

Testimony of
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September 12, 2006

Senate Judiciary Committee

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

Oral testimony By Thomas J. Donohue
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224 Senate Dirksen Office Building
September 12, 2006

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

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

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

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

? They obstruct - rather than facilitate - corporate investigations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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