

Statement of

# The Honorable Patrick Leahy

United States Senator  
Vermont  
September 18, 2007

Statement of Senator Patrick Leahy  
Chairman, Senate Judiciary Committee  
On "Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum"

September 18, 2007

Today, the Judiciary Committee considers whether the Department of Justice has struck the right balance between robust prosecution of corporate fraud and the bedrock legal principle of fairness protected by the attorney-client privilege. I thank Senator Specter for his leadership on this issue, and I thank the distinguished panel of witnesses for being with us today.

I am deeply concerned about the lawlessness that has affected this Administration's leadership at the Department of Justice. They have shown arrogance and asserted an unprecedented prerogative to rewrite the rules, often in ways that undermine the rule of law and disregard the finest traditions of impartial law enforcement and our justice system.

They have literally sought to rewrite the rules on the prosecution of politically-sensitive cases and on the retention and firing of United States Attorneys in ways that impermissibly and dangerously injected politics into our justice system. They have undermined the role of law enforcement by using partisanship in the hiring of career prosecutors, judges and other Justice employees. They have secretly rewritten the rules governing torture and the treatment of detainees in ways that call into question this Nation's commitment to basic human rights and American values. And they have secretly rewritten the rules for government surveillance of Americans, threatening our privacy and basic legal protections.

It is long past time for the Department of Justice to recommit itself to the rule of law and to the principles of our justice system. This Committee has through its oversight begun to seek accountability that I hope will lead to the restoration of law and order within the Justice Department and throughout the Executive branch.

In the area of corporate fraud prosecutions, this Administration has rewritten the rules. In 2003, the Department of Justice made it easier for prosecutors to pressure corporations to waive the attorney-client privilege. One judge went so far as to dismiss charges in a prosecution of fraud at the accounting firm KPMG based on government overreaching and misconduct. It is embarrassing for the government to lose cases, not because the evidence is insufficient, but because the Justice Department has pushed beyond the law. And it is unacceptable to steamroll principles that protect fairness.

Senator Specter and I made our concerns clear about Justice Department overreaching in this area in a hearing last fall. Soon after, the Justice Department rewrote the rules again, this time spearheaded by then-Deputy Attorney General Paul McNulty in what has come to be known as the "McNulty Memorandum." This memo added new safeguards and restrictions, including some that had been called for at this Committee's hearing, on prosecutors' ability to request the waiver of the attorney-client privilege.

I said at the time that it was a step in the right direction. With this hearing we continue our consideration whether or not the Department has, in fact, found and is implementing the proper balance. The McNulty Memorandum has been

in place for less than a year. We need to get a sense of whether and how it is working. We are evaluating whether the McNulty Memorandum and the Department's implementation of it has reached the right balance between aggressive enforcement of corporate fraud statute and proper respect for the attorney-client privilege. I look to today's witnesses for help in that analysis.

We are holding this hearing at a time when both the Attorney General and the Deputy Attorney General have resigned in the wake of the scandal associated with their firings of U.S. Attorneys. The Department of Justice has chosen not to send either the Acting Attorney General or the Acting Deputy Attorney General to testify today.

With nominations being made to the top positions at the Department of Justice, those who will be most directly responsible for setting and implementing the Department's policy are not yet in place. We do not know where Judge Mukasey, who the President just announced as his nominee to be Attorney General, stands on this issue. It will be vital to ask him and other top nominees for their views of these issues and what steps they intend to take to make sure that the Department strikes the right balance.

We must be mindful not to cripple law enforcement efforts to eradicate the scourge of corporate fraud, however. Early in this decade, an epidemic of greed among executives at companies like Enron and Worldcom, and many others, left employees without work and often bereft of their life savings, and it devastated the shareholders to whom those executives owed fiduciary duties.

Corporate wrongdoers who profit at the expense of ordinary, working Americans should be held accountable. In connection with the Enron and other corporate frauds, seemingly encouraged by this Administration's lax efforts, I authored criminal provisions included in the Public Company Accounting Reform and Investor Protection Act of 2002, known as the Sarbanes-Oxley Act, which strengthened existing criminal penalties for corporate crime. Aggressive prosecution of corporate fraud has helped to reduce the culture of greed that devastated so many Americans financial security. Enforcement must continue.

I am urging this Committee, the Senate and the Congress to continue our efforts in these regards by passage of additional anti-corruption and anti-fraud legislation. [I introduced the War Profiteering Prevention Act, S.119, at the beginning of the year to provide better tools to investigate and prosecute those responsible for ripping off hundreds of millions of taxpayer dollars from efforts in Afghanistan, Iraq and elsewhere. That bill now has 21 Senate cosponsors and was reported by the Judiciary Committee in May. Along with Senator Cornyn, I have recently introduced the Public Corruption Prosecution Improvements Act, S.1946, to improve our efforts to combat public corruption. And last week, I cosponsored the False Claims Act Correction Act, S.2041, introduced by Senators Grassley and Durbin and also cosponsored by Senators Specter and Whitehouse, to improve the effectiveness of anti-fraud efforts pursuant to that important statute.]]

We must be careful not to overreact to the Department's overreaching. This Administration has sought to immunize too much misconduct. Corporate misconduct should not be given a safe haven or immunized from accountability. Nor should the corporate bar, and its representatives in the American Bar Association, be allowed to use the legitimate concerns of overreaching we have identified to create favored status for corporate fraud defendants. We must not go back to the dark days before the Sarbanes-Oxley Act when Americans were too vulnerable to the greed of a few unscrupulous executives. We are working hard to protect prosecutorial independence and discretion from Administration efforts to influence them. Let us not undermine those efforts.

The Department of Justice and, in particular, its new leadership must understand the need to get this right. I hope that Congress demands that corporate fraud be pursued aggressively, but that prosecutors do so mindful of fairness principles. I hope the Department will work with us to get this right.

#####