

Statement of  
**The Honorable Patrick Leahy**

United States Senator  
Vermont  
September 12, 2006

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Ranking Member, Senate Judiciary Committee

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

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

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

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

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

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

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

Two recent cases involving the Justice Department's corporate fraud prosecutions highlight the ABA's concerns. Earlier this year, the Department took the unusual step of criminally indicting the securities class-action law firm of Milberg Weiss Bershad & Schulman after that law firm refused to sign a deferred prosecution agreement that would have required the firm to waive the attorney-client privilege. In June, a federal judge in the Southern District of New York ruled that the Department had unfairly pressured accounting firm KPMG not to pay the legal fees of its former partners, in violation of the partners' Fifth Amendment right to a fair trial and Sixth Amendment right to counsel.

The serious legal and constitutional concerns raised by the Department's policy have far-reaching implications. Erosion of the right to counsel undermines the fairness of our criminal justice system for all Americans. Once lost, this fundamental right would be hard to regain. Many critics worry that the Thompson Memorandum is yet another example of this Administration's tendency

to overreach in asserting executive power without regard for the Constitution, the laws, and basic fairness.

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