Testimony of

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Chairman Leahy, Ranking Member Specter, Members of the Committee, and staff: Thank you for the opportunity to testify before you today about corporate fraud prosecutions and the role that Congress should play in limiting negotiations between federal prosecutors and corporate entities over attorney-client and work product privilege waivers. I am a currently a professor at Columbia Law School, and for the past fifteen years, my scholarship has focused on federal criminal enforcement issues. Before entering academia, I served as an assistant U.S. Attorney in the Southern District of New York, and ultimately was the Chief Appellate Attorney in that Office. Since leaving government service in 1992, I have served as a consultant for the Justice Department's Office of the Inspector General and have been retained as defense counsel or a consultant in a number of criminal and civil matters.

What would federal criminal enforcement in the white collar area look like, were Congress to bar federal prosecutors, when evaluating a corporation's cooperation, from considering whether a corporation is willing to waive its attorney-client and work product privileges? Any answer to this question is bound to be highly speculative - a point that itself counsels against legislative action at this time.

In a broad range of cases, legislative intervention would change little. Companies currently have very strong incentives both to pursue internal investigations and to voluntarily offer up otherwise privileged information obtained in the course of those investigations. Where a federal enforcer - prosecutor or agency official - has expressed an interest in a matter (or there is a risk that such an interest will develop), corporate interests will frequently be served by providing an oral report or handing over a written one, and perhaps disclosing the underlying factual materials. There is a wide range of disclosure possibilities, and a variety of accommodations can be and are made. The faster and more convincingly corporate counsel can either assure enforcers of the limited nature and scope of any improprieties or demonstrate that no improprieties occurred, the better for the company. This dynamic would continue even after legislative intervention - unless of course corporate counsel were legally barred from advancing corporate interests in this way, something that no one has proposed, or should propose.

To be sure, such voluntary waiver decisions by corporations can lead to the disclosure to the government of statements by officers and employees to corporate counsel that may have been made under a considerable degree of economic pressure. But that is an inevitable consequence of a regime in which the company controls the privilege. Efforts should be made - and I hope are being made by corporate counsel and in the courts - to ensure that officers and employees at least recognize that they lack legal protection in this regard. Pending legislative proposals are not designed to advance the interests of these individuals, however - except to the extent that their interests coincide with the company's self-interest. There is thus no reason to expect that the proposed legislation would change the level of candor - or the apprehension - that mark corporate counsel's contacts with officers and employees.

What about these instances in which counsel does not believe that the corporation's interests will be advanced by initiating waiver? Since I take the need for enforcement of white collar crime statutes, particularly in the corporate

fraud area, quite seriously, I would hope that there will be a range of cases in which prosecutors, even though deprived of any investigative assistance from privileged materials, would plunge ahead with their inquiry and not be deterred by the fact that they will need to engage in a long and intensive inquiry into internal corporate matters. I would also hope that Congress, recognizing the difficulty of illuminating these black boxes without the assistance of privileged materials, would massively increase the funding and resources available for white collar enforcement. Even as the Justice Department has trumpeted its commitment to enforcement in this area, there have been regular reports of underfunding and open slots in U.S. Attorneys' offices, and of the toll that counterterrorism, violent crime, and immigration programs have taken on white collar enforcement generally. I'm not in a position to assess the validity of these reports. But they ought to be taken seriously, and significant remedial action taken, particularly if Congress imposes the proposed restraints on corporate investigations. (This point goes beyond corporate fraud cases and equally applies to workplace safety and other areas of potential corporate malfeasance.)

Moreover, such a commitment of resources ought to occur immediately. It would be regrettable indeed if we simply waited until the next spate of headlines about corporate fraud and then played catch-up. And even worse if we waited until the next Enron, and then just created a few more federal crimes or hiked up the sentences of those who do get prosecuted and convicted.

In those prosecutions that do go forward, we should expect considerable and extraordinary pre-trial litigation, with regular claims that the government's decision to charge was illegally influenced by the defendant corporation's refusal to waive its privilege or perhaps even that the charges against an individual defendant were supported by privileged materials that the government illegally obtained through an illegal threat to prosecute. Maybe the individual defendant would be held to lack standing to raise the latter sort of claim. But this Committee needs to confront the cottage industry of prosecutorial abuse claims that the proposed legislation would generate. And each claim of abuse could offer defense counsel the opportunity to put a prosecutor or two on the stand to testify about the charging decision. Even the ultimately unsuccessful claim would - unless district courts developed an elaborate screening mechanism - carry the promise of a defensive prosecutor and perhaps interesting insights into the government's case. Moreover, the possibility of an intrusive inquiry into prosecutorial motivation might itself lead prosecutors to shy away from a worthy case.

One should also expect a range of investigations and possible prosecutions that will not go forward or that will be less fruitful as a result of legislative privilege protection. How large will this class be and what will it look like? I have no idea, and am highly skeptical that anyone does. The class will include cases in which corporate counsel, having satisfied herself that no improprieties have occurred or that the corporation has adequately addressed the problem, will simply assure the government that matters are well in hand and that it should move on. And the government, faced with the choice of taking counsel's word or conducting a resource-intensive investigation will move on. Should we celebrate this combination of corporate responsibility and privilege? Perhaps, but I'd like to know a lot more about counsel and the kind of internal investigation they've conducted. Having been involved in internal investigations and being well-acquainted with some of my former colleagues in the U.S Attorney's Office who conduct them, I know that many such investigations leave no stone unturned and that considerable respect ought to be given to their conclusions. But the adage "trust, but verify," is relevant here too. Were Congress to limit requests for privileged material and were counsel to decline to offer such supportive materials, "trust" itself might be good enough. My confidence in my friends, however, is a pretty thin basis for policymaking. And the risk that other, less trustworthy counsel will have conducted little or no inquiry needs to be confronted, as well as the risk that counsel will protect managers at the expense of shareholders.

What about the argument that, notwithstanding the threat to white collar criminal enforcement that I've described, we still need legislative intervention to prevent the government from gaining an unfair advantage? After all, our criminal justice system puts many obstacles in the way of prosecutions, particularly in the form of constitutional rights. This should be the beginning of a conversation, however, not the end of it. For almost a decade, hearings and law review articles have resounded with claims that valuable corporate privileges have been eroded or even killed by the federal government's bargaining tactics. Let us put for aside the extremely unscientific support for these claims and presume that the government regularly has been using the explicit threat of prosecution to "coerce" (I use the term in its ordinary language sense) cooperation from corporations that includes a broad waiver of privileges. The government may indeed have fostered a "culture of waiver." But to say that hardly advances the argument for extraordinary legislative intervention. The fact is that the entire federal criminal justice system is based on a culture of waiver: Most

federal criminal defendants plead guilty, and a very large percentage of them waive their Fifth and Sixth Amendment rights and provide information and testimony against others in order to avoid harsher sentences.

It is true that even those individual defendants who cooperate with the government in hopes of leniency or non-prosecution usually don't have to waive their attorney-client privilege. But the distinction between individuals and corporations arises less from any governmental bias against capital formation than from the special relationship between corporate counsel and corporate "knowledge." When an individual seeks to cooperate with the government, he is expected to tell all he knows about the matters being investigated and many peripheral matters (like unrelated personal misconduct), with grave consequences often attending his failure to be completely forthcoming. If one expects analogous disclosure from artificial entities like corporations, there may be no one to turn to other than the lawyers - the only corporate agents charged with gathering all the information within the entity's collective knowledge.

Is there a risk that prosecutors will be too quick to demand waivers and that lazy prosecutors will be too quick to free ride on the investigative efforts of corporate counsel, with the consequences being some combination of "cheap" cases that ought not to have been brought and curtailed efforts by corporate counsel wary of the uses to which the government will put their work? Certainly. But there are risks on the other side as well, particularly given the tight resources in the white collar enforcement area. The possibility that the government will rely on attorney assurances unsupported by due diligence and perhaps lacking in candor is all too real. And so is the risk that worthy prosecutions will be unduly impeded.

The question becomes how to balance these risks, and even more importantly, what institutions should be doing the balancing. For now, at least, I strongly believe that Congress should stay its legislative hand. Justice Department policy has evolved considerably over a relatively short period of time, and, as a result of the McNulty Memo, we will be receiving an increasing amount of information from the Districts about how policy is implemented. Although we will soon see changes in the Department's leadership, there is no reason to expect - under any Administration - that the interests of corporate managers in policing their own houses will not be given due deference by DOJ. At the same time, there is good reason to be concerned about a structural bias in the flow of information to Congress. At some distant point - perhaps after some future scandal - groups representing shareholders, workers, and other dispersed beneficiaries of white collar criminal enforcement might come forward to join DOJ in opposing the legislative protection considered here. But coalitions of private lawyers and corporate interests are far more easily mobilized on this issue. While their viewpoints are, of course, understandable, they ought not be allowed to dominate decision-making.

I have not, until now, said anything about attorneys fees. This is an issue on which Congress has even less information about at this time. Much attention has been paid to Judge Kaplan's ruling in the Southern District of New York in the KPMG. But his constitutional analysis is, to put it mildly, highly contestable. And I urge this Committee to avoid passing legislation based on one case that has yet to be squarely considered by an appellate court, in a prosecution in which the government has not even had the chance to present evidence of the nature and extent of the criminal conduct charged.

It is true that an outsider would find the world of federal criminal law very strange: an odd combination of overly broad statutes and harsh punishments set against an array of rights and privileges that are generally traded off for leniency or non-prosecution. It is also true, as some have noted, that the both the substantive law of corporate criminal liability and the evidentiary protections offered to corporation by the attorney client and work product privileges are in need of recalibration. And there are many who would gladly jump in to help Congress if it wants to take these projects on. But in the absence of any such Congressional commitment, the targeting for legislative action of this one part of the white collar enforcement regime is troubling and, at least for now, unnecessary.