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

Answers to Written Questions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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