STATEMENT OF THE COALITION TO PRESERVE THE ATTORNEY-CLIENT PRIVILEGE

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

Submitted before the Senate Judiciary Committee
Hearing on:

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

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

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

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

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

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

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

The Veasey Report

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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