Testimony of

Dick Thornburgh

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"Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege under the McNulty Memorandum"
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Chairman Leahy, Ranking Member Specter and members of the Committee. Thank you for the opportunity to speak today about the ominous dangers that the Justice Department's McNulty Memorandum poses to the attorney-client privilege, the work product doctrine and the rights of individuals.

Let me state at the outset, that in my view, the McNulty Memorandum is so inherently problematic that there is nothing to be gained by continuing to wait and see how it is implemented. To the contrary, Congress should enact legislation such as S. 186 promptly to restore the attorney-client privilege, the work product doctrine and the Constitutional rights of individuals to their proper places in our system of justice.

A year ago, almost to the day, this Committee received extensive oral and written testimony from Mr. Weissman, former Attorney General Edwin Meese and myself, among others, on the issues at stake here today. We emphasized the fundamental importance of the attorney-client privilege to our legal system generally and to corporate compliance programs in particular. We also explained the corrosive dynamic engendered by federal cooperation policies that provide credit to organizations when they waive the privilege or work product protection. No matter what its procedural requirements or how reasonably the Justice Department may promise to implement it, a waiver policy poses overwhelming temptations to target organizations, often desperate to save their very existence. Prosecutors do not need to issue express requests for privileged documents to receive them. The same insidious result arises from policies that offer credit to organizations if they take adverse actions against employees that prosecutors deem culpable.

I do not question then-Deputy Attorney General Paul McNulty's good faith in attempting to remedy the widely-recognized flaws of the Thompson Memorandum. Unfortunately, the McNulty Memorandum is only an incremental improvement, and retains most of the basic flaws of its predecessors. For example, the Department emphasizes that the Deputy Attorney General now must personally sign off on a waiver request seeking so-called "Category II information," which the Memo defines as "attorney-client communications or non-factual attorney work product." But the Memorandum includes "witness statements" and "interview memoranda" within the basket of things it styles as "Category I" or "purely factual" information, for which a waiver request requires only the approval of the U.S. Attorney, after consultation with the Criminal Division. The statement of a witness to counsel is a paradigmatic example of the kind of communication the attorney-client privilege was created to protect. And even "purely factual interview memoranda" can reveal what a witness said to a lawyer - again, precisely what the privilege should guard from disclosure. Such memos are also clearly attorney work product. But the McNulty Memorandum explicitly allows prosecutors to deem organizations uncooperative if they do not accede to requests for these kinds of statements and memoranda.

To take another example, the Memorandum broadly states that "[p]rosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment." But a

careful reading of the same paragraph reveals that the Department is referring only to cases where a company is legally obligated, by statute or contract, to pay such fees. Where a company chooses to do so voluntarily, prosecutors are still free to pressure that company to stop, or be regarded as uncooperative. And yet this is exactly what happened in the KPMG case: with a few exceptions, the company did not have a legal obligation to pay its employees' legal fees, but had always done so customarily. Under the reasoning of Judge Kaplan's decision in that case, the McNulty Memorandum is just as unconstitutional as the Thompson Memorandum. And the McNulty Memorandum retains unchanged provisions authorizing prosecutors to draw negative inferences when companies share information with employees, enter into joint defense agreements with them, or decline to fire them if they exercise their Fifth Amendment rights.

There is no point in "giving the Department a chance" to implement the McNulty Memorandum, as some would suggest. Companies know what actions might win them a reprieve from indictment, and thus prosecutors do need to issue any express requests. The fact that companies can get cooperation credit for these actions is the fundamental flaw in the McNulty Memorandum.

S. 186 would forbid government lawyers from seeking waivers of privilege or work product, and from coercing organizations to take specified adverse actions against their employees. Importantly, S. 186 would also forbid government lawyers from "condition[ing] treatment" of an organization on whether the organization waived the privilege or penalized its employees, and from otherwise "us[ing such actions] as a factor in determining whether [the] organization ... is cooperating with the Government." S. 186 thus addresses the fundamental flaw in the McNulty Memorandum. For that reason, I was gratified this past July to join eight other former senior Justice Department officials, from Republican and Democratic administrations, in writing you, Chairman Leahy and Senator Specter, and your House counterparts in support of S. 186 and its companion H.R. 3013.

Before I close, let me briefly respond to those who argue that legislation like S. 186 improperly or unwisely impinges on the discretion of federal prosecutors. As you know, for a large part of my professional career I either served as a federal prosecutor myself or supervised other federal prosecutors. S. 186 does not in any way impair federal prosecutors from doing their proper jobs. They would remain free to prosecute - or refrain from prosecuting -as warranted by the evidence and the law. In support of such determinations, they could seek any communication or material they reasonably believe is not privileged, and they could accept voluntary submissions by companies of the results of internal investigations. They could also continue to seek other information through Grand Jury subpoenas, immunity agreements, and all the other tools that prosecutors have historically used. They simply could not seek, directly or indirectly, waivers of privileged information.

In all the years that I served as a U.S. Attorney, as Assistant Attorney General in charge of the Criminal Division and as Attorney General, requests to organizations we were investigating to hand over privileged information never came to my attention - and I would have rejected such a request if it had. Clearly, in order to be deemed cooperative, an organization under investigation must provide the government with all relevant factual information and documents in its possession, and it should assist the government by explaining the relevant facts and identifying individuals with knowledge of them. But in doing so, it should not have to reveal privileged communications or attorney work product. This balance is one I found workable in my years of federal service, and it should be restored.

The attorney-client privilege dates from Elizabethan times. In defining the privilege in the corporate context, the U.S. Supreme Court in the Upjohn case reaffirmed that the purpose of that privilege is to encourage: "full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice. The privilege recognizes that such legal advice or advocacy depends upon the lawyers being fully informed by the client."

Perhaps with prescient insight into recent developments the Court also observed: "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege ... is little better than no privilege at all." Just such uncertainty has been created by the Department of Justice and is only compounded by the McNulty Memorandum.

Thank you and I look forward to your questions.