Written Testimony
United States House of Representatives Subcommittee on Crime, Terrorism, & Homeland Security of the Committee on the Judiciary
"The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations"
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Good morning Chairman Scott, Ranking Member Forbes, and members of the Committee and staff. I am Andrew Weissmann, a partner at the law firm of Jenner & Block in New York. I served for 15 years as an Assistant United States Attorney in the Eastern District of New York and had the privilege to represent the United States as the Director of the Department of Justice's Enron Task Force and Special Counsel to the Director of the FBI.

Not long ago, as the Director of the Enron Task Force, I was an eyewitness to how much collateral damage can be wrought by an arrogant corporate culture, unburdened by concern for either law or ethics. Seeing the seventh largest corporation in America implode in a matter of weeks led Congress and the Department of Justice to take swift action. Many of those measures were beneficial and over-due. But as with many initiatives taken to address a sudden crisis, the passage of time allows the people who have to live with those new strictures to detect fault lines.

The DOJ policy promulgated in 2003 as the "Thompson Memorandum" was one such initiative undertaken to respond to the shocking events at Enron and WorldCom; it governs the factors that federal prosecutors must follow in deciding whether to charge a corporation. It was intended to put teeth in a company's claim to being a responsible corporate citizen. The Thompson Memorandum was undertaken in all good faith, but its provisions have not all proved beneficial in practice.

Although the DOJ has sought to remedy certain provisions of the Thompson Memorandum through the so-called McNulty Memorandum, real problems still remain. I will make three main points regarding the new McNulty Memorandum.

A. Penalizing Assertions of a Constitutional Right

The Department of Justice's McNulty Memorandum, like the Thompson Memorandum before it, leaves completely intact the government's ability to penalize a company that does not take punitive action against employees for asserting a constitutional right to remain silent, and reward those companies that do take such action. Under the McNulty Memorandum companies may be deemed by the Department of Justice as uncooperative simply because they do not fire employees who refuse to speak with the government

based on the Fifth Amendment.[1] By contrast, the bill introduced by Senator Specter in December 2006 and reintroduced this January would appropriately prohibit the government from considering an employee's assertion of the Fifth Amendment in evaluating whether to charge the individual's employer.[2]

The bill sponsored by Senator Specter would uphold the finest traditions of the DOJ by allowing it to strike harsh blows but fair ones in combating corporate crime. The bill is a recognition that the issue raised by current DOJ policy is not about how "Big Business" behaves; it is about how the government does. Indeed, the current DOJ policy should be of concern to all of us, since it impacts the rights of all employees, not just employers. Any person who is employed by a public or private company, a partnership, or a non-profit could get caught up in an investigation into possible infractions as serious as embezzlement and market manipulation or as murky as alleged violations of arcane contracting rules.

The ability of the DOJ to weigh in on an employee's assertion of the Fifth Amendment has garnered significant attention recently by virtue of the second of two decisions by Judge Lewis Kaplan of the Southern District of New York, in the so-called KPMG tax shelter case.[3] Judge Kaplan addressed two of the Thompson Memorandum factors that govern whether to indict a company -- whether a company elects to pay the legal fees of its employees and whether it punishes personnel who assert the Fifth Amendment privilege against self-incrimination during a criminal investigation. The McNulty

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[1] *Compare* McNulty Memo at § 7.A ("[A] company's disclosure of privileged information may permit the government to expedite its investigation. In addition, the disclosure of privileged information may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure.") *and id.* § 7.B.3 ("Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus . . . a corporation's promise of support to culpable employees and agents, *e.g.,* through retaining the employees without sanction for their misconduct or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.") *with* Thompson Memorandum, § VI cmt. ("Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus . . . a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees [or] through retaining the employees without sanction for their misconduct, . . . may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.").

[2] The Attorney-Client Privilege Protection Act of 2006, S. 186, 110th Cong. § 3 (2006) (providing that "[i]n any Federal investigation or criminal or civil enforcement matter, an agent or attorney of the United States shall not . . . condition a civil or criminal charging decision relating to a organization, or person affiliated with that organization, on, or use as a factor in determining whether an organization, or person affiliated with that organization, is cooperating with the Government . . . a failure to terminate the employment of or otherwise sanction any employee of that organization because of the decision by that employee to exercise the constitutional rights or other legal protections of that employee in response to a Government request").

[3] United States v. Stein, 435 F. Supp. 2d 330 (S.D.N.Y. 2006); United States v. Stein, No. S1 05 Crim. 0888 LAK, 2006 WL 2060430 (S.D.N.Y. July 25, 2006).

Memorandum addressed to a large degree the legal fees issue; it did nothing to protect the constitutional rights of employees by prohibiting prosecutors from goading companies to fire employees who assert their Constitutional rights.

Judge Kaplan's opinion highlights that this DOJ policy -- and the way it is wielded by federal prosecutors -- is causing companies to punish employees for merely asserting their constitutional right to remain silent. In the second *Stein* decision, issued in July of last year, Judge Kaplan concluded that certain statements made to the government by KPMG employees had been coerced and thus obtained in violation of the Fifth Amendment. KPMG had threatened certain employees that if they did not cooperate with the government's investigation they would be fired or their legal fees would not be paid. The court concluded that KPMG took those steps at the behest of the government and that the Thompson Memorandum precipitated KPMG's use of economic threats to coerce statements from its employees. Of note, the prosecution raised this issue *prior* to determining it had a prosecutable case against the company and *prior* to determining that this factor could make a difference in the calculus of whether to charge the company. In other words, the government used this factor with the goal of altering corporate behavior by causing the company to punish employees who refused to speak to the prosecution. Under these circumstances, the court found that such an identity existed between the government and KPMG that KPMG's conduct could be legally attributed to the government. Because he found that the government had coerced the pre-trial proffer statements of two defendants, Judge Kaplan suppressed them.[4]

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[4] The constitutional problem with a corporation's dismissing an employee as a result of the government's Thompson Memorandum arises because of a Supreme Court case governing the appropriateness of state actors' firing employees for refusing to cooperate. In *Garrity v. New Jersey*, 385 U.S. 493 (1967), the Supreme Court considered whether an incriminating statement can be voluntary if the alternative to self-incrimination is losing one's job. The defendants were New Jersey police officers under investigation for "fixing" traffic tickets. A New Jersey statute provided for the dismissal of any public official who refused, on the basis of self-incrimination, to answer questions relating to his employment. The defendants cooperated and made incriminating statements, which the state attempted to introduce against them at their subsequent trial. The trial court concluded that the statements were voluntary and admitted them over the defendants' objections. The defendants were subsequently convicted of conspiring to obstruct the administration of the state's traffic laws.

In affirming the trial court's determination that the statements had not been coerced, the New Jersey Supreme Court placed great weight on the absence of coercive tactics during the officers' questioning. It noted that the interrogation lacked physical as well as psychological compulsion.

The United States Supreme Court reversed. That coercive interrogation tactics had not been used to elicit the officers' statements was of no consequence. Instead, the Court focused on the choice the officers faced. Although they may have chosen to cooperate rather than lose their jobs, the mere fact of election did not render their statements free of duress. The choice between self-incrimination or job loss was, in short, no choice at all, and was in fact "the antithesis of free choice to speak out or to remain silent." The Court held that the state could not condition the right to remain silent on the threat of removal from office.

The factual situation in KPMG is not unique. Across the country numerous corporations have instituted strict policies that call for firing employees to employees who do not "cooperate" with the government. The motivation behind these policies is often to enable the company to be in full compliance with the Thompson Memorandum factors – and now the McNulty Memorandum factors -- so that it can avoid being indicted. Employees at these companies who refuse to speak with the government based on their Fifth Amendment rights against self-incrimination risk losing their jobs. Ironically, now that the McNulty Memorandum has largely eliminated the ability of prosecutors to weigh in on an employer's decision to advance legal fees, but left intact the ability to reward a company that fires employees who assert the Fifth Amendment, the government can encourage employers to take the more Draconian corporate measure against its employees, but not the lesser.

Regardless of the validity of the specific facts and inferences that led Judge Kaplan to attribute state action to KPMG, that case underscores the continued need to reevaluate the McNulty Memorandum. Senator Specter's bill recognizes that as a simple policy matter whether a company is willing to punish employees who assert their Fifth Amendment rights not to talk to the government is a poor proxy for determining whether the entire company should be charged with a crime. Other factors, such as the level and pervasiveness of the wrongdoing, a history of recidivism, and the presence of compliance measures, are far more accurate measures of corporate culpability.

More importantly, the DOJ policy should be altered because the government should not be fostering an environment where employees risk losing their jobs merely for exercising their constitutional right not to speak to the government. A company itself can properly decide on its own to fire an employee or cut off legal fees based on whether she cooperates with an investigation. But the DOJ should simply not base its decision to prosecute a company on whether it has punished an employee for asserting a constitutionally guaranteed right.[5]

B. The McNulty Memorandum's Continued Infringement Of The Attorney-Client Privilege

A second problem under the new DOJ policy is that companies will continue to feel pressure to waive the privilege because the McNulty Memorandum still permits a prosecutor to consider a company's refusal to waive in various circumstances and also still gives "credit" to those companies that do waive. Although the McNulty Memoranudm states that a refusal to disclose legal advice and attorney-client communications cannot count against a company, the same does not hold true for information the government deems "purely factual." In practice, however, the line

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[5] *See also The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the Senate Comm. on the Judiciary* (Sept. 12, 2006) (testimony of Andrew Weissmann), *available at* http://judiciary.senate.gov/testimony.cfm?id=2054&wit_id=5743; Andrew Weissmann & Ana R. Bugan, *No Choice: It's Time to Rethink the DOJ's "Principles of Federal Prosecution of Business Organizations"*, The Deal, Aug. 7, 2006, at 24.

between what is "purely factual" and what contains attorney work product is rarely clear-cut. Moreover, information that is deemed by the McNulty Memornadum to be allegedly "purely factual" is in fact usually clearly protected by the attorney-client and/or work product privileges. Thus, the McNulty Memorandum in reality does little to protect the privilege with respect to a large category of important privileged information.

The McNulty Memorandum's examples illustrate the problem. As examples of "purely factual" material, the memorandum lists: "copies of key documents, *witness statements*, or purely factual *interview memoranda* regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, *factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel*."[6] But who an attorney interviews, what questions an attorney asks, and what information is chosen as important to memorialize can reveal important information about the attorney's defense strategy and her evaluation of the strength and weaknesses of the issues in a particular case. For this reason, courts have repeatedly held that "[h]ow a party, its counsel and agents choose to prepare their case, the efforts they undertake, and the people they interview is not factual information to which an adversary is entitled."[7] Yet the McNulty Memorandum simply ignores this case law and its unassailable logic and abrogates to itself the determination that material that has heretofore been widely deemed to be privileged is not entitled to protection under the Memorandum.

By continuing to allow prosecutors to base their charging decisions on whether a corporation discloses this sensitive information, the McNulty memo fails to provide the attorney client relationship with the protection it needs to serve its important role in our justice system.

C. Lack of Oversight of Corporate Charging Decisions

Finally, one of the main flaws in the McNulty Memorandum, which was equally true of the Thompson Memorandum and the Holder Memorandum before it, is that the decision to charge a corporation is not required to be reviewed in Washington at Main Justice. Such a lack of national oversight is bewildering given the wide array of relatively minor decisions that are overseen by Main Justice and the enormity of the potential consequences of charging a corporation. This lack of oversight is unfortunate, since there is considerable expertise at Main Justice in examining these issues. That knowledge and guidance should be brought to bear on these difficult judgment calls regarding how to prosecute corporate crime.

Thus, although the theory of the McNulty, Thompson, and Holder Memoranda is a good one -- setting forth the criteria that should guide all federal prosecutors in deciding when

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[6] McNulty Memorandum § 7.B.2 (emphasis added).

[7] United States v. Dist. Council of New York City & Vicinity of United Broth. of Carpenters & Joiners of Am., No. 90 CIV 5722, 1992 WL 208284, at *10 (S.D.N.Y. Aug.18 1992); *see also* Massachusetts v. First Nat'l Supermarkets, Inc., 112 F.R.D. 149, 154 (D. Mass.1986) (holding that "pattern of investigation and exploration employed by its attorney" is protected from disclosure).

to seek to charge corporations -- in practice individual prosecutors are left to interpret and implement its "factors" in making the ultimate decision as to how to deal with corporate criminality. Wide variations currently exist. Indeed, even after the passage of the McNulty Memorandum there is reason to believe that little has been done to train federal prosecutors on its dictates and to measure compliance with its provisions. Even assuming good faith and dedication to public service by all federal prosecutors, they are not receiving the necessary guidance.

National guidance and oversight in this area is needed. The determination as to whether to charge a company has unique challenges. The mere indictment of a company can lead to serious consequences for hundreds or thousands of innocent people. Indeed, it is largely for this very reason that the DOJ has special guidelines for charging a corporation. Although by no means always the case, it is undeniable that a corporate indictment carries with it the *risk* of being the equivalent of a death sentence. One of the lessons corporate America took away from Arthur Andersen's demise in 2002 is to avoid an indictment at all costs. A criminal indictment carries potentially devastating consequences, including the risk that the market will impose a swift death sentence -- even before the company can go to trial and have its day in court. In the post-Enron world, a corporation will thus rarely risk being indicted by a grand jury. The financial consequences are likely to be too great to subject the company and its shareholders to that risk.

Moreover, under the current standard of criminal corporate liability under federal common law a corporation can be held criminally liable as a result of the criminal actions of a single, low-level employee. No matter how large the company and no matter how many policies a company has instituted in an attempt to thwart the criminal conduct at issue, if a low-level employee nevertheless commits such a crime, the entire company can be prosecuted.[8]

In light of the Draconian consequences of an indictment and the fact that the federal common law criminal standard can be so easily triggered -- despite a company's best efforts to thwart criminal conduct -- the McNulty Memorandum offers prosecutors enormous leverage. To avoid indictment, corporations will go to great lengths to be deemed "cooperative" with a government investigation. KPMG is a prime example, and

[8] N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481 (1909) (holding that illegal rebates granted by agents and officers of a common carrier could be imputed to create criminal liability for the carrier itself); Dollar S.S. Co. v. United States, 101 F.2d 638 (9th Cir. 1939) (affirming steamship corporation's conviction for dumping refuse in navigable waters despite the company's extensive efforts to prevent its employees from engaging in that very conduct); United States v. Twentieth Century Fox Film Corp., 882 F.2d 656 (2d. Cir. 1989) (affirming conviction despite the fact that bona fide compliance program was in effect at company); United States v. George F. Fish, Inc., 154 F. 2d. 798 (2d Cir. 1946) (affirming corporation's conviction based on criminal acts of a salesman); Riss & Co. v. United States, 262 F.2d 245 (8th Cir. 1958) (clerical worker); Tex.-Okla. Express, Inc. v. United States, 429 F.2d 100 (10th Cir. 1970) (truck driver); United States v. Dye Constr. Co., 510 F.2d 78 (10th Cir. 1975).

one that has been spotlighted in the two decisions by Judge Kaplan in the *United States v. Stein* case.

In spite of these potentially devastating consequences, current DOJ policy does not require the decision to indict even the largest of companies to be reviewed in Washington. This is largely inexplicable since myriad decisions are subject to such review, including whether to charge an individual with a RICO offense, whether to subpoena an attorney or a member of the press, whether to apply for immunity for a grand jury or trial witness, or how to settle tax and forfeiture counts. Indeed, individual death penalty cases are admirably required to be subject to searching scrutiny at Main Justice to be assured that there is consistency and no hidden local bias in the decision-making process. Yet, a potential corporate death sentence receives no similar national oversight. Again it is ironic that one of the key innovations in the McNulty Memorandum was to have national oversight of decisions regarding requests for waiver of the attorney-client privilege in corporate investigations. Yet, the final decision regarding whether to charge the company receives no such scrutiny.

This lack of oversight is particularly problematic since there have been and still are wide differences across the country regarding when and how to prosecute corporate crime. The considerable variances in implementation of the DOJ policy can subject corporations, many of which are national and even international in scope, to the vagaries and unreviewed decisions of an individual prosecutor. This problem can be exacerbated by the tradition of independence of each of the 93 United States Attorneys across the country, whose offices in practice often run quite autonomously of Main Justice here in Washington, D.C. Some offices look first to trying to charge a company and use the easy threshold for corporate liability to insist on exacting a plea to a criminal charge; others are satisfied to pursue culpable executives and consider deferred prosecution agreements with a company rather than insisting on a guilty plea that might lead to enormous collateral consequences to innocent employees and shareholders. These two different approaches currently co-exist, with no uniform review at Main Justice.

In short, although DOJ has acted to remedy certain problems in its corporate charging policy, many remain. There is no reason to believe those problems will disappear with the passage of time since they are still embedded in the McNulty Memorandum. Hearings like these are a useful tool at the very least to bring to light and ideally to address policies and practices that serve to undermine important constitutional rights we all should enjoy.

Thank you for the opportunity to address this committee on this topic.