

Statement of
The Honorable Russ Feingold

United States Senator
Wisconsin
September 12, 2006

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Senate Judiciary Committee

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

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Mr. Chairman, first I want to thank you and the Ranking Member for holding this hearing. I believe that the threat to attorney-client privilege raised by the Department of Justice policy established in the Thompson Memorandum is serious and must be discussed. The confidential nature of the attorney-client relationship is essential to the functioning of our legal system and should not be undermined. The promise of confidentiality encourages people to seek legal advice and encourages full disclosure between attorney and client so that the best possible legal advice can be offered.

The attorney-client privilege in the corporate context allows corporate officers and employees to ask questions and discuss potential problems with corporate counsel in order to make sure that the corporation acts lawfully. The privilege also enables corporate self-investigation, one of the most effective methods of detecting and stopping malfeasance. Attorney-client privilege is already very limited; I am far from convinced that there is reason to further restrict these protections in the corporate context.

I am concerned not only that federal prosecutors may be able to coerce corporations into waiving the attorney-client privilege, but also about the ramifications these waivers have on employees. If a corporation has no attorney-client confidentiality protection, an employee speaking to corporate counsel during an internal investigation has no guarantee that statements made during the investigation will not later be turned over to federal prosecutors. This forces employees to decide whether to cooperate with an internal investigation and give up their legal rights or face firing. This is a situation no employee should be forced to contemplate.

Mr. Chairman, I recognize that the Department of Justice faces many hurdles when undertaking the investigation and prosecution of corporate malfeasance. It is vital that federal prosecutors have all the tools necessary to protect the public in these matters. Facilitating and encouraging such investigations, however, should not occur at the cost of the legal rights of corporations or their employees. To aid federal prosecutors, the Department of Justice should clarify and narrow its policy on the corporate waiver of attorney-client privilege.

I hope that today's hearing will begin a dialog between the interested parties about how to preserve the attorney-client privilege for corporations under federal investigation while not unduly hamstringing the ability of Department of Justice attorneys to conduct investigations of corporate wrongdoing. I believe that with the proper guidelines, the power of federal prosecutors to investigate corporate wrongdoing and the legal right to confidential communications between lawyers and clients can exist together. I hope this hearing will help the Department and the corporate counsel community, with the involvement of this Committee, start to figure out how. Thank you Mr. Chairman.