy adjustment fails to protect employees to the extent that they have always been protected under established theories for decades. Specifically, the McNulty Memorandum includes a general rule barring prosecutors from requiring companies to stop reimbursing employees' attorneys fees if they wish to avoid indictment of the entity. Notably, however, there is an explicit exception allowing prosecutors to ignore this general guidance in special circumstances (which are determined by the DOJ).

Moreover, and more troubling, the McNulty Memorandum continues to permit other prosecutorial tactics that trample on employees' rights – they simply haven't addressed these issues at all. For example, prosecutors are still permitted to require companies who wish to be deemed cooperative to (i) terminate individual employees, (ii) deny employees information critical to their defense (which was often required to be offered to prosecutors), and (iii) refuse to enter into any joint defense or common interest agreement with employees. Any of these three tactics alone can result in the same level of coercion over individual employees as the denial of reimbursement for attorneys fees. As such, notwithstanding the McNulty Memorandum,

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[3] 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.

employees who are concerned about protecting their individual rights will perceive a DIS-incentive stepping forward and alerting in-house counsel to potentially illegal conduct occurring within the company, all of which further undermines corporate compliance programs.

C. Internal DOJ authorization procedures do not constitute meaningful safeguards

Finally, the McNulty Memorandum's reliance on new authorization procedures from fellow prosecutors for formal waiver demands does not constitute a substantive change to the current culture of waiver that DOJ has created. As a threshold matter, these new procedures would not even apply except when there is a formal waiver request which, as noted above, is rare. Further, like the proverbial fox guarding the hen house, it is unrealistic to expect prosecutors' colleagues to be able to effectively police requests made by other lawyers in the same office with their assurances that waiver is necessary to ensure a successful prosecution. This is not intended to suggest any ethical infirmities at DOJ, but rather a recognition of human nature – colleagues within the same organization are poor candidates to be objective decision-makers about the validity of their peers' shared working practices.

I would also note that DOJ previously assured ACC and its coalition partners (in offline meetings at the time of the issuance of the McCallum Memorandum) that most U.S. attorneys were required to get permission from a supervising prosecutor before they demand privilege waivers even *prior to* the issuance of the McNulty Memorandum. If so, this suggests that the post-McNulty procedures represent even less of a policy change than has been suggested. It also suggests, further, that prosecutors who were likely to ignore these requirements before, will likely continue to find ways around them now.

For all of these reasons, the McNulty's Memorandum's reliance on internal DOJ authorization procedures also will not have a substantive impact on the culture of waiver that has eroded attorney client privilege, work product protections, and individual rights in the corporate context.

IV. Legislation is Required Because DOJ Refuses to Fix the Problem

As a general matter, ACC members are hesitant to endorse legislation regarding issues such as attorney-client privilege, the work product doctrine, or individual rights in the corporate context. For that reason, ACC and our coalition partners have attempted to actively engage DOJ since 1999 in a discussion of how to address the culture of waiver it has created. DOJ, however, was not receptive to either our concerns or our proposed solutions. Moreover, during the same period DOJ was equally unresponsive to extensive congressional oversight on this issue. Because the adverse ramifications of this culture of waiver continue to grow and the new McNulty Memorandum further demonstrates that DOJ will not fix the problem itself, ACC concludes that a legislative solution is necessary.

A. Prosecutors' conduct does not appear to have not changed during the months since the issuance of the McNulty Memorandum

Unfortunately, the report from the front lines is that nothing has changed. In the months since the DOJ issued the McNulty Memorandum, ACC has heard from in-house and outside counsel that they have not noticed any substantive differences in the way prosecutors interact with corporations regarding these issues. Indeed, some reports suggest that some prosecutors have

become even more abusive in their requests, threatening that companies that ask them to take a formal waiver request up the ladder will be more harshly treated than if they simply comply. One report recounts a conversation that suggested that "we can do this the easy way, or the hard way …. If you force us to go the hard way, rest assured that our privilege waiver request will be approved, you won't win, but options that are open to you now will be gone and you can expect our offices to treat your client as "uncooperative" for purposes of charging decisions."

Other reports suggest that the only difference between Thompson behaviors and current standards is that is that prosecutors now toss a copy of the McNulty Memorandum – rather than Thompson Memorandum that it replaced – on the table at the start of the informal conversation about a company's "choice" to waive privilege.

Other prosecutors have noted quite candidly that the McNulty Memorandum does represent any "real change" in policy: they suggest that while the request for waiver is now formalized, privilege waiver remains a valid and quite significant criteria in determining a company's cooperation.

In short, the McNulty Memorandum has not changed the current culture of waiver or slowed the erosion of attorney client privilege, work product protections, and individual rights in the corporate context.

B. Legislation should restore these important doctrines that existed before government policies recently created this culture of waiver

Attorney-client privilege is the oldest of the evidentiary privileges and is a cornerstone of the attorney-client relationship.[4] The scope and application of this doctrine, as well as of attorney work product protections and individual rights in the corporate context, were well-settled prior to the recent government policies creating this culture of waiver. ACC members simply want to return to this status quo ex ante.

Specifically, ACC believes the following are the key elements of legislation to restore the vitality and purpose of these important doctrines:

- Government officials are barred from requesting waiver of these protections. Legislation should prevent both formal and informal waiver requests. This would include eliminating the practices of penalizing a company for refusing to waive and (the other side of the same coin) rewarding a company for waiving. With regard to individual rights, the legislation should prohibit government officials from making any request that a company refuse to pay an employee's legal fees, terminate an employee, refuse to share relevant information with an employee, or refuse to enter into a joint defense or common interest agreement with an employee.
- These limited protections do not shield facts. Legislation should reflect the limited nature of these protections. They never have prevented any prosecutor from

[4] The concept of confidentiality of counsel dates back to ancient Rome; the privilege as we know it originates from English common law in the 1500s. *See Berd v. Lovelace*, 21 Eng. Rep. 33 (Ch. 1577); *Dennis v. Codrington*, 21 Eng. Rep. 53 (Ch. 1580) (finding "[a] counselor not to be examined of any matter, wherein he hath been of counsel").

investigating or examining the facts, and privilege protections should not be used to shield otherwise discoverable facts from review.

- Well-established exceptions to these protections remain intact. Legislation should protect only *valid* assertions of attorney-client privilege and work product doctrine. It should not expand these protections or alter any applicable exceptions to the privilege (*e.g.*, crime-fraud, advice of counsel).

V. Conclusion

Over the past few years, my in-house colleagues and I have seen how policies and practices of the government undercut the lawyer-client relationship in the corporate context. Forced privilege waivers undermine responsible corporate compliance efforts and ethical leadership by making it more likely that executives and other employees in fast-paced businesses will simply forego consultation with lawyers with whom no predictable presumption of confidential communications exists. Such a result adversely impacts not only companies, but also employees, the investing public, and our markets.

As discussed above, the McNulty Memorandum does not substantively change DOJ's policies that have created this culture of waiver. Accordingly, the in-house legal community has reluctantly reached the conclusion that legislation is now necessary to stop the harmful erosion of attorney client privilege, work product protections, and individual rights in the corporate context.

ATTACHMENT 1:

Why Congress Should Act to Protect The Attorney Client Privilege

Offered by the Coalition to Preserve the Attorney-Client Privilege[5]

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
Retail Industry Leaders Association
U.S. Chamber of Commerce

- The Coalition to Preserve the Attorney-Client Privilege strongly supports S. 186, the "Attorney-Client Privilege Protection Act of 2007," introduced by Sen. Arlen Specter (R-PA) on January 4, 2007 and we anticipate that we will support similar legislation that a bipartisan group of members of the House Judiciary Committee is planning to introduce.

- The Department of Justice has steadfastly refused to reverse its policy of pressuring companies and other organizations to waive the attorney-client privilege and work product doctrine—and take certain punitive actions against their employees—during investigations in return for cooperation credit. This policy was – until recently – embodied in its "Holder" and "Thompson" memoranda.

- The Department of Justice's new policy, outlined in the December 12, 2006 "McNulty Memorandum," is not a comprehensive solution. It falls far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product, and employee protections for the following reasons:

    - Instead of eliminating the improper Justice Department practice of requiring companies to waive their privileges in return for cooperation credit—the approach advocated by S.186—the McNulty Memorandum merely requires high level department approval before formal waiver requests can be made.

    - The McNulty Memo only applies to formal privilege waiver demands. According to our surveys of corporate lawyers, the most common method by which prosecutors convey their waiver expectations is less than formal: it takes the form of questions such as: "You're going to cooperate with this investigation, right?" This kind of

[5] The American Bar Association is prohibited from joining coalitions, but works closely with this group in promoting privilege protections and also supports S.186 and the arguments advanced in this overview as to why it's still necessary.

request may not be reported as a waiver demand under the McNulty Memo's process, but since prosecutors can continue to encourage companies to "voluntarily" waive their attorney-client privilege and work product protections in return for cooperation credit and less harsh treatment, the new memorandum all but guarantees the continued erosion of these protections. Companies will continue to feel inexorable pressure to waive in order to receive cooperation credits that are crucial to the entity's survival of the investigation and charging process.

- The McNulty Memorandum, like the previous Thompson Memorandum, will continue to seriously weaken the attorney-client privilege between companies and their lawyers and undermine companies' internal compliance programs. Lawyers play a key role in helping companies and their officials to comply with the law and to act in the entity's best interests. To fulfill this role, lawyers must enjoy the trust and confidence of the company's officers, directors and employees, and must be provided with all relevant information necessary to properly represent the entity. By allowing prosecutors to continue to force companies to waive these fundamental protections, the new policy, like the old Thompson Memorandum, will discourage company personnel from consulting with the company's lawyers, thereby impeding the lawyers' ability to conduct thorough internal investigations and to effectively counsel compliance with the law. This harms not only companies, but the markets, employees, and the investing public as well.

- While the new policy bars prosecutors from requiring companies to forego paying their employees' attorney fees in most—but not all—cases in return for cooperation credit, it continues to allow prosecutors to force companies to take other punitive actions against their employees in return for such credit, long before any guilt is established. As such, the new policy fails to adequately protect employees' legal rights.

- Additionally, because other government agencies—including, for example, the Securities and Exchange Commission, Department of Housing and Urban Development, and Commodity Futures Trading Commission—have followed the Justice Department's lead by adopting similar privilege waiver policies, congressional action would be necessary even if the Department changed its policies and practices.

- In essence, the key provisions of S. 186 prohibit any agent or attorney of the United States from pressuring any company or other organization to:

  - Disclose confidential information protected by attorney-client privilege or work product doctrine,

  - Refuse to contribute to the legal defense of an employee,

  - Refuse to enter into a joint defense, information sharing, or common interest agreement with an employee,

  - Refuse to share relevant information with employees that they need to defend themselves, or
  - Terminate or discipline an employee for exercising his or her constitutional or other legal rights.

- S. 186 prevents both direct coercion (e.g., demanding or requesting one of these actions) and indirect coercion (e.g., measuring cooperation or otherwise conditioning treatment on such an action).

- S. 186 protects only *valid* assertions of attorney-client privilege and work product doctrine. It does not expand these protections—which are very limited under existing law and do not prevent any investigator from investigating or examining the facts—or alter any applicable exceptions to the privilege (e.g., crime-fraud, advice of counsel).

- The bill also preserves the ability of prosecutors and other law enforcement officials to seek information that they reasonably believe is not privileged or work product.

- Although the judicial branch generally should continue to govern lawyers' conduct, the current policies and practices of the Justice Department and other agencies have so undermined the confidential attorney-client relationship that corrective legislation is necessary. Clear precedent exists for Congress enacting legislation, like S. 186, that overrides inappropriate Justice Department directives to its prosecutors: the "McDade/Murtha" law, enacted in 1998, required federal prosecutors to abide by the same state laws and rules, and local federal court rules, as all other lawyers.

ATTACHMENT 2
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)

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

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

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

Dick Thornburgh
Attorney General
(1988-1991)

Jamie Gorelick
Deputy Attorney General
(1994-1997)

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

Theodore B. Olson
Solicitor General
(2001-2004)

Kenneth W. Starr
Solicitor General
(1989-1993)

Seth P. Waxman
Solicitor General
(1997-2001)

Mr. SCOTT. Thank you, Mr. White.

We will proceed under the 5-minute rule with questions, and I will begin. I recognize myself for 5 minutes.

Mr. Sabin, should a corporation be punished for exercising its constitutional right to attorney-client privilege?

Mr. SABIN. No.

Mr. SCOTT. If there is a difference in consideration for those that waive and those that do not, isn't there, therefore, a punishment for those that do not waive their right?

Mr. SABIN. No, it is a voluntary decision by the corporate entity whether or not to waive and disclose that information.

Mr. SCOTT. And will they be given positive, beneficial consideration for waiving their right to attorney-client privilege?

Mr. SABIN. Yes. A corporate entity that cooperates with the Government investigation and waives that privilege, as one subfactor of the nine factors set forth in the McNulty Memorandum, that would be positively considered as part of the overall analysis of corporate criminal charging policies.

Mr. SCOTT. And those that do not waive are not given that consideration, that little subfactor consideration?

Mr. SABIN. The distinction between category one and category two information, the——

Mr. SCOTT. But, I mean——

Mr. SABIN [continuing]. The declination of a corporate entity not to provide legal analysis or opinions or mental impressions, explicitly stated in the McNulty Memorandum, will not be considered against that corporate entity.

Mr. SCOTT. But, I mean, those that waive the privilege will be given beneficial consideration. Those that do not will not be given beneficial consideration. Therefore, there is a differential in consideration between those who waive and those who do not.

Mr. SABIN. The fact that——

Mr. SCOTT. So, those that do not are, in effect, punished.

Mr. SABIN. I disagree with that conclusion.

We consider positive cooperation as part of the analysis in the McNulty Memorandum as to whether, in the totality of the circumstances, how the Government should decide whether to charge or not charge a corporate entity.

Mr. SCOTT. Do you ever ask individuals to waive attorney-client privilege for the purpose of getting beneficial consideration?

Mr. SABIN. The McNulty Memorandum addresses the corporate context. It is separate relating to the individuals. I believe that practice has occurred, yes.

Mr. SCOTT. Did people get beneficial consideration for waiving their attorney-client privilege in a criminal case?

Mr. SABIN. I cannot speak to that, you know, grounded in any particular experience. But the fact that, say, a person in a drug case and we are investigating the extent and pervasiveness of that activity, or in a mafia prosecution and that is waived, I think that that would be a positive consideration for that individual, again, distinct from a corporate analysis.

Mr. SCOTT. If there is beneficial consideration, why would that not be considered coercion to waive your privilege?

Mr. SABIN. Because the privilege is the corporate entity's whether to waive or not. It is within their discretion whether to proceed in that fashion or not. It is not the Government either routinely asking for it or demanding it. That is not our guidance; that is not our practice.

Mr. SCOTT. Thank you.

Ms. Mathis, you indicated that you wanted some time to address the exception?

Ms. MATHIS. Thank you, Congressman.

If your staff and you would take a look at footnote three, which appears on page 11 of McNulty Memorandum, you will find that, when the totality of the circumstances show that a corporation's advancement of its employee's legal feess is intended to impede a criminal investigation, then the attorney—the U.S. attorney—may, on the U.S. attorney's own say-so, direct a corporation not to pay those attorneys' fees.

The effect of this footnote, sir, is that you have a back door to stopping a corporation from paying an employee's legal fees that is big enough to fly a C-140 through.

All you have to do as a U.S. attorney is say that, looking at the totality, there was intent to impede a criminal investigation, and then the employee's legal fees cannot be paid.

So, in this particular instance, one has to really question whether McNulty has advanced the cause of an individual's constitutional rights to legal counsel or not.

Mr. SCOTT. Thank you. I yield back.

Mr. Forbes?

Mr. FORBES. Thank you, Mr. Chairman.

Again, I want to thank each of you for taking your time and being here today. We wish we had the time to chat with you individually, because you bring so much expertise to the table, but we are limited to 5 minutes.

You know, one of the issues that we hear raised here this morning—there is a little bit larger issue that I have been concerned about. And that is kind of the abuse of prosecutorial discretion we have seen that—and it is not just on the Federal level, it is on the State level.

We have a lot of wonderful prosecutors, just like we have a lot of wonderful law enforcement officers, but we have to always look at those abuses in those situations where it is not justice we are looking at, it is just more prosecutions.

And the weight of the resources that can be brought against a corporation or an individual can just have enormous intimidation factors, and sometimes we do not always get to justice.

Mr. Weissmann, that is why I was really interested in one of your comments about the need for us to have more oversight in the charging decisions against corporations and individuals. I wonder if you could just elaborate on that just a moment for us.

Mr. WEISSMANN. Yes. First I should say, as an assistant United States attorney for 15 years and serving on the Enron task force for about 3.5 years, I got to see first hand an enormous array of talent at main justice and people who have experience in making the determination about how to treat corporations.

The problem of white-collar crime is, in many districts, relatively new in light of what happened at Enron, so that you have a number of U.S. attorneys offices now wading into a field that they frankly did not have a lot of experience in prior to Enron.

I think it is important to have a system where people at Main Justice are evaluating how those decisions are made, because corporations are largely national, if not international, in scope. And it should not be the case that a company has to worry about the vagaries of whether a prosecutor in one part of the country is going to be applying a very different standard than in another part of the country.

In many ways this applauds the Thompson memo and the Holder memo before it and the McNulty memo, because it is saying that there are valuable aspects to those policies, but I think, if you ask practitioners, they will tell you that they are not applied uniformly, by a long shot, around the country.

Mr. FORBES. Mr. Sullivan, I was interested in your testimony where it seemed to indicate that prosecutors were actually requesting a waiver before there was even a determination as to whether or not there was a crime that was committed.

Has that been your experience?

Mr. SULLIVAN. In all fairness, Mr. Forbes, prior to the promulgation of the McNulty memo, I had been in the first meet-and-greet meetings with representatives of the Government upon my first engagement, when I was asked if I would be sharing the results of my internal investigation.

And the questions went so far as to ask whether or not I was representing the corporation, or whether I was a third-party investigator, suggesting that from the very first, even if I were paid by the corporation, that I would be an individual who would not have a privilege relationship with that corporation. And the suggestion was it might be better if I was an independent contractor, as opposed to an advocate.

I took great pains in those discussions to explain to the Government that I could be forthright and candid with them, that I would proffer to them hard, factual information, that I would not try to spin the story, but I could do that as being an advocate for the corporation itself.

Mr. FORBES. And you could always deal with getting around the problem, if you wanted to, by offering the proffer in a situation like that, without having to provide a waiver.

Mr. SULLIVAN. I began most of these discussions by proffering as an attorney.

Post-McNulty, I have still been badgered by the Government demands that my corporation, my client, my company compel the provision of witness statements from employees under threat of termination.

Now, this is in direct opposition to the Garrity case, which compels that the Government cannot pursue such leverage or intimidation tactics with their own employees. Someone who refuses to speak or invoke is not going to be threatened with sanctions.

I have had such requests literally within the past month.

Mr. FORBES. My time is about up, but Ms. Mathis and Mr. White, in case we do not get another round, could you follow up,

maybe, with something in writing if you have experienced the kind of prosecutorial abuse in certain situations, and what your recommendations might be on how we can get a balance on that, and suggestions for that.

It is something we are very much concerned about, and I do not know if I will have time to get your answers in, but you can try.

Ms. MATHIS. Congressman, let me just, if I may, reflect on something that Mr. Sabin said earlier. And that is that, since McNulty, there have been no formal requests.

And what we think is happening, but there is no hard evidence, because it is not being kept by DOJ, is that what is happening now is it has gone underground, and there now are implicit requirements that they be waived.

And as the Chairman said earlier, if you are both at a standstill, but one person is given an advantage, whether it is in a golf game or around an oval track, then somebody has got an advantage. And the person who is left back here is left in the dust. And that is one of the main problems with McNulty.

We would be happy to supplement our testimony.

Mr. FORBES. Thank you.

Mr. WHITE. We will be happy to do so.

We are getting anecdotal calls and reports from some of our members, who are saying that the practice is vastly different from the language of the McNulty Memorandum. It is more informal than formal.

Mr. FORBES. Well, thank you. My time is out.

Thank you, Mr. Sabin. I hope I will get some more questions later for you.

Mr. SCOTT. Thank you.

Mr. Conyers?

Mr. CONYERS. Thank you, Mr. Chairman.

You know, this is a pretty one-sided hearing, in a way, for Mr. Sabin. You see, when bipartisanship comes together, things get pretty rough, don't they? Because, this is pretty——

Mr. SABIN. I appreciate the opportunity to be here and have that dialogue.

Mr. CONYERS. Yes. Well, I want to try to lighten the environment for you, because I kind of sense which way this train is moving here.

And before we start, I think we are in an almost corporate crime wave. There is nobody that wants to get on top of some of the criminal activity that has been going on the last, past number of years than I do.

But the advantages and the below-the-radar activity that the Department can engage in is pretty clear. You can write this in red letter law all you want.

But it is what—you know, when the U.S. attorney sits down with an attorney defending someone, they do not read back the Federal Code to each other. "You get the drift," as they say on the streets.

And so, what is happening right now is that we are overtaking a small, but important part of creating the level playing field. And that is what interests me so very, very much.

When you get the American Bar Association and dozens of organizations—progressive, conservative, corporate, civil rights—it

seems to me—and I listen to the tenor of the discussion among our colleagues—we do not always get this kind of bipartisanship in the Judiciary Committee.

So, I would just like to ask Mr. White and the president of the Bar, is there some way we can take this medicine, you know, calmly and understand? Why doesn't the attorney general see the light here? Or will this hearing help him?

Mr. SABIN. Can I address that, sir?

Mr. CONYERS. Sure.

Mr. SABIN. The attorney general actually spoke at the ABA white-collar crime gathering, conference, in San Diego last week and discussed the McNulty Memorandum with them.

I am a member of the ABA. I am going down to chat with their litigation section next month. We appreciate the opportunity to talk through these issues.

Mr. CONYERS. That is great.

Mr. SABIN. We are not——

Mr. CONYERS. Whereas, the president is right here three seats down from you. [Laughter.]

Mr. SABIN. Okay. Well, I would say that, to the extent that there are suggestions that practice is different from reality, we have not heard about that. So, if there are specific suggestions——

Mr. CONYERS. Let me recognize her with the couple minutes I have left.

Are there any ways that this different—everybody is supporting—I mean, you support the McNulty. But the fact of the matter is, it is not sufficient. Is that the correct interpretation?

Ms. MATHIS. Congressman, the American Bar Association believes, number one, in the basic jurisprudence concept of attorney-client privilege and all that in the common law it has done to backstop our judicial system and to provide very limited privileges.

But the privilege is not that broad. It does not cover facts. It does not cover a number of things.

And we think that within that privilege, and the way it has been structured and reviewed by our judicial officers—mainly judges—that it is sufficient for the purposes of Department of Justice.

It is so central to our system of Government that people be entitled to that, that to the extent McNulty and its predecessors violate those precepts, that they must be amended, and that, clearly, the way to do that at this point is through congressional legislation.

Mr. CONYERS. Absolutely.

Richard White, would you like the last word?

Mr. WHITE. I certainly would agree with the ABA on that point, and would suggest to you that the attorney-client privilege is a privilege that should not be for sale, either for positive incentives or punitive responses. It is that basic to our system of justice and fairness.

And it sort of hits me as somewhat peculiar that we would, under Sarbanes-Oxley and other appropriate legislative initiatives, require codes of conduct and ethical behavior in corporations and allow behavior that could be, under some circumstances, unethical and inappropriate to go on.

Legislation is not only warranted, it is absolutely necessary.

Mr. CONYERS. Thank you.

Mr. SCOTT. Thank you. Thank you. The gentleman's time has expired.

The gentleman from California, Mr. Lungren?

Mr. LUNGREN. Thank you very much, Mr. Chairman.

I mean, this issue came up about 2 years ago when Mr. Delahunt and I were concerned about it in the context of the Sentencing Commission's recommendations, where, even though I believe it was a footnote, nonetheless, it was very obvious that there were going to be consequences as far as judges were concerned, following the Sentencing Commission guidelines as to whether or not a corporation basically gave it up—I mean, gave up the attorney-client privilege.

And we joined together, along with others, to make our views known to the Sentencing Commission, and the Sentencing Commission basically decided that they would not do that anymore.

So, the second phase of it is the Justice Department. And I see we have one, two, three, four separate memoranda that have been in succession on this—Mr. Holder's, Mr. Thompson's, Mr. McNulty's, Mr. McCallum's.

And I guess I would ask one question to the four non-DOJ representatives here, and just, hopefully, a very short answer, because I only have 5 minutes, as well.

Is there any improvement that you see as a result of the memorandum? That is, is the McNulty iteration of these memoranda an improvement for the Department?

Mr. Weissmann?

Mr. WEISSMANN. The short answer is that, in theory, it is an improvement; and in practice I have seen no change at all.

Mr. LUNGREN. Mr. Sullivan?

Mr. SULLIVAN. Frankly, it is a little early to tell.

On the waiver side, there has not been any specific request. On the indemnification side there have been requests made to me to retain employees under threat of termination in order to compel their statements. That is a violation, unacceptable.

Mr. LUNGREN. Ms. Mathis?

Ms. MATHIS. It is not an improvement, Congressman. And one particular reason that it is not is, it has taken what might have been a formal request of a waiver—in other words, in the light of day—and it has put it back into an implicit request for waiver, where it is not as clear to see, nor will data be kept on it.

But as the other witnesses have indicated, it is still ongoing, it is still pervasive.

Mr. LUNGREN. Mr. Weissmann?

Mr. WEISSMANN. I would agree with Ms. Mathis, that it is not an improvement. It is an attempt, but that is about all that it is. And our feedback is from our folks out in the field, that the practice continues underground.

Mr. LUNGREN. Mr. Sabin, I mean, based on that I have got one person who believes it is an improvement in words, but not in theory, another who said it's being violated, one who said it is not an improvement and another one who said it is not an improvement.

The very fact that Mr. McNulty felt it necessary to issue a new memorandum, and then, with the memorandum that accompanied the memorandum from Mr. McNulty, in which he said, we have

heard from responsible corporate officials recently about the challenges they face in discharging their duties to the corporation, while responding in a meaningful way to a Government investigation.

Many of those associated with the corporate legal community have expressed concern that our practices may be discouraging full and candid communications between corporate employees and legal counsel.

To the extent this is happening, it was never the intention of the Department for our corporate charging principles to cause such a result. And then indicates that they are, therefore, promulgating this new memorandum.

What was the purpose of the memoranda? That is, the new memoranda? What do you say about those who say that, either it is insufficient, or that, while sufficient on its terms, it is being violated in its practice, or thirdly, that all it has done is driven these decisions underground?

And I guess the last way to ask that last part is, what are you doing to enforce this? If, in fact, you believe in this memorandum, what would you do to respond to the complaint that, in fact, the memorandum is being observed in its breach?

Mr. SABIN. We believe that the McNulty memorandum strikes the right balance with respect to our ability to thoughtfully and aggressively investigate corporate wrongdoing. We believe that it is an improvement.

And back to Congressman Conyers' point, in terms of the long view of history, I believe that the Department's attempts to transparently and thoughtfully articulate the manner in which it goes about its corporate criminal charging decisions will be viewed as sound and well-placed and well-grounded.

The prosecutors around the country—not only in Main Justice, but in the 93 U.S. attorneys offices—take their duties and responsibilities to enforce those laws and protect the American investing public extremely seriously.

We are not seeking to obtain waivers as a routine matter. We are not seeking to abrogate constitutional violations.

We are seeking to ensure that we have full and complete understanding of a factual nature, in order to make appropriate charging decisions as to the corporate and business entity.

With respect to our means of enforcing it, we have had training and guidance, and continue to have such distributed to prosecutors, investigators and regulators around the country. Indeed, today, out in Salt Lake City, the securities fraud working group that is discussing with those entities how to ensure that there is complete and full and accurate compliance with it.

Prosecutors understand those duties and responsibilities. And when guidance is provided by the Department's leadership, it is expected to be followed.

To the extent that folks here have suggested that it has gone underground, or that there is something going on below the radar screen, we welcome the referral of those specific matters to obtain concrete, specific data to address that kind of either implicit or "wink-wink, nod-nod" activity.

To the extent that what we have had in terms of specific data, is that prosecutors do care about what has been said—the career prosecutors around the country in economic crime sections and fraud sections, in the Criminal Division's Fraud Section, at Main Justice—the ability to enter into a real understanding of how to implement it and enforce it.

We ask for that time to make sure that it is done thoughtfully and appropriately.

We have had five matters where we have had specific requests for factual information, category one type, narrowly tailored requests for the waiver of information. And we have had that meaningful dialogue between the Criminal Division and the respective U.S. attorneys office.

Mr. LUNGREN. Thank you, Mr. Chairman.

I would just say that, I think you understand there is a bipartisan concern that, as we go after corporate corruption, we do not in any way create a prosecutorial culture of coerced waiver, because we happen to believe, on a bipartisan basis, that the attorney-client privilege is so important to the working of justice, the protection of American citizens, but also to promote actual legal compliance within a corporate structure.

And I think you are going to find, on a bipartisan basis, we are going to continue to look at this and to see how it falls out. So, I thank you.

Mr. SABIN. I appreciate those comments, Congressman. And we agree. I agree absolutely with what you just stated.

Mr. SCOTT. The gentleman from Massachusetts?

Mr. DELAHUNT. I thank the Chairman.

And I, again, concur with the observations by the gentleman from California. I am sure you are aware that Mr. Lungren and I actually penned an opinion piece.

But he has asked the questions—he has preempted me, because those really were the questions that I was going to pose.

Let me acknowledge to Mr. White and Ms. Mathis that, from my perspective, you know, the attorney-client privilege is such a core value of American jurisprudence, that even if it should lead to great frustration, it has to be respected. This is so vital to our system of justice.

But let me pursue with Mr. Sabin. I mean, as a prosecutor—and I know that Mr. Lungren was a former attorney general—we are very familiar with human nature.

And human nature being what it is, aggressive prosecutors, who are passionate about a particular case or an investigation, eventually, in my opinion, will slip into that gray area where all of the training and all of the guidance simply do not, will not accomplish the kind of enforcement that I am sure you would like to see in terms of compliance. So, that is my problem.

Now, if you want to talk about a sanction and maybe civil liability, personal liability, the ability to sue the Government, you know, that is a different kind of enforcement.

Guidance and training is wonderful. But when there is a clear sanction—and I am not talking an administrative sanction, necessarily, but a sanction that could be brought in a court of law by

a corporation—for those cases that seem to drift away from the explicit guidelines enumerated, now, that is a different situation.

I would suggest that, if you went back to Justice and did a survey of assistant U.S. attorneys and others that are involved in this decision-making process, there would be real reluctance to accept that sanction—again, a real sanction. Because, I think it was Mr. White that—well, maybe it was actually yourself—that talked about, you know, reality and practice, there is a divergence there.

And that is what I am particularly sensitive to, and I am sure members of this panel are, and as Mr. Lungren indicated, we will continue to monitor. But my own initial inclination is that—without revealing it in detail—is that Senators Specter and Leahy have an answer that I think respects the history of American jurisprudence.

Mr. Sabin, you are more than welcome to comment. The last time I think you were here, we were discussing cockfighting, if I remember. [Laughter.]

Mr. SABIN. Mr. Delahunt, you have a good recollection.

Mr. DELAHUNT. Right. You were rather well-informed on that—— [Laughter.]

Mr. SABIN. Well, I actually came up on a different topic. But since the other panel members were engaging in that, I think the Committee——

Mr. DELAHUNT. You are a renaissance man in terms of—— [Laughter.]

Mr. SABIN. I appreciate the kind words that you say there.

The Department appreciates that concern. I am aware of your op-ed with Congressman Lungren. I am aware of your prior prosecutorial background, as well as Congressman Lundgren.

We respect and understand the concern that has been articulated.

I would suggest that, let us look at the concrete, tangible data. Let us look at how it is implemented. Let's look——

Mr. DELAHUNT. I understand. But, you know what? I mean, again the reality is, this data will only come in anecdotal form. And you welcome—and I am sure of your bona fides—referrals.

But in the real world with defense counsel to make those references, there is a variety of motives that would dictate against that.

I guess what I am suggesting is that it is really impossible in terms of defining a methodology that would give us that accurate data. And my own sense is that we just have to go on our sense of what the reality is and trying to understand human nature.

Mr. SABIN. And I believe that prosecutors will follow Department directives, consistent with their ethical duties and responsibilities, to uphold the highest traditions and principle of the Justice Department.

Mr. DELAHUNT. And I am sure the vast majority will. I am not suggesting otherwise.

But we all know that there is always a percentage that will be so aggressive, that will extend—will go beyond the parameters and the boundaries that have been defined.

And in our system of justice, the one thing that we cannot compromise is the integrity of the system, because when we begin to

do that, we erode the confidence of the American people in our justice system.

Mr. SABIN. Don't disagree, sir.

Mr. SCOTT. Thank you. Thank you.

The gentleman from Texas, Mr. Gohmert?

Mr. GOHMERT. Thank you, Mr. Chairman. I appreciate the opportunity for having this hearing. And I appreciated the Chairman of the full Committee's comments about the bipartisanship here in this Committee. We are pleased the Democrats would join us on this issue. And, anyway—a little inside joke. [Laughter.]

Mr. SCOTT. Moving right along——

Mr. GOHMERT. But moving right along.

Mr. DELAHUNT. That was a very futile attempt at humor from somebody from Texas. [Laughter.]

Mr. GOHMERT. But one of the things that has concerned me the last week is noting that perhaps just an inquiry about anything that may have to do with cases pending may be deemed as an ethics violation, or perhaps an obstruction of justice.

So, I hope that the holding of this hearing does not rise to that level that we are all potentially obstructing.

But, anyway, I have been concerned about the sentencing guidelines. Some of us remember when those were put in place, and the Supreme Court held that, absolutely, of course they are constitutional.

And some of you, I am sure, remember an awful lot of Federal judges were very upset about that, but they got used to them. And then I did not hear a lot of complaints.

And then the Supreme Court, since it is so consistent and they are so magnanimous in their incredible view of the law, came back and said, well, I do not know what we were thinking before, but it does not look constitutional to us now.

But the problem is, you know, is the right of waivers were exacerbated in 2004. To have that even come up as a consideration, a waiver of the attorney-client privilege come up in a sentencing scenario—well, you talk about a chilling effect on the claiming of attorney-client privilege.

And so, I have been a little out of the justice loop over the last few years, running for Congress and being here, and I am not familiar with whether or not there has been any effect, been any consideration at all, in the sentencing aspects, especially in view of Booker throwing out the guidelines.

As you are probably aware, we have considered the last couple of years, some people have been proponents of inserting legislative guidelines. I have been one of those that were encouraging, when we were in the majority, let us hold up. I am hearing Federal judges say they are not sure they need them. Let us see how the data goes from the sentencing, and determine whether or not we really need to interpose like that.

I still am not sure about that.

I would like, maybe starting right to left.

Mr. White, any comments, anything of which you are aware, cases in which you are aware, that the non-waiver of attorney-client privilege may have been considered in any way in the sen-

tencing aspect, because I am sure you would agree, that would have a dramatic chilling effect if it were. Right?

Mr. WHITE. Well, it would.

But, Congressman, from a practical standpoint, the chilling effect occurs long before sentencing. From a practical standpoint, the chilling effect occurs when I have employees who are reluctant to come forward in a code of conduct, ethical program, because they are concerned that what they say to me will be silver-plated over to——

Mr. GOHMERT. Well, and I understand that. A lot of people have covered those issues. And I only have a few minutes, and I was wanting to get to the sentencing guidelines aspect.

Mr. WHITE. I think there are probably——

Mr. GOHMERT. But has it been——

Mr. WHITE. Sorry. I think there are probably others who, on the group here. I have not gotten directly involved in the sentencing aspect. And I think that Ms. Mathis and, perhaps, some of the outside counsel would have more to say about that.

Mr. GOHMERT. Thank you for your candor, Mr. White.

Mr. WHITE. I will just pass to them. Thank you.

Mr. GOHMERT. Thank you.

Ms. Mathis?

Ms. MATHIS. Congressman, I think it is instructive to note that, after the U.S. Sentencing Commission decided to voluntarily withdraw their guidelines about privilege waiver, that the Commodity Futures Trading Commission did the same thing.

So, I will tell you that my sense is that, by not coercing or asking for the voluntary waiver of the privilege, that it has not had a deleterious effect on the Sentencing Commission.

The other point that I would make is that this is a little bit like shadow boxing, if I may, because the Department has said that, since McNulty, there have only been five requests for category one waivers, and there have been no requests for category two waivers.

Now, if no one is asking for these waivers, then the question really does arise: What is wrong with legislation, which straightout says that no agent or attorney of the United States may pressure a company or another organization to disclose confidential information protected by the attorney-client privilege or work product doctrine, or to take some of these very draconian measures against its own employees?

It is a rhetorical question.

Mr. GOHMERT. Well, my time is up and I still have not gotten an answer on whether or not—because, even though it is not a part of the guidelines, the guidelines are affected, as we have heard before. It doesn't mean that it is not being utilized. And so, maybe, if we have another round, I can get somebody to answer my question.

Thanks.

Mr. SCOTT. Did you want to continue responding?

Mr. SULLIVAN. I am happy to continue. I second what Ms. Mathis——

Mr. GOHMERT. Thank you, Mr. Chairman.

Mr. SULLIVAN. I second what Ms. Mathis has said about the guidelines and the CFTC. I had a role in submitting information for purposes of the CFTC's report.

I will try to directly answer your question by saying, in my experience, the sentencing guidelines, by virtue of the revision, there has not been a significant, or any impact, frankly, on any clients that I have had.

If I may say one more thing. I am very aware of the buzzer. I have heard that before. I think we may be able to simplify this dialogue from the perspective of outside counsel.

I am not here to suggest—and I don't think any of my brethren are, either—that waiver is not sometimes good and useful. The 1989 Salomon Brothers case, where the law firm of Wachtell Lipton decided to waive, in the face of pervasive and horrific facts, began the process.

There are times to waive. If you have got a billion-dollar restatement and you represent the corporation, you might want to assist the Government for purposes of finding the individual, culpable wrongdoers.

My point is, it is the corporation's privilege. It should be the corporation's decision. There should be no attempt to coerce on the part of the Government, and there should be no penalty for not waiving. It should be neutral, except if you choose to voluntarily waive; then you should be provided a benefit.

Mr. WEISSMANN. I have nothing to add, because I agree with Mr. White. The issue for corporate criminal liability is one that arises at the charging phase, because for a company it is all about not being charged.

And given the enormous hammer that the Government has, if there is a factor, whether it is to penalize or to reward based on a waiver, whether it be category one or category two, they are going to waive, because it is not viewed as voluntary. They are going to do everything they can to get every possible benefit, because the indictment can kill the company.

Mr. SABIN. One aspect that has not been discussed is deferred prosecution agreements, that the idea that there is this kind of cooperation, voluntary disclosure, or even limited disclosure with respect to the privilege, allows the Government to make informed decisions and to address not necessarily in charging with an actual criminal charge, but to have a deferred prosecution agreement as a result of that voluntary cooperation.

So that addresses sort of the sentencing phase, which never actually gets to a sentencing phase, because you have a compliance agreement, you have a monitor. Depending upon the specific circumstances of a deferred prosecution agreement, that is one of the sort of spans between the charging nature and the sentencing phase.

And the Department is continually working through those relationships with experienced and sophisticated corporate defense counsel.

Mr. SCOTT. Thank you.

Mr. Forbes and I had about one additional question, and then part of my question.

Let me just make a statement that, Mr. Sabin, I think you indicated that there is, in fact, a difference in treatment between those who waive and those who don't, creating a differential.

And that did not come as a surprise to everybody, because everybody knew that to begin with.

And I have always been intrigued by the idea that you cannot charge extra for using a credit card. However, you can give a cash discount if you pay cash, creating a differential between those who pay cash and those who use credit cards.

But somehow you eliminate that problem by, if you call it a discount, it is okay. If you call it a punishment or a surcharge, then that is not okay.

The fact of the matter is, so long as there is a differential, you can call it what you want. The people who do not get—who do not waive are, in fact, put at a disadvantage, and some would call that punishment for not having waived.

And if everybody knows that that differential is there, you do not have to say it, that's pressure.

Now, my question is, to kind of put these kind of things in perspective, what difference does it make to a corporation to get the cooperation? How much less of a penalty may they get? What are we talking about in terms of qualifying for the benefit?

Mr. SABIN. Again, I reiterate, we are not—the Department of Justice is not pressuring corporations into waiving the privilege. We respect the privilege——

Mr. SCOTT. Everybody knows there is a differential between those who do and those who do not.

Mr. SABIN. We reward cooperation for category one information that has been provided, voluntary disclosure information that has provided.

In many instances, that is crucial information to ferret out the wrongdoing that is undertaken by individuals in the corporate entity.

Again, I go back to the larger picture. It is a nine-factor analysis, and cooperation is just one factor. And the waiver of the privilege and the shielding of culpable agents and employees are subparts of that totality of the circumstances analysis.

So, all those factors go into informed prosecutorial decision-making.

Mr. SCOTT. I guess my question was, what difference does it make to a corporation to get that cooperative designation, as opposed to not getting that designation? How much benefit is it to the corporation?

Mr. SABIN. And again, that is going to be fact-dependent upon——

Mr. SCOTT. Well, I mean——

Mr. SABIN [continuing]. Specific facts——

Mr. SCOTT. Are you talking about the fine will be cut in half, they will not get time in jail? I mean, what difference does it make for——

Mr. SABIN. I am not going to make a broad assertion as to the nature and extent of that.

Mr. SCOTT. Okay, well, then let me——

Mr. SABIN. It is going to depend upon the specific facts and circumstances involved. And then you go to the pervasiveness of the misconduct, the complicity of management in the misconduct, the history of the corporation relating to that. All those factors go into the prosecutorial decision-making.

Mr. SCOTT. Let me hear from some of the corporate counsel, because those are the ones that are considering whether or not it is worth waiving.

Mr. Sullivan?

Mr. SULLIVAN. Thank you, Chairman Scott.

The key issue for corporate counsel, for purposes of engaging with the Government in the light of potential misconduct, is to avoid a corporate indictment.

My testimony did not discuss, but written materials do, why I think—and this is probably a topic for another hearing—my corporation should only in exceedingly rare circumstances ever be indicted.

But nevertheless, the corporate company's indictment has dramatic, draconian ramifications. Its business suffers. Its stock price falls. Employees leave—well before conviction, well before there has been a determination of guilt beyond a reasonable doubt.

So, that is the dynamic that corporate counsel fight to preclude, almost at all costs.

And as I said before, if bad facts are pervasive, you need to engage to avoid an indictment. That is the Wachtell-Salomon case.

If there is gray area, as I said in my opening statement, my obligation is to understand that the preponderance of—I am sorry—that the guilt beyond reasonable doubt and the presumption of innocence still applies in these contexts. And I need to understand the facts and to establish a credible defense.

It is the gray area cases where, if I choose not to waive, I should not be penalized.

Mr. SCOTT. Mr. White?

Mr. WHITE. Mr. Chairman, if a company is asked to waive, even before the investigation is complete, the value or the differential that you were talking about of waiving or not, cannot even be assessed by the company.

So a knowing and/or intelligent waiver really does not take place at that level. You just waive or you do not get the benefit slash punishment.

Mr. SCOTT. Thank you.

Mr. Forbes?

Mr. FORBES. Thank you, Mr. Chairman.

Once again, I just want to thank all of you.

And, Mr. Sabin, thanks for holding up under fire here. We want to make sure you know that we appreciate the great job that you and your office do in so many areas. We are just trying to get that balance and make sure we are protecting these rights.

Mr. Sullivan gave a great summary of the whole waiver issue, I think, just a few moments ago.

Mr. SULLIVAN. Thank you, Mr. Forbes.

Mr. FORBES. And we really thank you for that.

And I think what Mr. White and you are both saying is that, really, in a corporate situation the indictment really is the sen-

tence. And so, by the time you get there, the game is pretty much up.

Mr. Sabin, we have talked about the concrete evidence that you would like to have, and I think everybody knows, they are not going to be able to get you that. And maybe that is something that your office could look at. Maybe you are doing it.

But even getting data like the number, or keeping track of the number of waivers that are taking place, and doing them by district, so that maybe that gives us some patterns we can look at. And maybe you are doing that. I don't——

Mr. SABIN. That is explicit in the memorandum——

Mr. FORBES. That was the——

Mr. SABIN [continuing]. To maintain written records and to have those records available——

Mr. FORBES. Maybe——

Mr. SABIN [continuing]. Both in the U.S. Attorney's Office——

Mr. FORBES. If we could get a look at those at some point in time, maybe that kind of could help us, sir, see——

Mr. SABIN. Well, I am not going to——

Mr. FORBES [continuing]. The numbers. I understand.

Mr. SABIN. But I am——

Mr. FORBES. I am just throwing it out, what helps.

Ms. Mathis, a final question for you. We are trying to get that pendulum swing right. We do not want to go as far as our friend, Mr. Delahunt, was raising in terms of civil penalties.

I know the ABA supports Senator Specter's legislation.

What is the mechanism for enforcement in that legislation, and what does the ABA recommend as an enforcement mechanism that strikes that proper balance?

Ms. MATHIS. Congressman, let me talk about it in general principles, because my understanding is that Senate bill S. 186 does not specifically have an enforcement mechanism.

Mr. FORBES. But are you okay with that? I mean, do you feel that just having it in the legislation will be enough without any enforcement mechanism?

Ms. MATHIS. The ABA's position is that, it is important for the Congress, both houses, to put their own stamp on legislation, and that what you feel comfortable with is what you should do.

But with regard to these types of prosecutorial misconduct, the common law has handled them often, by allowing the judicial officer—the judge in the case—to determine. And so, that is a general precept that the ABA is supportive of.

However, if your legislation provides specific sanctions, we would be happy to work with your staff to look at what would fit within the normal contextual balance, as you point out, between the prosecutorial duties, and also the attorney-client privilege.

Mr. FORBES. But you are pretty comfortable with leaving it up to the way the common law has handled it with discretion to the judge.

Ms. MATHIS. Yes, so the judge could deal with it, yes.

Mr. FORBES. Thank you all so much. Mr. Chairman, thank you.

Mr. SCOTT. Thank you.

Mr. Gohmert, do you have other questions?

Mr. GOHMERT. Yes.

Mr. SCOTT. Okay, thank you.

Mr. GOHMERT. Thanks.

I thought the gentleman's analogy about gas prices with use of credit card, use of cash, was a great illustration.

And I guess what I was trying to get to earlier, I understood all the other testimony. But if it were to come up at all in sentencing that this person either waived or didn't waive, then there's potential for effect there.

But just quickly, on the issue of sanctions, and Ms. Mathis, I think you made a great point that, it seems in so many areas of the law, if you just give the judge the power of enforcement, then it takes care of itself.

In Texas, several—and I had felonies and I had major civil litigation as a judge. But I liked the discovery rule that finally it came to, because there had been so much abuse.

But a discovery rule that gave the judge latitude to either prevent witnesses from testifying as a form of sanction, prevent certain evidence from coming in as a form of sanction, or in the worst case scenarios, forcing—just outright dismissal.

What do you think about some form of sanction in a rule like that? If I could get comments.

Ms. Mathis?

Ms. MATHIS. Congressman, it seems that those are exactly the kind of sanctions in terms of increasing bad effects, consequences, of the request for a waiver or the use of material that came from a waiver.

I also concur with the statements that Mr. Sullivan has made earlier. It may well be in a corporation's best interest, but it should be in their interest to waive.

But if a judge were to find that there was pressure for them to waive, then it would need to be done early. And I think that is something we have to remember, that it may not be at the point of going into a trial. It may be at the point of indictment.

And so, we would have to think about how would a judicial officer be involved prior to that indictment coming to the fore.

Mr. GOHMERT. Well, if it were prior to indictment, or at the time of potential indictment, I am not sure I can envision different degrees. You know, either you get to indict or you do not. And I understood the great point about sometimes an indictment is a death penalty to a corporation.

Do you agree that different degrees of sanctions would be good for the judge to have?

Ms. MATHIS. In general, I am all for the judicial officer being able to have the full spectrum of opportunities for sanctions.

Mr. GOHMERT. Yes. Not just a death penalty, throw the case out or leave it. Yes.

But at the time of potential indictment, do you see any other degrees that I am missing, other than either you don't get to return the indictment or you do? Are there any other measures that could be taken?

Ms. MATHIS. I am going to pass that one, if I may, to Mr. White.

Mr. GOHMERT. Mr. White?

Mr. WHITE. Thank you, Karen.

I am not sure I appreciate the pass, but I will give a pass at it. [Laughter.]

Again, I will hearken back to one thing that Karen did say, and that is that we believe—I believe—that there is enough not only intellect, but commitment—and apparently bipartisan commitment—to establish an appropriate enforcement principle, whether the principle is one of referring to the discretion of the court to do certain things on a pre-indictment basis, should it be found that there's been some form of coercion, and that a right as trusted and as vulnerable as the right to attorney-client confidentiality has been breached.

It would seem to me that that could become even a separate matter for inquiry in an appropriate prosecutorial way.

And I would suggest to you that there may even be ethical requirements for prosecutors who are aware that another prosecutor may have violated a constitutional right of someone to have the duty to step forward and do something about it. That is on a pre-indictment basis.

On a post-indictment basis, you know, the bell has already rung. And it would seem to me that a court could take notice of inappropriate behavior and act accordingly, either suppress certain evidence or impose certain sanctions, or some of the other things that you mentioned.

Mr. GOHMERT. Mr. Sabin, do you see different degrees of potential sanction, even at the early indictment stage?

Mr. SABIN. I would not concede that there is factual evidence that prosecutorial misconduct is occurring in this area, such that there should be a need for sanctions to be in play.

We have the Office of Professional Responsibility for egregious misconduct violations, if and when they should occur.

But to go back to the premise, I would strongly disagree that there is, as suggested here, some kind of concerted or widespread prosecutorial misconduct, requiring this Congress or——

Mr. GOHMERT. And I appreciate that, Mr. Sabin.

And I understand that. And I actually appreciate the DOJ taking this effort in order to try to minimize the potential for that kind of problem.

But it still did not answer my question of whether or not, given that is the position, I do not have anything factual to start at this point.

I am just saying, if there were a rule, would you like to have input? Are there different degrees of sanctions at the indictment stage?

Mr. SABIN. Sure, in the theoretical——

Mr. GOHMERT. Do you realize you may not be in the DOJ come, you know, January or February of 2009.

Mr. SABIN. I am a career prosecutor, sir. So, I look forward to a long——

Mr. GOHMERT. Well, you must have missed the hearing that was going on this week. [Laughter.]

But that potential is out there.

Mr. SABIN. The ability to link it to a judicial officer, when that, I do not see in the pre-indictment stage, other than in a grand jury context with a judge overseeing the grand jury having authority for

some kind of misconduct, would have a triggering mechanism for a judicial officer to be involved.

Absent that, how does a court get involved in something that is merely an ongoing investigation? I do not see how you can link those two, at that investigatory phase, link it up with a judicial officer.

Mr. SULLIVAN. Mr. Gohmert, if I may?

Mr. GOHMERT. Well, I have to yield back to the Chairman at this point. I am out of time. But if the Chairman allows.

Mr. SULLIVAN. Thank you, Mr. Chairman.

In answer to your question and Mr. Sabin's response, I think at the pre-indictment phase, if there were a sanctions provision and it can be showed that an aggressive prosecutor violated that sanctions provision, you could move to dismiss the indictment.

You could allege in that motion that improper considerations were undertaken and adverse inferences were drawn by the refusal of the corporation to waive, that the request to waive itself was improper.

You could submit that, even post-indictment, if such a motion would fail, that information obtained, or potentially to be obtained, through that request would be excluded for purposes of the prosecution's case in chief.

You could also suggest that the violating prosecutor be subjected to OPR—internal OPR investigatory review—as well as Bar sanctions, in accordance with the Bar jurisdictions where that person is admitted.

So, I think there are a variety of efforts to be undertaken for purposes of chilling a willfully aggressive prosecutor who seeks to violate Senator Specter's proposal.

Mr. GOHMERT. Thank you, Mr. Sullivan. Appreciate that answer.

Mr. SCOTT. I would like to thank the witnesses for their testimony.

Members will have an additional—if they have additional written questions, we will submit them to you, and ask you to, if we submit any additional questions, respond as quickly as possible.

Without objection, the hearing record will remain open for 1 week for the submission of additional materials.

And without objection, the Committee stands adjourned.

[Whereupon, at 11:10 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

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)

Statement of the Coalition to Preserve the Attorney-Client Privilege

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

before the
Subcommittee on Crime, Terrorism, and Homeland Security
of the House Judiciary Committee
regarding

"The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations."

March 8, 2007
2141 Rayburn House Office Building

The Coalition to Preserve the Attorney-Client Privilege commends Chairman Scott, Ranking Member Forbes and the members of the Subcommittee for convening today's hearing on the McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations. As we explain below, the McNulty Memorandum does not – indeed, cannot – solve the chronic "culture of waiver" that its predecessors, and similar governmental policies, have created. The only solution to this problem is federal legislation that simply and clearly prohibits U.S. government employees, directly or indirectly, from pressuring organizations to waive their attorney-client privilege or work product protections or to take actions that adversely affect the rights of their employees. Until such legislation is enacted, the ability of organizations to promote compliance and to investigate possible noncompliance, and the Constitutional rights of their employees, will all continue to be profoundly impaired.

Background of the Coalition

The Coalition to Preserve the Attorney-Client Privilege is a uniquely broad and nonpartisan group of membership organizations with one thing in common: we are all deeply troubled by the corrosive effect that federal investigative and prosecutorial policies and practices regarding "cooperation" have had on four fundamental elements of the American system of justice: the attorney-client privilege, the work product doctrine, and the Fifth and Sixth Amendments. We have actively advocated against these government policies and practices before Congress, the U.S. Sentencing Commission and the Department of Justice, and we were privileged to testify before this Subcommittee one year ago yesterday when it held it the first Congressional hearing on these issues.

Developments Since Last Year's Heariug Show the Merit of the Coalition's Position

Last year, the Subcommittee heard extensive testimony regarding the threats to the attorney-client privilege and the work product doctrine posed by the cooperation policies of DOJ, the Sentencing Commission, and other federal agencies such as the Securities & Exchange Commission. Former Attorney General Dick Thornburgh and the other witnesses focused on DOJ's "Thompson Memorandum" and emphasized that DOJ's newly-issued "McCallum Memorandum" did nothing to ameliorate the adverse effects of the Thompson Memo. Members of the Subcommittee were uniformly skeptical of then-Assistant Attorney General McCallum's defense of DOJ's policies and practices, urging him to convey the Subcommittee's deep reservations about them to the Attorney General.

In the year since that hearing, the shortcomings of federal cooperation policies have become increasingly evident, and DOJ's position has become increasingly isolated and tenuous:

- In April, the Sentencing Commission repealed its guidelines commentary that made waiver of privilege or work product protection an indication of cooperation.[1] This step was unprecedented for two reasons: the Commission was reversing a decision it had made only two years earlier, and it was doing so over strident DOJ opposition.

- In June, a federal district court judge ruled that the Thompson Memorandum unconstitutionally violates the Fifth Amendment substantive due process right to prepare a defense free of government interference, and the Sixth Amendment right to counsel of one's choice, because it rewards organizations that do not pay the legal fees of employees the government deems "culpable."[2]

- In August, the American Bar Association adopted new policy opposing governmental cooperation policies and practices that impair the rights of individuals by inducing organizations to cut off their employees' legal fees, to refuse to enter into joint defense agreements or otherwise share information with them, or to fire them if they exercise their Fifth Amendment rights in government interviews.[3]

- In September, ten former Attorneys General, Deputy Attorneys General and Solicitors General, from both Democratic and Republican administrations, took the unusual step of writing a joint letter to Attorney General Gonzales asking him to revise the Thompson Memorandum to state affirmatively that waiver of the attorney-client privilege and work product protections should not be a factor in assessing cooperation.[4]

- Also in September, the Senate Judiciary Committee held a hearing in which witnesses again leveled broad-based criticism at DOJ's cooperation policies and practices.[5] Then-Chairman Specter and then-Ranking Member Leahy jointly excoriated Deputy Attorney General Paul McNulty for those policies and practices and for his unwillingness to concede that they might be problematic.

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[1] The resulting recommendations were sent to Congress on May 1, 2006, *see* 71 Fed. Reg. 28063, 28073 (May 15, 2006), and took effect on November 1 of last year.
[2] *United States v. Stein*, 435 F. Supp. 2d 330, 362-65, 367-69 (S.D.N.Y. 2006).
[3] ABA Resolution No. 302, *available at* http://www.abanet.org/buslaw/attorneyclient/materials/hod/emprights_recommendation_adopted.pdf.
[4] Letter to Hon. Alberto Gonzales re *Proposed Revisions to Department of Justice Policy Regarding Waiver of the Attorney-Client Privilege and Work Product Doctrine* (Sept. 5, 2006), *available at* http://www.abanet.org/buslaw/attorneyclient/materials/065/065.pdf.
[5] Hearing on "The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations" (Sept. 12, 2006), *available at* http://judiciary.senate.gov/hearing.cfm?id=2054.

- In December, Senator Specter introduced legislation – which he has reintroduced in this Congress – to prohibit government lawyers or agents from directly or indirectly seeking waiver or actions in violation of employee rights.[6]

- In February, SEC Commissioner Paul Atkins declared that he had "serious concerns" about the SEC's "waiver-as-cooperation" policy embodied in the SEC's "Seaboard Report."[7][8]

- Just last week, the Commodity Futures Trading Commission issued a new enforcement advisory stating that the CFTC did not intend for its policies to adversely effect either the attorney-client privilege, the work product doctrine or the rights of employees.[9]

Against this mounting series of demonstrations that its policies are wrong-headed, DOJ has doggedly persisted in them. Four days after Senator Specter introduced his bill, Deputy Attorney General McNulty announced DOJ's new "McNulty Memorandum."[10] As discussed below, the McNulty Memorandum offers no material improvement over the Thompson Memo. Rather, it confirms that DOJ's governing strategy is to adopt cosmetic "reforms" calculated to undercut its critics, that it is either unwilling or unable to truly reform its own policies and practices, and that legislation is the only solution.

Shortcomings of the McNulty Memorandum

For all the prominent coverage it has received, the McNulty Memorandum makes only a handful of narrow changes to the Thompson Memorandum. Those changes are largely procedural, and do not meaningfully diminish the threat that the document poses to the attorney-client privilege, the work product doctrine, employee rights or – as a result – the ability of organizations to assure compliance or investigate possible noncompliance:

- The memorandum requires approval by the U.S. Attorney (or the Assistant Attorney General for the Criminal Division) of waiver requests for "Category I" information, which it characterizes as "purely factual."[11] Included within this

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[6] S. 186, the Attorney-Client Privilege Protection Act of 2007, introduced January 4, 2007. The bill was introduced on December 8 of last year as S. 30.

[7] *See* Sara Hansard, *Atkins Laments "Culture of the Waiver,"* INVESTMENT NEWS (Feb. 9, 2007), *available at* http://www.investmentnews.com/apps/pbcs.dll/article?AID=/20070209/REG/70209023.

[8] *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), *available at* http://www.sec.gov/litigation/investreport/34-44969.htm.

[9] *Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations* (March 1, 2007), *available at* http://www.cftc.gov/files/enf/enfcooperation-advisory.pdf.

[10] Memorandum to Heads of Department Components and U.S. Attorneys from Deputy Attorney General Paul J. McNulty entitled *Principles of Federal Prosecution of Business Organizations* (Dec. 12, 2006), *available at* http://www.cftc.gov/files/enf/enfcooperation-advisory.pdf.

[11] *Id.* at 9.

category, however, are "witness statements," which are among the core communications protected by the attorney-client privilege.[12] The Coalition fears that approvals of Category I requests could become just as routine as requests to provide statutory immunity to witnesses, which require (and regularly get) similar approvals. More important, so long as the *possibility* of waiver demands exists, DOJ's policy will continue hamper and chill corporate compliance programs and investigations. Notably, the memorandum states that a company's refusal to accede to a waiver request regarding Category I information can be considered a sign of noncooperation.[13]

- The memorandum requires the Deputy Attorney General to approve requests for "attorney-client communications" and attorney opinion work product.[14] Again, however, the Coalition believes such requests could be commonly approved, and the simple prospect that they can be made hobbles corporate compliance efforts. Worse, while the memorandum says that prosecutors cannot hold against a company its refusal to provide Category II information, the document adds that the Department may always consider, and reward companies for, "voluntary" waivers of the protections attaching to Category I or II information.[15] Only a bar on such favorable consideration can prevent this provision from creating a competitive dynamic in which companies will feel inexorable pressure to waive because others have done so before them.

The McNulty Memorandum generally abandons the unconstitutional practice of pressuring companies not to pay the legal fees of employees under investigation, but does so in the very narrow case of where a company has a legal obligation to pay such fees.[16] Thus the much more common case – where payment of fees is discretionary but customary – would remain vulnerable to DOJ coercion. And the memorandum makes no change whatsoever to prior language that has led prosecutors to force companies to avoid joint defense agreements with employees, to stop sharing information with them, and to fire them if they exercise their Fifth Amendment rights before the government.[17]

The "race to the bottom" waiver dynamic that the McNulty Memorandum preserves demonstrates that the only way to protect the attorney-client privilege, the work product doctrine or employee rights is by forbidding DOJ not only from overtly making requests, but from even considering whether a company chose to waive or to take adverse actions against employees. The test of cooperation must be whether a company actually provided assistance to prosecutors, through the provision of unprotected facts or in other

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[12] *Id.*
[13] *Id.*
[14] *Id.* at 10.
[15] *Id.*
[16] *Id.* at 11 (referring to "a corporation's compliance with governing state law and its contractual obligations").
[17] *Id.*

ways that do not require waivers, rather than whether it passed the 'loyalty test' of waiver.

The Necessary Elements of Federal Legislation

The Coalition strongly supports a federal statute that would prohibit any lawyer or agent of the federal government from:

- Demanding, requesting, etc., that an organization:
  - Waive its attorney-client privilege or work product protections,
  - Not pay the legal fees of an employee;
  - Not enter into a joint defense agreement with an employee;
  - Not otherwise share relevant information with an employee; or
  - Fire an employee who exercises his or her Fifth Amendment rights in interviews with the government; or
- Considering, when making charging decisions, whether an organization took or refused to take any of these actions.

These prohibitions should extend beyond the DOJ, since the SEC and other federal agencies like HUD and the IRS continue to make similar demands of organizations.

The Coalition has applauded Senator Specter for introducing his "Attorney-Client Privilege Protection Act of 2007" (S. 186), as it embodies these elements. There are no doubt other ways to implement these concepts legislatively. There are also issues that the Specter bill does not address, such as how these prohibitions could be enforced, that the Subcommittee may wish to consider. In any event, the key is for members of the Subcommittee to introduce legislation and to promote its passage in this Session of Congress.

Conclusion

Once again, we appreciate the Subcommittee's leadership in taking on this grave threat to fundamental tenets of the American system of justice and to the causes of corporate compliance and individual rights. Democrats or Republicans, you are all lawyers first and thus grasp the need for action. We stand ready to assist you in any way we can.

The Decline Of the Attorney-Client Privilege in the Corporate Context[1]

Survey Results

Presented to the United States Congress
and the United States Sentencing Commission
by the Following Organizations:

American Chemistry Council
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
Washington Legal Foundation

BACKGROUND

The coalition of organizations listed above[2] believes that the attorney-client privilege and work product doctrine as applied in the corporate context are vital protections that serve society's interests and protect clients' Constitutional rights to counsel. The attorney-client privilege is fundamental to fairness and balance in our justice system and essential to corporate compliance regimes. Without reliable privilege protections, executives and other employees will be discouraged from asking difficult questions or seeking guidance regarding the most sensitive situations. Without meaningful privilege protections, lawyers are more likely to be excluded from operating in a preventive (rather than reactive) manner. In today's complex business environment, it is increasingly important to encourage business execntives and even line managers to regularly – and without any hesitation – engage their lawyers in open discussions about anything that concerns them in furtherance of assuring the corporation's legal health. It is our belief that attorney-client communications, and the confidentiality that fosters those communications, are more important than ever, and laudably serve society's and our legal system's public policy goals.

Our coalition has been very active in protecting the attorney-client privilege in the corporate context from governmental policies and practices whose daily applications, we believe, erode the privilege. Our work has

[1] This survey is also available online at http://www.acca.com/Surveys/attyclient2.pdf
[2] The American Bar Association has also expressed similar views to Congress and the U.S. Sentencing Commission regarding the importance of preserving the attorney-client privilege and work product doctrine and protecting them from federal governmental policies and practices that now seriously threaten to erode these fundamental rights. The ABA has also worked in close cooperation with the coalition in the preparation and distribution of the surveys referenced in this document.

been advanced through educational programs, study groups and task forces, and various filings, communications, meetings, and testimony before authoritative bodies examining privilege erosions.[3]

In March of 2005, in response to increasing concerns expressed by in-house counsel and outside criminal defense counsel regarding their experiences with the policies and practices just noted, coalition members asked their respective constituencies to complete an online survey titled: *"Is the Attorney-Client Privilege Under Attack?"*[4] According to the survey, approximately one-third of the survey respondents had personally experienced some kind of privilege erosion. This powerful finding offered some of the first empirical evidence documenting the difficulty – indeed, the Hobson's Choice – that corporate clients confront when the government begins an investigation into an allegation of wrongdoing and presumes that confidentiality should be waived, or when company auditors demand access to confidential information in order to certify the company's books. The 2005 survey also found that: 1) clients may be increasingly unwilling to rely on the long-established protections of the confidentiality of their lawyer's counsel (affirming the logic of the US Supreme Court's insight that "an uncertain privilege is no privilege at all"[5]); 2) companies that refuse to waive their privileges suffer consequences (being labeled uncooperative or obstructionist, even if they fully cooperated with every other legitimate request of the investigator); and 3) contrary to the claims of many prosecutors and other regulators, privilege waiver demands are neither uncommon nor rarely exercised.

On November 15, 2005, the results of this survey were presented to the United States Sentencing Commission, which had begun to re-examine the commentary language regarding privilege that the Commission had inserted into Chapter 8 of the guidelines in the 2004 amendment process.[6] At that hearing, the Commission asked coalition members to help to gather additional information and data regarding the frequency with which governmental entities have been requesting that businesses waive their attorney-client and work product protections as a condition for cooperation credit, as well as the effects of these waiver requests. In response to that and similar requests for more detailed information about the erosion of the privilege, our coalition undertook a second, more detailed survey, and obtained an even greater response rate (more than 1,200) from our constituents. We are pleased to present the findings of this second survey, which was designed to capture more detailed information about government and auditor requests and implicit expectations for privilege and work product waivers.[7]

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[3] Representatives from all of the organizations listed here have participated in previous testimony before the US Sentencing Commission on this issue, some both prior and subsequent to the Commission's 2004 adoption of new commentary language on privilege in Chapter 8, which our organizations find offensive (see, most recently, http://www.ussc.gov/AGENDAS/agd11_05.htm). Please visit each organization's website or contact their staff for more information on educational programs, resources, and additional advocacy (including communication with Congressional leaders and their staffs, the Department of Justice, Securities & Exchange Commission, Public Company Accounting and Oversight Board, and others), which our organizations have engaged in to seek better protection of the attorney-client privilege.

[4] An Executive Summary of the March 2005 survey may be accessed via the following links: for the in-house version: http://www.acca.com/Surveys/attyclient.pdf, and for the outside counsel version: http://www.acca.com/Surveys/attyclient_nacdl.pdf. Based on feedback from those who read the previous survey results, this document provides in one place the combined 2006 results of both the in-house and outside counsel surveys.

[5] *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

[6] The USSC Commentary to Section 8C2.5 (adopted in November of 2004) states that "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." It is our position that the exception listed in the latter part of that sentence swallows the rule. Under this exception, prosecutors are free to make routine requests for waivers, and organizations will be forced routinely to grant them, because there is no obvious method by which the corporation can challenge the government's assertion that waiver is "necessary."

[7] In January 2006, the Association of Corporate Counsel directly contacted approximately 4,700 members, whose titles included the words either "general counsel" or "chief legal officer," requesting them to complete this web-based survey. The web link to the survey was also made available to the coalition partners offering this summary and the ABA Task Force on Attorney-Client Privilege, which in turn publicized it to the many groups participating in the Task Force's endeavors. The survey was "open" for approximately 2 weeks.

Survey Results

We prepared two surveys with virtually identical questions except for some minor wording changes that reflected that one survey was for in-house counsel and one was for outside counsel.[8] Section I summarizes key themes emerging from the survey. Section II shows information on respondent demographics. Section III summarizes results shared by companies who have experienced government expectations to waive attorney-client privilege or work product protections and/or expectations regarding other employee actions. Section IV summarizes themes that emerged from the open-ended questions on situational experiences regarding privilege waiver and additional commentary on privilege erosion. Quotes from survey respondents are also interspersed throughout the text as illustrations of the points made.

I. KEY THEMES *(additional discussion follows)*

- **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.)**
- **Waiver is a Condition of Cooperation:** Fifty-two percent of in-house respondents and 59% of outside respondents confirmed that they believe that there has been a marked increase in waiver requests as a condition of cooperation. Consistent with that finding, roughly half of all investigations or other inquiries experienced by survey respondents resulted in privilege waivers.
- **'Government Expectation'[9] 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.

Five hundred sixty-six of the 676 responses to the in-house version of the survey were received from the Association of Corporate Counsel emailing to 4,700 general counsel members; the remaining corporate counsel responses are from contacts initiated by the other groups. Also in January, the National Association of Criminal Defense Lawyers emailed the web link for the survey to its 13,000 members. NACDL also posted the web link for the survey on its listserv for white collar practitioners, which has approximately 1,200 subscribers. The survey was also made available to approximately 5,000 members of the Business Law and Criminal Justice sections of the American Bar Association. Five hundred thirty-eight outside counsel responded to this survey.

Both surveys included 23 questions primarily seeking specific responses to multiple choice or yes/no questions, with 4 open-ended questions at the end seeking text responses with additional detail on situational experiences. Since the open-ended questions were not mandatory and did not "apply" to those who said they'd had no occasion to run into a privilege erosion situation, the number of responses to those questions was not as robust.

This document offers the survey results in numbers and percentages that are approximated by rounding to the nearest whole integer. Summaries of broad themes and quotations drawn from the open-ended text responses are also included, but not all responses to those questions are included out a concern for confidentiality and to avoid unnecessary repetition. We believe the survey's response rate can be considered robust; but since we are not an independent surveying company or statisticians, we can make no proffer that the sampling is statistically significant or representative of the entire profession. We can note that statisticians have designated the Association of Corporate Counsel's membership as statistically representative of the entire in-house legal profession.

[8] The majority of differences between the two surveys were in the information requested in the respondent demographic information categories, and in general question phrasing such as "your company" for the in-house lawyers, and "your client(s)" for the outside lawyers. No "substantive" differences between the surveys' questions exists. If you would like a copy of the questions asked on these surveys, please contact Susan Hackett at hackett@acca.com.

[9] 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.

- **Prosecutors Typically Request Privilege Waiver – It Is Rarely "Inferred" by Counsel:** Of those who have been investigated, 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.[10] Only 8% percent of outside counsel and 3% of in-house counsel said that they "inferred it was expected."
- **DOJ Policies Rank First, and Sentencing Guidelines Second, Among the 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 placed the Guidelines third, behind "a quick and efficient resolution of the matter," and DOJ policies (Thompson/Holder/McCallum), respectively.
- **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 law suits). 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%.

II. RESPONDENT DEMOGRAPHICS

In-house: Almost 90% of the in-house counsel survey respondents were General Counsel. Approximately 40% indicated that the government (federal or state) had initiated some form of investigation into allegations of wrongdoing at their company during the past 5 years. Below is a summary of information on the in-house counsel respondent demographics.

- **Company Type:** Fifty-one percent of the respondents indicated their companies were privately-held/owned; 35% said their companies were publicly-traded but not in the Fortune 500; and 9% of respondents worked for non-profits. Quasi-governmental entities and Fortune-ranked companies each represented 1% of the survey respondents, and less than 1% of the respondents said they worked for FTSE 200 companies.
- **Industry Group:** Respondents were asked to identify the primary industry that best describes their client company's main line of business and were given 22 response options. The top three industries selected were: Finance and Insurance (18%), Manufacturing (13%), and Information Technology (11%).
- **Size of Law Department:** Almost 90% of respondents had law departments of less than 20 lawyers: 33% were solo practitioners, 46% had offices of 2-7 lawyers, and 10% had offices of 8-19 lawyers. Of the remaining respondents, approximately 4% had law departments of over 100 lawyers, and less than 1% had law departments of over 500 lawyers.

These demographics are significant in that they show that even among a general population of company counsel, almost half have experienced some kind of privilege erosion. The vast majority of these respondents who experienced privilege erosions do not work for mega-corporations with extremely high visibility and the potential for "blockbuster" failures; they work for a wide variety of differently-sized businesses, representing the full spectrum of industries. While the companies participating in the survey are

[10] Sixty percent of in-house counsel who'd had experience with a waiver request responded "N/A" (not applicable) to this question, suggesting they had not been present when privilege waivers were discussed.

obviously large enough to afford full-time in-house counsel staff, only 1% of those responding worked fot Fortune 1000 employer/clients, and three-quarters work in departments with fewer than 8 lawyers. We couclude that this sampling represents a breadth of experience from the "norm" of corporate America, and not just the perspective of the biggest companies, where the stakes and publicity attendant to the most prominent governance failures may attract disproportionate attention or be perceived as requiring "setting an example" responses.

Outside counsel: Seventy-one percent of those who answered the survey for outside counsel wete partners in law firms, and 40% practiced criminal litigation as their primary area of concentration (26% indicated civil litigation and 20% indicated transactional work as their primary practice areas). Sixty-three percent represented companies that had been subject to a criminal or enforcement investigation in the last five years. Further demographics show:

- **Client Type:** Results were distributed in the following categories: Privately-held or -owned with revenues of less than $200 million annually (22%); individual officers or employees of organizations (20%); publicly traded companies with more than $1 billion in annual revenue (12%); publicly traded companies with between $500 million and $1 billion in annual revenue (11%).
- **Size of Law Practice:** Thirty-five percent of respondents worked for firms of between 2 and 20 lawyers. The rest of the responses were fairly evenly distributed among the following categories: solo (19%); 21-100 lawyers (17%); 101-500 lawyers (15%); more than 500 lawyers (14%).

As with the results of the survey of in-house counsel, these answers indicate that among a general population of outside counsel with a wide array of experience, both in terms of the rypes of law that they practice and the types of clients that they represent, 51% indicate that they experienced a demand, suggestion, inquiry, or other expectation of waiver by the government. A commanding 73% agree that a culture of waiver has evolved with respect to the corporate attorney-client privilege. The sizable plurality of lawyers who answered this survey represented either smaller, privately held companies or individuals—thus belying the conclusion that waiver requests, demands, and expectations are a problem only for large, publicly-traded companies who are at the center of "headline" scandals.

III. SUMMARY OF WAIVER EXPECTATIONS AND EXPERIENCES

> *"Whether to waive the privilege has not been subject to discussion; the only question is how far the waiver will go. And, thus far, there appears to be no limit."* (Response to in-house counsel survey)

> *"I think the forced waiver and related policies have become a problem of Constitutional proportions. There are many examples of government pressuring companies to waive privileges, stop advancing legal fees, and make statements against employees, under pain of corporate destruction. ... When I was a prosecutor, we recognized that big white collar cases are hard and that they should be. Now, the attitude seems to have changed, and if the corporation does not partner with the government to prosecute individuals, the government views it as obstruction. This view is becoming part of the culture, having begun with the Thompson, Holder, and USSG pronouncements. It's simply wrong ...."* (Response to outside counsel survey.)

A. Experiences relating to waiver

Almost 60% of respondents identified government expectations of waiver of **attorney-client privilege/communications** as relevant to their personal experience with their clients. Of those respondents, almost 30% confirmed that they experienced a government expectation that the company should waive the attorney-client privilege if it wanted to engage in any form of bargaining or receive more favorable treatment from the government's officials.

Almost 23% of respondents said that a question regarding government expectations for waiver of **work product protections** was applicable to their situations. Of those respondents, around 45% said their clients had experienced a governmental expectation of waiver of work product protections if the company wanted to engage in bargaining or receive more favorable treatment.

Responses regarding these experiences, including which agencies indicated an expectation of waiver, how these expectations were expressed, the type of requested material, justifications for waiver requests, and whether companies waived are summarized below.

1. AGENCIES REQUESTING WAIVER

For both in-house and outside counsel, the U.S. Attorneys' Offices were identified as the government agency that most often indicated an expectation of waiver. The survey asked respondents to identify which agencies indicated an expectation of waiver and were given a choice of seven enumerated agencies/categories of agencies, as well as the opportunity to state that the question did not apply or to write-in a response. (About one-third of the in-house respondents and one-fourth of outside counsel respondents indicated that this question was not applicable.) The top agencies/categories identified as most often expecting waiver (in descending order) were:

In-house counsel	Outside counsel
▪ U.S. Attorneys' Office	▪ U.S. Attorneys' Office
▪ SEC	▪ Department of Justice – 'Main' (e.g., Antritrust or Criminal Fraud)
▪ Department of Justice-'Main' (e.g., Antitrust or Criminal Fraud)	▪ SEC
▪ Other Federal Agencies (e.g., DOL, EPA, HHS, FEC, etc.)	▪ Other Federal Agencies (e.g., DOL, EPA, HHS, FEC, etc.)
▪ State Attorneys General Offices	▪ State Attorneys General Offices

> *"It is clear to me that this has become the 'rage' among prosecutors. … In effect, prosecutors are overriding the [evidentiary precedent] that the attorney client privilege is to be maintained."* (Response to in-house counsel survey)

> *"[An AUSA told us] that he expected a full investigation and waiver of attorney-client privilege in order for my client to demonstrate that it was cooperating in an investigation into possible wrongdoing, including interviews of my client's outside counsel who provided advice contemporaneous to one of the events the AUSA wanted to investigate. He also expected that we would conduct interviews of foreign personnel not subject to U.S. jurisdiction and*

> *obtain documents that had only ever existed in foreign jurisdictions. He described a scorecard method he used … he defined cooperation as the company conducting a full internal investigation, including interviewing outside counsel, submitting a written report of the investigation to him, and giving full waiver of the attorney-client privilege – and no joint defense agreements with any other person or entity. He said that otherwise he would issue grand jury subpoenas and conduct the full investigation with DOJ resources and it would be much worse for us if he had to do that. This was after he informed us that our company was NOT the target!"* (Response to in-house counsel survey)

2. HOW WAIVER EXPECTATIONS WERE EXPRESSED

Respondents were asked how prosecutors or enforcement officials conducting the investigation(s) have indicated that privilege waiver was expected.

Only 11 % of outside counsel who said that their clients had recently been involved in enforcement actions where there was an expectation that their clients would waive privilege said that prosecutors never mentioned waiver as an expectation. Nearly three-quarters (73%) of outside counsel said that the expectation was communicated and not inferred. Of these, 26% said that "waiver was requested in a direct and specific statement, along with an indication that waiver was a condition precedent for the company if it wishes to be considered cooperative." Twenty-one percent indicated that waiver was "requested in an indirect statement that suggested (without explicit statements) that waiver was encouraged and in the company's interests." Only 13% said that waiver was requested directly but without any indication that positive or negative consequences would flow from the decision to waive.

Similarly, 66% of in-house respondents who indicated experience with this issue said that waiver expectations were communicated through direct and specific and/or indirect statements by prosecutors or enforcement officials. When waiver expectations were expressed, these in-house respondents said they were made using direct and specific statements more often than indirect statements. According to in-house counsel, direct statements with an indication that waiver was a condition precedent for the company to be considered cooperative occurred almost twice as often as direct statements indicating generally that positive or negative consequences would flow from the decision.

> *"The very nature of the self-reporting schema (at use in many federal and state regulatory contexts) is waiver of privileges."* (Response to in-house counsel survey)

> *"My company restated its earnings, after first notifying the SEC that we were about to do so. SEC's Corp Fin referred the matter to Enforcement. During our first meeting with Enforcement, we described the internal investigation we conducted that led to the decision to restate. Enforcement expressed the opinion that 'of course' we would waive privilege as to the investigation report, as a condition of being deemed 'cooperative.'"* (Response to in-house counsel survey)

"During an investigation by a state attorney general, we were told that we would be considered uncooperative and would not be able to settle with the agency unless we turned over lawyers' interview notes." (Response to outside counsel survey)

3. KINDS OF MATERIALS REQUESTED IN WAIVER DEMANDS

On a 2:1 basis,[11] in-house counsel who experienced privilege waiver indicated that prosecutors or enforcement officials do not draw distinctions regarding attorney-client privilege and work-product protections and the kinds of materials these privileges protect. Outside counsel concurred with this observation by a margin of 4:3.[12] However, when a distinction is drawn in the course of a government investigation, both in-house and outside counsel respondents indicated again on almost a 2:1 basis[13] that the distinctions were made at the initiative of defense or corporate counsel rather than by the prosecutor or enforcement official.

Respondents were asked about the types of privileged materials requested by the government in connection with **attorney-client privilege waiver requests** (as opposed to work product waiver requests). A choice of 11 types of possibly privileged materials was provided and respondents could check all that had been requested in their experiences. Respondents could also indicate that the question did not apply and/or include an additional text response.

About 46% of the responses of in-house counsel and 82% of the responses for outside counsel were for choices other than the "n/a" or the write-in category options. Around 90% of both in-house and outside counsel responses (other than the "n/a" group) identified specific types of material that enforcement officials had requested, with around 10% indicating that prosecutors or enforcement officials simply asked for complete waivers without articulating a specific material type.

Materials believed to be protected by attorney-client privilege and identified as most often requested by prosecutors or enforcement officials were (top 3, in descending order, for both categories of respondents):

- Written reports of an internal investigation (16% for outside counsel; 21% for in-house counsel)
- Files and work papers that supported an internal investigation (13% for outside connsel; 18% for in-house counsel)
- Lawyers' interview notes or memos or transcripts of interviews with employees who were targets (13% for outside counsel, a tie with "files and work papers"; 13% for in-house counsel)

For in-house respondents, numbers 4 and 5 were:

- Regular compliance performance reports and audits (11%)
- Notes/oral recollections of privileged conversations with or reports to senior executives, board members, or board committees (10%)

For outside counsel, numbers 4 and 5 were:

- Notes/oral recollections of privileged conversations with or reports to senior executives, board members, or board committees (10%)

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[11] 68% versus 31%.

[12] 56% versus 43%.

[13] 66% versus 33 % for outside counsel; 65% versus 34% for in-house counsel.

- Lawyers' interview notes with employees who were not available for interviews by the government or memos/transcripts of the same (8%)

As part of this same question, respondents could also choose three categories of material related to advice of counsel: advice contemporaneous with the conduct being investigated absent the assertion of an advice of counsel defense; same as foregoing but requested after an advice of counsel defense was asserted; and advice relating to the investigation itself (rather than the underlying conduct being investigated). The responses selecting these three types of material comprised around 15% of requests experienced by in-house counsel and 20% of requests experienced by outside counsel. According to outside counsel, enforcement officials only asked for communications with counsel ***pursuant to*** the assertion of a company's advice of counsel defense 6% of the time, placing it eighth among nine types of requested material.

Likewise, respondents were asked about the types of protected materials requested by the government in connection with **work product waiver requests.** Six types of material protected by work-product were listed and respondents could check all that applied. Respondents could also provide a text response. Of the six types, the three most often requested were:

In-house counsel:	Outside counsel:
▪ Results of written internal investigation reports (29%);	▪ Interview memos with witnesses (30%);
▪ Interview memos with witnesses (22%); and	▪ Results of written internal investigation reports (25%); and
▪ Results of reports prepared by non-lawyers or contractors hired to investigate a corporate matter (14%).	▪ Results of reports prepared by non-lawyers or contractors hired to investigate a corporate matter (16%).

> *"Usually the government does not justify its request. They want you to make their case for them."* (In-house counsel respondent.)

> *"In my experience, government enforcement officials simply have no respect for the attorney-client privilege and simply demand it be waived. In some cases, the demand seems to have been driven by sheer laziness and an expectation that we would do all the government's work for them ...."* (In-house counsel respondent.)

4. JUSTIFICATIONS PROFFERED FOR WAIVER REQUESTS

Sixty-two percent of in-house respondents and 48% of outside counsel who had been asked to waive indicated that government officials did not give a specific reason to justify their waiver requests. In a question asking for additional details on justifications when they were received, nine possible justifications were provided, as well as the opportunity to indicate that the respondent didn't remember or wished to submit a write-in response. The top "justification responses" follow (in descending order):

In-house counsel:	Outside counsel:
▪ The government said waiver was needed in order to facilitate a quick and efficient resolution of the matter/because it would ease their fact-finding process (19%)	▪ The government cited their internal policies sanctioning privilege waiver requests: The Holder, Thompson, or McCallum Memoranda (18%)

▪ The government cited their internal policies sanctioning privilege waiver requests: The Holder, Thompson, or McCallum Memoranda (13%)	▪ The government cited the negative impact of non-cooperation by corporations as articulated in the U.S. Sentencing Guidelines (17%)
▪ The government cited the negative impact of non-cooperation by corporations as articulated in the U.S. Sentencing Guidelines (10%)	▪ The government said waiver was needed in order to facilitate a quick and efficient resolution of the matter/because it would ease their fact-finding process (15%)[14]

"US Attorneys indicted my company despite complete cooperation and waivers of [attorney-client and work product] privileges, and despite the fact that only two lower-level employees were indicted." (In-house counsel respondent)

"The Holder/Thompson policy and the Guidelines themselves have created an unintended result. To claim certain material rightfully to be privileged is now a bad thing, only someone hiding something would hide behind it. Waiving is a good thing. The result has lead to such erosion of the concept behind a claim of privilege as to bring shame to whomever would make it." (Outside counsel respondent)

"[The Sentencing Guidelines] came up at the first meeting with the US Attorney or the second meeting." (Outside counsel respondent)

"[The Sentencing Guidelines] were mentioned in a not-so-subtle threatening manner." (Outside counsel respondent)

"Prosecutors casually refer to Thompson and the Sentencing Guidelines." (Outside counsel respondent)

"[The Sentencing Guidelines] were specifically discussed as a negotiating tool for a better or for any deal." (Outside counsel respondent)

"[The Sentencing Guidelines] were cited in pre-indictment settings re: possible penalties if no cooperation." (Outside counsel respondent)

"Waiver as an indictator of co-operation under the Guidelines was specifically mentioned." (Outside counsel respondent)

[14] For outside counsel, the next most frequently cited justifications were: (4) privilege did not apply because of a crime-fraud exeeption (11%); (5) no reasons were offered—the demand was simply made (10%); (6) information protected by privilege was necessary to the investigation (8%). **Susan: complete.**

5. WAIVER AND TIMING

Asked whether their clients ever waived the attorney-client privilege, approximately 52% of in-house counsel but only 23% of outside counsel said that they never had occasion to consider the issue (either because they had not been subject to an investigation in the last five years or because waiver was not an issue in any particular representation). When clients did have occasion to consider waiver and decided to waive,[15] the top two of six reasons (for both in-house and ontside counsel) that the client decided to do so were:

- Government officials' stated expectations that waiver would be required for the company to be treared as cooperative (37% for outside counsel, 30% for in-house counsel), and
- Government officials' unstated but perceived expectations that the company would not be treated as cooperative if waiver were withheld (27% for outside counsel, 28% for in-house counsel).

In addition, when clients waived, the most frequent point in the process for waiver was during the government's fact-finding process (36% for inside counsel and 27% for outside counsel): waivers were most likely provided at this point when the investigator raised concerns that the investigation could not be completed through gathering non-privileged information. For in-house counsel, the next most frequent point for waiver to occur was during the first meeting or communication with the government: around 26% of waivers at that stage were at the government's request or implicit suggestion, as opposed to 8% which were offered by the client without formal prompting or demand (on the presumption that privilege waivers were expected). For outside counsel, the second-most frequent point for waiver to occur was during the bargaining and charging decision (25.5%). Twenty percent of outside counsel said that the decision to waive was made during the first meeting or communication with the government at the government's suggestion, with and only 11% said waiver was offered without prompting or demand. According to all respondents, about 10% of the waiver decisions were made when the problem first surfaced – before any contact with enforcement officials. Approximately 8% of in-house respondents and 5% of outside counsel indicated that their clients do not assert the privilege.

> *"My experience … is that government agencies routinely 'blackmail' companies with threats of indictment, fines, etc., in order to get them to waive privilege and take other actions (discharge of employees, and so forth). This was true in my dealings at the federal level with agencies (FTC, for example) as well as with federal and state prosecutors."* (In-house counsel respondent)

> *"Federal prosecutors in particular have begun to treat waiver as almost synonymous with cooperation."* (Outside counsel respondent)

> *"The decision by a client to waive the privilege is always agonizing. In part, it has to do with the unexpected … the law on partial waiver is so unclear, does a decision to waive once ever stop? What will other agencies or third parties do if they get the material? How will an internal investigation ever be conducted in the future if employees feel the company has 'betrayed' them? It's the easy case when the company has identified a discrete problem. When the government seeks this material, however, the extent of the problem is usually not known."* (Outside counsel respondent)

B. Experiences relating to employees

[15] Eighteen percent of outside counsel and 6% of in-house counsel said that their clients did not waive the privilege but instead asserted their rights when faced with pressure to waive.

Respondents were asked whether the government had ever indicated certain expectations with regard to employees during the course of a governmental investigation. Around 60% of outside counsel indicated that this question applied to their own experiences. (Around 10% of in-house respondents to this question indicated that it applied.) Outside counsel who responded to this question said that they had experienced the following government expectations or demands with regard to employee actions:

- Not advance legal expenses (or agree to reimburse) to a targeted employee (26%);
- Not enter into, or breach, a joint defense agreement with a targeted employee (24%);
- Refuse to share requested documents with a targeted employee (21%)
- Discharge an employee who would not consent to be interviewed by the government (16%)

> *"The biggest issue is the pressure that the government puts on companies to terminate employees under investigation (long before any status determination is made) and then not to cover legal fees for loyal employees. A criminal investigation can bankrupt an individual quickly leaving them unemployed and destitute. The government does not want people to have adequate and competent counsel."* (Outside counsel respondent)

> *"[B]ecause of prosecutor demands for cooperation, corporate attorneys often decline to provide access to key documents critical to prepare a wholly legitimate defense based on actual facts. Government policies are interfering with the defense function, and will lead to increased charges against individuals who should not be charged."* (Outside counsel respondent)

> *"The culture of 'cooperate or be fired' has severely impacted the ability to represent executives in corporate investigations."* (Outside counsel respondent)

IV. SUMMARY OF WRITE-IN SITUATIONAL EXPERIENCES AND ADDITIONAL COMMENTARY

As noted above, some of the respondents completed open-ended text questions offered at the end of the survey, in which the survey requested them to provide examples of experiences they'd had with privilege erosion and to provide feedback on the general subject. Highlighted below are a few of the many illuminating responses to these questions.

In-house counsel:

.....

"In connection with a routine SEC investigation we were told that if we did not produce e-mail the matter would be referred to enforcement (i.e., the only wrongdoing would he failure to produce the e-mail – there was no other allegation of misconduct). When we produced our e-mail with a privilege log, we were told that the privilege log was insufficient because it did not describe the content of the e-mails not produced (which on advice of our outside securities counsel, a major law firm, we were advised could serve to waive the

privilege). After a conference call in which SEC attorneys advised us that they did not recognize the work product doctrine and that internal compliance investigations were not privileged,' we ended up simply producing most of the e-mails without asserting privilege because 'we had nothing to hide'."

……..

"The company for which I work has commissioned an investigation of alleged accounting improprieties. The investigator is sharing its work with several outside regulators including the SEC and DOJ. All expect, and have received, a great deal of privileged material through this process. Whether to waive the privilege has not been subject to discussion; the only question is how far the waiver will go. And, thus far, there appears to be no limit. From speaking with my in-house counterparts, I know that my experience is not unique."

……..

"Gov[ernment] lawyers and investigators have asked – demanded - that we produce attorney notes of interviews with employees as well as internal studies that constitute work product."

……..

"The government investigated our company starting about four years ago. At the request of the FBI agent, with her suggestion that it would help us to cooperate, we proffered several upper level employees for them to interview… About a year later, the government executed a warrant on our office. They seized an entire closet full of legal documents, most of which were not related to the investigation or appropriately seized under the warrant. They returned copies of all of the documents after numerous requests, but never returned the originals… . Over the next two years, requests were made to interview several employees and repeated requests for information were made. It was repeatedly outright said or implied that cooperarion would make things easier for us... Prior to joining this company, I worked for the government. I feel that the government has behaved inappropriately and illegally with respect to this ongoing investigation. They have abused their authority and terrorized our employees…."

……..

"…The real concern goes [to how the] judiciary … react to and support such activities. Our matter focused on an alleged credit fraud charge that spread from the accused's business to his family and any attorney he had ever engaged. It was as if the government forgot how to spell privilege. They improperly sought and obtained warrants and subpoenas for everything, including protected matters. Eventually the matters were quashed, but only after significant effort."

……..

"We produced the documents because the privilege claim was not beyond doubt and because we wanted to be viewed as cooperative."

……..

"Our general practice is not to waive[] AC or work product protection. However, in circumstances in which a prior opinion of counsel was obtained and an 'advice of counsel' defense exists we will consider waiver of that opinion dnring the charging decision process."

……..

"We are forced to practice in a world where we cannot expect that any privilege will be respected hy government investigators. In addition to a chilling effect on communications with between the client and the lawyer, waiver of privilege subjects companies to disclosure of these materials in litigation, potentially causing grievous harm to the company."

……..

"The assault on privilege seems to me deeply misguided from a long- or medium-term policy standpoint. Counsel serve a critical role in encouraging compliance and transparency. These current policies run a significant risk of chilling attorney client communications in the future which will heighten, rather than

reduce, compliance risks. Simply, this is a terrible idea which is solving a problem which doesn't exist - ... agencies can proceed with their investigations on the basis of evidence obtained through [other means]."

.....

"The fear of privilege waiver has curtailed my ability to frankly and strongly direct my colleagues in areas of risk. I can no longer send memos that say: "under no circumstances may you do this," or the like, for fear of reprisal [in the future]. My inability to speak forthrightly forces my advice to be sugar-coated in ways that I believe lessen my power and effectiveness to force others to do the right thing... . When things appear as if they will be highly sensitive, I carefully retain outside counsel, often in matters I could handle better internally, thereby wasting significant not-for-profit dollars because of the government's inappropriate intrusion in this formerly sacrosanct land."

.....

"Outside counsel urge their retention in part because they contend in-house counsel cannot assert the privilege as effectively as outside counsel."

.....

"The privilege was established so persons could seek competent legal advice and thereby understand their rights and obligations under the law. To treat corporations differently creates the specter that companies won't seek appropriate legal advice, as they have no ability to feel confident in the confidentiality of their communications."

.....

"Our corporate strategy is to have in-house counsel active and involved in business deals early and often. We have found that this significantly minimizes the risk that employees engage in questionable behavior. This 'prevention' strategy demands on open dialogue with employees. DOJ demands for waiver have a chilling effect on our employees seeking out in-house counsel to discuss potentially tricky legal situations. We depend on open lines of communication with employees and these are being strained by DOJ's policy and their push to alter the Sentencing Guidelines. We should have policies in place that encourage dialogue with employees. DOJ's waiver pnsh is short sighted and counter productive."

.....

"It is my opinion that the concept of the government asking any person (either individual or corporate) to waive attorney-client privilege in order to facilitate their investigation is a travesty of justice. The attorney-client privilege is there as a means to have open discussions between the client and their attorney regarding all possibilities. To allow for this type of request will merely result in many corporations no longer including in-house counsel in important decision making processes which may in fact lead to even more wrongdoing."

.....

"In my experience, it is remarkably difficult for corporations and their employees to get legal advice in today's environment. There is a clear expectation -- sometimes unspoken, often spoken -- that any communication, privileged or not, will be shared with the government. There is no balancing of the advantages of waiver against the risks, including the company's ability to defend itself in ongoing civil litigation. This puts company counsel in a completely untenable position, nnable to give or seek advice freely. The important purposes behind the privilege are simply being ignored."

.....

"I think the government's policy and position that companies should/must waive privilege and threatening criminal sanctions if they refuse to cooperate from the outset is frighteningly wrong, unconstitutional, over-reacbing by the government, misguided, and is serving to undermine the efficacy of our system of jurisprudence and the assumption of innocent until proven guilty."

.....

"Reviewing the reports of waivers and requested waivers in the general press and in the legal periodicals has had a chilling effect on my function as general counsel. I warn our senior managers regularly that they should not count on having any privilege regarding their communications with me. We try hard to follow the law at this organization, so criminal prosecution is not a concern. What is a concern is that the continued erosion of privilege in prosecution by state and federal agencies will spill over into the civil arena. We are in a business sector in which litigation is common and the stakes are often very large. The self-censoring I feel compelled to do at this point hinders the company's ability to protect against or plan for anticipated claims."

.....

"While I have not experienced any problems, privilege erosion is a real fear that affects how we do business. A free and open dialogue between counsel (in house and outside) and management is critical to any business, aud if the privilege becomes even more endangered, it will have a crippling effect on how we conduct our business."

.....

"As a result of our experiences, we now routinely advise our clients that there is not such thing as information protected by the attorney client privilege. Although I have no belief that the prosecutors requiring the waivers understand what they have done, within a matter of a few years, these attorneys have utterly eviscerated the attorney client privilege and undermined the most important aspect of the attorney client relationship. As a result, instead of advancing the interests of the public, government attorneys have now created a situation where clients are going to be less, not more, forthcoming; a result that will only lead to more corporate misdeeds."

.....

"At this stage, much of the damage is done--one has to conduct affairs, take (or not) notes, write communications and obtain information on the assumption that there will be no protection. In that environment, lawyers are already much less effective in discovering information and counseling compliant conduct."

.....

"That waiver may be just 'a factor' in the determination of cooperation as mitigation under the Guidelines is very little - in fact, no - comfort at all."

.....

"The government is out of control. The Bar and the Judiciary should stand up and recognize this is wrong. Individual companies cannot affotd to do it on their own; the stakes are too high."

.....

"We are involved in several investigations/subpoenas/lawsuits in which AGs, DOLs, or other regulators have retained plaintiffs firms and are using their state powers to demand production to those firms of documents we would not produce in discovery. Some of those law firms are paid on contingency basis. They typically ask for investigation reports."

.....

"From discussions with other general counsel, top law firm partners, and reading case law, it appears that failure to "cooperate" with federal investigators will incur theit wrath, whether it's obstruction of justice charges, increased fines/penalties, new charges, character assassinations, pressure on a company to terminate an employee, ptessure to have a state bar "review" an attorney's conduct, etc. (translation of "cooperate" meaning, waive the privilege and work-product protection and give them everything they ask for; asserting one's rights is seen as trying to defy the federal government). This is frightening (the federal gov[ernment] becoming more like a police state), and just the threat of such action from the feds changes the way attorneys and their clients work together, and changes the defense strategies when handling such issues – all for the worse with regard to the Constitutional and legal rights of individuals and companies. The law becomes a

weapon wielded by the feds against the "people," and the protections that people and corporations are entitled to become a meaningless facade."

.....

"It is clear to me that this has become the "rage" among prosecutors. Frankly, if this is to be the expectation of all prosecutors in corporate criminal investigations, then it will essentially eliminate the privilege as to corporations in all of those cases. Indeed the waiver has also become prevalent in grand jury work with individuals in which the prosecutor hints at avoiding target status if the individual will waive his attorney client (and reporter/source) materials. In effect, prosecutors are overriding the legislative decision that the attorney client privilege is to be maintained."

.....

"On more than one occasion in small group meetings with government lawyers, such as in discussions of the requirements and expectations under Sarbanes Oxley, government lawyers have stated in absolute terms that they expect complete, open and full cooperation and that any actions, including assertions of privilege, significantly affect their assessment of culpability, the level of fines or civil or criminal penalties that should apply."

.....

"The attorney/client privilege is critical for clients, because they need to be frank with their attorneys in order to obtain accurate advice. If the privilege is not there or is likely to be waived, the client may not inform its attorneys of all the relevant facts. The heavy-handed "requests" for waiver of the attorney/client privilege, with heavy penalties levied for failure to "cooperate," will undermine the administration of justice in the long run. These requests are not fair or appropriate."

.....

"The DOJ routinely ignores the role of corporate counsel in establishing the ground rules for communications with company employees and the rights of both the company employee and the company of having a company lawyer present during questioning."

.....

"Waiving privilege through coercion is bad policy. It prevents an in-house attorney from advising his/her client the company. It interferes with the company's and employees' rights ... . If the government can't make a case without waiver, then perhaps the case isn't that strong. [They already] have a large club they can use to access company records and interview employees, far beyond what is available in civil litigation."

.....

"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. See Arthur Andersen for details...oh yeah...they cease to exist."

.....

"Currently, during the course of annual audit by a big 4 public accounting firm, the firm has demanded that the company waive privilege by turning over a legal memorandum prepared by outside tax counsel. The [accountants have] taken the position that their review of the memorandum is "necessary" to complete their Sarbox internal control review. We have been informed that our failure to waive will result in the firm not issuing a clean opinion in connection with our 10K. The firm has cited litigation as support for its position."

.....

"Auditors are asking for privileged information in connection with reviewing the company's accrual of potential or contingent liabilities; opening the door even before investigations start. Need accountant client privilege in addition to attorney client privilege."

.....

"Where we see the most potential for privilege erosion is during our regular interactions with our external auditors who are asking for more and more information impinging on attorney/client privilege…"

……..

"Privilege should be mainrained inviolate, and pressure brought to force waiver should be prevented. If a company chooses to waive the privilege it should be purely voluntary and not coerced."

……..

"I believe the issue of government supported waiver of attorney-client privilege and work-product is one of the most critical issues facing in-house companies, and, indeed, companies, today. Waivers will cause non-lawyers to avoid consulting with lawyers because to do so would expose the company to civil and/or criminal prosecution. The net result will be to reduce the effectiveness of counsel, particularly in-house counsel, and, ultimately, increased violations of regulations and rules."

Outside counsel:

Two responses in particular to the long-answer questions in the outside counsel survey are discursive and thoughtful, and merit reproduction in their entirety:

"My practice focuses exclusively on environmental crimes cases most always being conducted out of the Environmental Crimes Section at the DOJ, an office I used to head. For many years now, dating back to the end of the Bush I administration the Section has become increasingly aggressive in demanding a waiver of the privilege, most always excluding materials on strategy, direct advice to the client and mental impressions of the lawyers. Everything else must be turned over. Sometimes explicitly, more often subtly it is expressed that the waiver is a condition for even entering into plea negotiations. In no case have I ever felt that the client received any benefit for the waiver (or for that matter overall cooperation), rather it had evolved over time to be an expectation that the client has to waive. More to the point, any claim of privilege or refusal to waive implies that something is being hidden from the government and that before a case can be concluded, the government must have that information even where it duplicates , for instance, information the government already has in its possession through the grand jury or otherwise. It has become so prevalent as to be casual. To fail to waive is to impede, it is said, often with the suggestion that a decision not to waive is to obstruct. I have been on many panels on this subject and I always hear the gov't representatives describe their request in sterile tones as if there were only infrequent demands for a waiver and then only when there was no other way for the government to obtain the evidence in counsel's possession. Something is missing in the discussion. The give and take with line prosecutors never sounds like the supervisor's view of how and when the demand for waiver takes place. What's more invidious in my view is how the concept of waiver/cooperation has made any suggestion or discussion of the concept of privilege a 'dirty word.' Prosecutors act as if a claim of privilege were an implement of the crime itself or a legal concept without any historical or important basis in our jurisprudential system. To claim a privilege is to force the government to work harder, they want a short cut. And yet, ironically, while I have never felt a client received any credit for waiving, I have also never felt that the material the government obtained from a waiver served any purpose. This has led me to conclude, it is not the actual material the government wants, it simply that the government wants to obtain waiver per se to be able to claim a thorough investigation."

…….

"I was a federal prosecutor for 16 years, in the EDNY (6 years), District of Arizona (2.5 years) and NDCA (7 years) (where I was the Chief of the Criminal Division and the US Attorney (interim

appointment) for the last five of those years). I have been in private practice for the past 3 years.

Several US Attorneys' Offices were historically aggressive in demanding waivers, and that practice has become more prevalent, along with demands that companies fire employees who decline to talk to government investigators or who the government believes may have done wrong, even if those employees have not been indicted. The demands from some US Attorneys' Offices have sometimes required an immediate response, without giving the company time to evaluate the demand or distinguish among different documents. For example, one US Attorney's Office accused a client of failing to cooperate because it spent 2 weeks reviewing the documents that would be the subject of the waiver.

Even more troubling, however, is the lack of consideration that government prosecutors have provided to companies that waive privileges. Unlike the Antitrust Division, which has a history of granting amnesty to those companies that waive the privilege and otherwise cooperate, some US Attorneys' Offices demand waivers, demand that companies force executives and employees to be interviewed by the government on pain of termination, and suggest that the company should not pay the legal fees of those employees or officers (on pain of indictment of the company).

These tactics are intended to deprive employees of top legal representation and cause employees to resent the corporation for 'abandoning' them, both attempts by the government to convince those employees to provide damning information about others in the company. While truthful cooperation is in the government's interest, several US Attorneys' Offices have resorted to making false statemeuts to counsel for individual employees and mischaracterizing companies' cooperation in an effort to extract guilty pleas from individuals and from companies.

In addition, some prosecutors, including prosecutors at Main Justice in Washington, D.C., have demanded that companies retain separate 'independent' counsel to conduct internal investigations and turn the results of those investigations over to the government. In my experience, our client declined that demand, recognizing the client might incur the wrath of the prosecutor, because it was unnecessary. Such demands essentially require tbe companies to conduct the investigation for the government, turn over the results, and then agree to punitive measures for the company.

Finally, prosecutors recognize the difficult position that companies are in when they face criminal prosecution, because of negative public and shareholder reaction and because of possible government debarment. Some prosecutors exploit that fear to obtain information and then use it against the companies to extract unnecessary corporate guilty pleas or deferred prosecution agreements. Prosecutors' primary goal should be to indict individuals who commit crimes; in my experience, prosecutors have failed to give adequate weight to the factors identified in the Thompson memo and have disregarded mitigating factors when the companies do not accede to the prosecutors' version of events."

Other responses by outside counsel follow:

"Environmental enforcement case, handled by DOJ Environmental Crimes Section (ECS) and U.S.Atty. DOJ ECS lawyer made clear that favorable disposition (misdemeanor Water Act and diversion of felony hazardous waste charges) would not occur absent waiver. Produced approximately 80 typed interviews and notes. At other times in the litigation, was suggested that company terminate funding of counsel fees for employees (despite company bylaws authorizing). Demanded that company withdraw from all joint defense agreements in settlement agreement, despite pendency of continuing parallel civil litigation.

Environmental prosecution under Clean Water Act; U.S. Attorney and staff made clear that government decision to prosecute, despite company general cooperation and violation conduct caused by employee contrary to explicit company policy, hinged on company decision not to waive privilege. Govt immunized employee who committed violation then used him against company that had informed employee that pollution violations were contrary to company policy."

.....

"Typical situation: environmental crimes investigation in which the company is invariably expected to turn over its internal investigation. Although DOJ lawyers give lip service to the proposition that waiver is not required to get Thompson Memo cooperation credit. they invariably asked for the information (or the client knew they would invariably ask for the information) in such a manner as to make it plain they would not consider any company that did not waive to be a 'good corporate citizen' deserving of consideration for a charging decision less than 'the most serious readily provable offense.' In fact DOJ and USAO lawyers say the only way they are authorized under DOJ policy to charge less than the most serious readily provable offense is if the company shows it comes within the mitigating categories in the Thompson memo, and invariably waiver of work product and attorney client protections are discussed."

.....

"For all intents and purposes, there is no such thing as an attorney-client privilege or work product protection in a public company. This is true for inside counsel as well as outside counsel. In-house counsel should probably periodically issue a blanket warning to senior executives that they should expect that, in the event of a future governmental investigation, any conversations that would otherwise be viewed as privileged will likely be disclosed to the government. For outside counsel coming in to perform an investigation, we do so now in the expectation that our client will instruct us to turn over all of our materials to the government. We are, as a consequence, also fair game for testimony in class action and other civil cases brought by shareholders. Public companies currently have little choice in this matter and it is likely, at least in my opinion, that executives are beginning to realize that they cannot bring difficult problems to their counsel and receive their advice for fear that advice will be disclosed and decisions will later be second-guessed by the government."

.....

"The AUSA wrote a letter to the company's counsel explicitly stating that whether the company receives any credit for cooperation would be determined by whether it had 'fully' met the factors set forth in the Thompson Memo, including the company's willingness to make a firm commitment to provide the government prompt access to all 'potentially relevant information, including information protected by the attorney-client privilege and work product privilege.'

Shortly thereafter, and even though the company waived privilege and work product with respect to the subject matter of the investigation, the prosecutor complained of a lack of cooperation, and demanded that the parent company's General Counsel, Audit Committee Chairman and CEO meet with him personally so that they could respond directly to his demands. Surprisingly, the company acceded to this request and there were one or more meetings at which the General Counsel (and, I believe) other top executives were lectured by the AUSA in a threatening manner.

As he realized that these pressure tactics were actually working, the AUSA continued to make escalating demands, including a series of demands for virtually unlimited waiver of the attorney-client privilege. When the company's outside counsel pointed out that the company had in fact complied with the Thompson Memo by providing, inter alia, the facts, the identity of witnesses, the documents, voluntary presentations on various issues and even limited waivers of attorney-client privilege, the AUSA apparently concluded that this attorney was an obstructionist and not cooperating."

.....

"When we assert privilege with regard to an independent counsel investigation report, records and recommendations, the government (in my case state attorneys general and state departments of insurance) tells us that we are being uncooperative and unreasonable and that we are the only person who has received such a subpoena that is withholding this kind of information. The state also requests information on the process our client followed to prepare its answers to other questions in the subpoena, including inquiries and analysis done by outside and inside counsel. We have also resisted that (on work product and other grounds) and received the same reply that we are the most unreasonable, uncooperative person in our industry, and that if we want to save the time and money of the government's investigation then we should cooperate."

.....

"The Department of Justice and the CFTC have extorted the energy industry into waiving privileges and paying huge unjustified settlements for "false reporting" trade data to the trade publications."

.....

"While guidelines for various agency voluntary disclosure programs may permit the assertion of privileges, in reality, agents who investigate apparent misconduct, those administering the disclosure programs and government lawyers who evaluate the issue that is the subject of the disclosure clearly expect waiver as a matter of course. Assertions of privilege, in such circumstances, are usually met with raised eyebrows and "tisk-tisks" rather than by direct threats or explicit statements of unfavorable treatment. Corporate clients, in particular, quickly get the message from the regulators and investigators and elect to waive the privilege in expectation favorable treatment in agency and prosecution decision making. The most common privileged material provided to government investigators and lawyers are interview memoranda prepared by counsel."

.....

"Government suspension and debarment and exclusion officials routinely demand that companies disclose internal investigations, including notes, in order to be deemed 'responsible' contractors and receive Federal contracts. Also, Congressional investigators routinely request such waivers. I have not had a serious issue with the Civil Division of the Justice Department. I routinely get this request from Assistant US Attorneys when they are conducting grand jury investigations."

.....

"The government now expects a waiver as their inherent right. In return, almost no credit is given."

.....

"In situations where the government is aware that an investigation has occurred, it has been indicated directly and indirectly that they need all of the gathered information to make a proper assessment elsewise they view any claims of cooperation or truthfulness unacceptable."

.....

"We generally advise clients to be prepared to waive certain privileges when the results of a preliminary investigation uncover a potential violation of law that, absent an affirmative disclosure, could subject the client to increased penalties or a potential qui tam action."

.....

"AUSA stated that asserting the attorney-client privilege was inconsistent with cooperation."

.....

American Bar Association

News Release

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ABA PRESIDENT KAREN J. MATHIS SAYS JUSTICE DEPARTMENT POLICY 'STANDS PRESUMPTION OF INNOCENCE ON ITS HEAD'

WASHINGTON, D.C., March 8, 2007—A Department of Justice policy pressuring corporate targets of federal criminal investigations to take punitive action against employees who assert their legal rights "stands the presumption of innocence principle on its head," said American Bar Association President Karen J. Mathis today.

Testifying before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security, Mathis cited shortcomings in the Justice Department's 2006 McNulty Memorandum, which modifies the 2003 Thompson Memorandum on corporate charging guidelines for federal prosecutors. Both of these Justice Department memoranda have been widely criticized as eroding attorney-client privilege, work product, and employee legal protections in the corporate context, and harming corporate compliance with the law. She urged committee members to introduce or support corrective legislation in the House similar to S. 186, sponsored by Sen. Arlen Specter.

The Thompson Memorandum instructed federal prosecutors to consider specific factors in determining whether corporate targets of investigations would receive leniency in the form of cooperation credit during federal investigations. The factors include a company's willingness to waive its attorney-client privilege and work product protections and to fire or not assist its employees with their legal defenses. The McNulty Memorandum continues to allow prosecutors to demand privilege waiver after receiving high level Department approval, and grants companies credit for "voluntarily" waiving without being formally asked. The new memorandum also continues to allow prosecutors to force companies to take certain punitive actions against employees in return for cooperation credit.

Specter's bill would bar Justice and other federal agencies from pressuring companies to take punitive actions against employees or other corporate agents, premised on assumptions of employee guilt before wrongdoing has been proven, as a condition for the business to receive credit for cooperating with investigations. It also would bar those agencies from compelling corporate waiver of attorney-client privilege or work product protection or granting credit for voluntary waivers.

"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," said Mathis.

"Prosecutors take the position that certain employees and other agents suspected of wrongdoing are culpable long before their guilt has been proven or the company has had an opportunity to complete its own internal investigation. In those cases, the prosecutors often pressure the company to fire the employees in question or refuse to

provide them with legal representation or otherwise assist them with their legal defense as a condition for receiving cooperation credit," she said.

Mathis said the policy overturns well-established corporate governance practices and intrudes on the fiduciary duties of corporate directors to determine in the best interest of shareholders whether to provide defense to an employee. It also improperly weakens the corporation's ability to help employees defend themselves in criminal actions, and undermines the employees' rights, she said.

The Thompson Memorandum was cited in a 2006 survey of more than 1,200 corporate counsel as a key factor in creating a "culture of waiver" among federal prosecutors to regularly pressure companies and other entities to waive their privileges during investigations, said Mathis. The survey was conducted by the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers and the ABA.

"From a practical standpoint, companies have no choice but to waive [their attorney-client privilege] 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," she said.

Mathis noted that the "profoundly negative, if unintended, consequences" of the Justice Department privilege waiver policy, and similar policies subsequently adopted by other federal agencies, spurred efforts by the ABA and by a diverse coalition of influential legal and business groups seeking modifications. The coalition members range from the U.S. Chamber of Commerce and the Association of Corporate Counsel to the National Association of Criminal Defense Lawyers.

She also cited the objections of a group of prominent former senior Justice Department officials, including three former attorneys general, who wrote to the U.S. Sentencing Commission in 2005 and to Attorney General Alberto Gonzales in 2006 voicing the same concerns. The Sentencing Commission reversed its policy in 2006.

Mathis' testimony is available at http://www.abanet.org/poladv/letters/attyclient/2007mar080_privwaivht.pdf.

With more than 413,000 members, the American Bar Association is the largest voluntary professional membership organization in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law in a democratic society.

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FRIDAY, SEPTEMBER 8, 2006

Memo to Gonzales

It's not every day that top Justice Department officials from the Carter, Reagan, Bush 41, Clinton and Bush 43 Administrations can all agree on a matter of law. That's what happened Tuesday, when three former Attorneys General, three former Deputy AGs and four former Solicitors General sent Alberto Gonzales a letter.

In it, they call the "Thompson Memorandum" "seriously flawed" and argue that it "undermines, rather than enhances, compliance with the law." The 2003 memo, written by then-Deputy Attorney General Larry Thompson, set out standards that U.S. Attorneys must apply when deciding whether to indict a company under investigation.

The letter, which Mr. Gonzales told us he'd received but not yet read, focuses on the waiver of attorney-client privilege and a company's willingness to pay the legal fees of employees accused of wrongdoing. The memo makes plain that a company that refuses to waive attorney-client privilege or continues to pay accused employees' legal fees is more likely to face criminal indictment.

Yesterday, Mr. Gonzales allowed that "it shouldn't be the case that if a company pays the attorneys' fees, that represents 'circling the wagons.'" But that is certainly how the memo has been interpreted by prosecutors in cases like the KPMG tax-shelter prosecution.

Mr. Gonzales told us he believes the problem is more with how the memo has been perceived than with its language. Which suggests that Tuesday's letter, signed by Griffin Bell, Dick Thornburgh, Jamie Gorelick, Theodore Olson, Kenneth Starr and Seth Waxman, among others, will serve a purpose if it convinces Mr. Gonzales that the Thompson memo is more than a PR problem for Justice.

The New York Times

WEDNESDAY, SEPTEMBER 13, 2006

Justice Department Is Reviewing Corporate Prosecution Guidelines

Critics Say Coercive Tactics Are Allowed

By LYNNLEY BROWNING

WASHINGTON, Sept. 12 — A top Justice Department official on Tuesday defended the tactics used by federal prosecutors after Enron to combat corporate wrongdoing, but he also indicated that the agency might consider changes to the guidelines.

The comments by the deputy attorney general, Paul J. McNulty, before the Senate Judiciary Committee, were the first public response by a senior Justice Department official to mounting criticism from companies and lawyers that the tactics are being used as a bludgeon to force companies to cooperate with investigations.

Senator Arlen Specter, the Pennsylvania Republican who is chairman of the Judiciary Committee, and Senator Patrick J. Leahy of Vermont, the panel's ranking Democrat, said the prosecution practices were coercive and called on Mr. McNulty to have them modified.

But Mr. McNulty said, "I really don't see this as the kind of coercive practice being discussed." He noted that the tactics had helped federal prosecutors to rein in fraud by more than 1,000 companies, like WorldCom and Adelphia Communications, since 2002.

The Justice Department's guidelines for prosecutors, as outlined in a 2003 document known as the Thompson memorandum, describe nine factors that prosecutors must consider when weighing whether to indict a company for corporate misconduct. Among them are whether a company has demonstrated cooperation with prosecutors by disclosing legal communications to investigators, and whether it has stopped paying legal fees to employees caught up in investigations.

Companies that do not demonstrate cooperation face a greater risk of indictment — which can be a death sentence, as it was for the accounting firm Arthur Andersen in 2002.

Any changes to the guidelines could alter the way prosecutors pursue companies and white-collar defendants.

The guidelines in the Thompson memorandum, Mr. McNulty said, "are nothing more than a structured recitation of what common sense would lead a prosecutor to consider."

Nonetheless, he said that amid the recent criticism, "we are giving thoughtful consideration to everything," and that "we'll have new guidance if, and that's the key here, if something should be identified that would improve the process." He said that the Justice Department would consider making the guidelines nonbinding for prosecutors.

Later, Mr. McNulty told reporters that "it may be necessary to look at what the prosecutors understand of the policy" and that "we have to decide what is wrong with our policy, if anything is wrong with our policy and how to fix it." He declined to provide details or a schedule for any decision on a new policy.

But he added that any "changes in a policy that would discourage cooperation would not be good, in our perspective."

The Thompson memorandum was written in 2003 by Larry D. Thompson, then the deputy attorney general and now general counsel at PepsiCo. It has come under sharp criticism in recent months.

Former top Justice officials have criticized the guidelines, as has the federal judge overseeing the trial of former employees of the accounting

Jay Mallin/Bloomberg News

Paul J. McNulty, a deputy attorney general, defended government methods in cases involving companies like WorldCom and Adelphia.

An official said the present rules reflect 'common sense,' but are being examined.

firm KPMG over tax shelters. The investigation of KPMG — which first capped legal fees to employees under investigation and then cut them off — has been cited as a prime example of the coercive tactics employed by prosecutors.

Critics say that practices encouraged by the Thompson memorandum infringes on defendants' right to legal counsel and the presumption of innocence. Critics also contend that the guidelines undermine long-established legal doctrines — the lawyer-client privilege and work-product privilege — protecting the confidentiality of communications between lawyers and their clients and of documents created as part of the development of a legal position.

The committee also heard from Edwin Meese III, who was attorney general during the Reagan administration. He said that the Justice Department should eliminate the two guidelines on the disclosure of legal communications and the termination of legal fees as factors for avoiding indictment. Otherwise, Mr. Meese said, Congress should pass legislation to protect those rights.

With Congressional elections just weeks away, the hearing was not likely to lead to any immediate action by lawmakers, but it laid down a marker in a growing debate over white-collar prosecution practices.

Other witnesses at the hearing, all opposing the guidelines, included Andrew Weissmann, a lawyer who is a former director of the Justice Department's Enron task force, and top American Bar Association officials.

In defending the Justice Department guidelines, Mr. McNulty began by citing what he called "five realities." They were, he said, the duty of prosecutors to hold companies and individuals accountable for wrongdoing, the desire by firms for a quick resolution of investigations, the willingness of firms to cooperate with investigators to speed resolutions, the disclosure of legal secrets as "one of the best ways" to speed an investigation, and a desire by corporations "to receive credit" from prosecutors for turning over any internal reports.

"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," he said.

Mr. McNulty called the guidelines indicative of a "just the facts, ma'am" approach. "Some attorneys assert privilege like that famous scene of Lucille Ball gobbling chocolates off of a conveyor belt," he said.

Mr. Specter, the committee chairman, asked if Mr. McNulty would consider President Bush's frequent assertions of executive privilege during the confirmation hearings of Supreme Court Justice Samuel A. Alito Jr. and Chief Justice John Roberts Jr. to be an example of noncooperation, in the same vein as companies that do not disclose legal communications.

Mr. McNulty said that he did not.

The New York Times

SEPTEMBER 7, 2006

Ex-Officials of Justice Dept. Oppose Prosecutors' Tactic in Corporate Criminal Cases

By LYNNLEY BROWNING

A group of former top Justice Department officials have asked the United States attorney general to curtail the tactics of federal prosecutors that encourage companies and people to disclose legal communications to avoid indictment.

The unusual request, in a letter delivered Tuesday to Attorney General Alberto R. Gonzales, is the latest attack upon prosecutorial guidelines that were adopted after the collapse of Enron and other corporate scandals. Any revision to the guidelines would change the way the government pursues white-collar cases.

The letter was signed by Richard L. Thornburgh, an attorney general under Presidents Ronald W. Reagan and George H. W. Bush, and by Kenneth W. Starr, a former solicitor general, as well as by eight others, including three former deputy attorneys general.

It was released a week before the Senate Judiciary Committee is scheduled to hold a hearing on the disclosure of communications between lawyers and clients.

The confidentiality of conversations, notes, letters and legal analyses exchanged between lawyers and clients, including those between in-house lawyers and whistle-blowers, has been a long-established legal doctrine. Such confidentiality, known as lawyer-client privilege and work-product doctrine, is protected in some states by law and in the federal system by the courts.

But lawyer-client privilege has eroded in recent years largely through the influence of a Justice Department document known as the Thompson memorandum.

Written in 2003, the memorandum outlines nine guidelines that prosecutors can consider when weighing whether to indict a company or individuals for wrongdoing.

One guideline calls for consideration of whether a company or person has demonstrated cooperation with investigators by disclosing legal communications to them. Companies that do not disclose secrets face a greater risk of indictment — and for most an indictment is a death blow, as it was for the accounting firm Arthur Andersen.

The Justice Department argues that the Thompson memorandum has helped prosecutors crack down on corporate misconduct.

But the letter from the former Justice Department officials argues that the pressure to disclose information has discouraged insiders from reporting wrongdoing, by breaking the traditional bond of trust between lawyers and the people they talk to.

Protesting efforts to get disclosure of lawyer-client dealings.

"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," the letter said. "This, in turn, harms not only the corporate client, but the investing public as well."

The Justice Department has in recent months defended the Thompson memorandum. Kathleen Blomquist, a Justice Department spokeswoman, said yesterday, "We must disagree with their criticism of the Thompson memorandum."

The letter is the latest move in a growing attack from prominent legal and business circles upon the Thompson memorandum.

Other provisions of the document, which was written by Larry D. Thompson, the deputy attorney general at the time, have come under criticism.

One such provision urges companies under investigation to cut off legal fees to employees caught up in the inquiries, even before they are found guilty of wrongdoing. Companies have traditionally paid legal costs.

In June, Judge Lewis A. Kaplan of United States District Court in Manhattan said that the guideline on fees violated the constitutional rights of former employees of the accounting firm KPMG, who stand trial next year in a case involving questionable tax shelters.

Still, it is unclear whether the Justice Department is reconsidering the Thompson memorandum.

In mid-July, a low-level Justice Department official sent a letter to the president of the American Bar Association saying that the Justice Department did not believe that a coercive "culture of waiver" had taken hold under the Thompson memorandum.

Susan Hackett, general counsel for the Association of Corporate Counsel, a lobby of senior lawyers who oppose the Thompson memorandum's guideline on disclosure, said yesterday that "there's been a spate of corporate scandals, but what's so different now that requires all of these new privilege erosions?"

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