The Honorable Patrick Leahy
Chair, Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

June 20, 2008

Re: S. 186, the Attorney Client Privilege Protection Act

Dear Senator Leahy,

As former representatives of the Department of Justice, we respectfully request your support of S.186, the Attorney Client Privilege Protection Act of 2007. This bill is crucial to stemming the Department of Justice's widespread practices and policies that pressure businesses to waive the attorney-client privilege in return for avoiding a harsher charging decision. S. 186 protects the vital attorney-client privilege without hindering vital law enforcement efforts.

As former prosecutors, we understand the importance of investigating alleged wrongdoing fully, especially in the often complex circumstances surrounding business organizations. This bill does not diminish that ability. S. 186 is a carefully crafted and judicious tool that does not seek to expand the scope of attorney-client privilege or the instances in which the privilege may be invoked. Nor does the bill take tools away from the Department of Justice by preventing access to facts, witnesses, or other necessary information. Most important, S. 186 does not in any way prevent a business from *voluntarily* waiving its rights and privileges. Instead, the bill sets clearly defined limits on what Department of Justice officials are allowed to demand when considering whether to indict an entire business organization.

Under the 2006 McNulty Memorandum prosecutors can demand that a business waive the privilege with regard to a host of communications with its counsel in exchange for more lenient treatment. By contrast, an individual who is negotiating with a prosecutor about whether to cooperate is rarely, if ever, asked to reveal what he or she said to counsel. If a well-established exception to the privilege is present, such as the crime-fraud exception or advice of counsel defense, then the privilege is viewed to have been breached, and an Article III judge would presumably rule that the communication is no longer confidential. This bill would put organizations, and the individuals who work for them, on equal footing with other citizens.

The Attorney-Client Privilege Protection Act would prevent federal enforcement officials from demanding that a business organization waive its attorney-client or work-product protection in exchange for more lenient treatment for itself. It would also prevent the government from penalizing a company that makes a valid assertion of privilege. Enforcement officials will—as has been their practice for decades—instead award lenient treatment for cooperation credit based only on the quality of relevant information

provided by the organization, through such means as providing factual roadmaps of what happened and when, making witnesses available, and voluntarily producing documents.

The widespread practice of requiring waiver has led to the erosion not only of the privilege itself, but also to the constitutional rights of the employees who are caught up, often tangentially, in business investigations. S. 186 protects the rights of individual employees in a variety of clear-cut ways. The bill takes off the table the irresistible incentive for businesses to waive the privilege in order to gain favor with the prosecution. When corporate officers or directors waive the privilege in exchange for avoiding indictment, the result is that individual employees' statements are turned directly over to the government. These employees never have the opportunity to assert their Fifth Amendment rights to the government. Yet, as in several recent cases, they can be prosecuted for making false statements *to the government*, even though the statements were made only to company counsel. In addition, the statements that employees make to company counsel are often made without their own lawyers, without meaningful reflection, and without the opportunity to refresh their recollection about past events by, for example, reviewing relevant documents. Typically, the statements are memorialized in the notes of the company's lawyers. When these notes or interview memoranda are turned over to the government, employees who endeavored to tell the truth can face prosecution, or are at least seriously hindered in mounting a defense, when their statements are merely inconsistent. Such inconsistencies often arise as the result of interviews that are conducted early in an investigation, without the full context of all of the available facts, and under formidable time pressure (mostly imposed by the government). Moreover, though employees are advised by company counsel that their statements could be shared with third parties, some employees continue to expect that their employers will protect their statements from disclosure.

The bill contains other crucial protections for individual employees. It prevents the government from threatening a business with indictment in the following situations: for not firing an employee who asserts his Fifth Amendment rights during government investigations, for paying an employee's attorney's fees before the employee has been found guilty of anything, and for entering into valid common-interest agreements to share basic information about the allegations that are under investigation. These manifestations of government pressure are sanctioned in various ways by the McNulty Memo. We believe, as at least one district court has agreed, that these methods of extracting cooperation violate individuals' rights under our adversarial system of justice.

Finally, S. 186 is consistent with good corporate governance. Public policy should encourage employees to cooperate with internal business investigations. Without the centuries-old protection of confidentiality, the very compliance programs that are sanctioned by legislation such as Sarbanes-Oxley are severely undermined. If employees are reluctant to seek advice from a business' counsel because they are afraid that their communications will be turned over to the government, fewer employees will be willing

to seek the compliance advice that is crucial to maintaining law abiding businesses in the United States.[1]

The 2006 McNulty Memorandum, which was heralded as a much-needed fix to the 2003 Thompson Memorandum, is inadequate for a number of reasons. First, the Memo provides for oversight of privilege waiver requests by the U.S. Attorney or Main Justice. However, a report written by the Honorable E. Norman Veasey, former Chief Justice of the state of Delaware, found that prosecutors in the field are still requesting or demanding privilege waivers without the supervision required by the McNulty Memorandum. Second, the McNulty Memorandum does not cover other federal agencies, including the SEC, HUD, FCC, EPA, and others, all of which have issued "copy-cat" policies requiring waiver in exchange for cooperation. Legislation that covers all federal agents and agencies is thus needed to ensure compliance across the board.

The attorney-client privilege, the oldest of the evidentiary privileges, is a cornerstone of our justice system. The Department of Justice must end the practice of demanding that an organization place its employees in legal jeopardy in return for leniency. The time has come to pass legislation that protects the existing rights of individual employees and business organizations. As Chairman of the Senate Judiciary Committee, you are in the position to ensure this legislation is given proper consideration. The Department of Justice has failed to make necessary changes. Therefore, we respectfully ask you to support S. 186, the Attorney Client Privilege Protection Act of 2007, and take appropriate action to bring it to the floor of the Senate.

Thank you for considering our views on this critical subject.

Sincerely,

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James S. Brady
US Attorney, Western District of Mississippi
1977-81

B. Mahlon Brown III
US Attorney, District of Nevada
1977-81

Wayne A. Budd
US Attorney, District of Massachusetts
1989-92

[1] There is ample evidence that this is already happening. *See* Testimony of Susan Hackett, General Counsel, Association of Corporate Counsel, available at http://www.acc.com/public/attyclntprvlg/coalitionussctestimony031506.pdf.

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cc: Senator Arlen Specter, Ranking Member, Judiciary Committee
Senate Prosecutor's Caucus:
Senator John Kerry
Senator Lindsey Graham
Senator Arlen Specter
Senator Ken Salazar
Senator Tim Johnson
Senator Norm Coleman
Senator Max Baucus
Senator Mark Pryor
Senator Sheldon Whitehouse
Senator Amy Klobuchar

Re: S. 186, the Attorney Client Privilege Protection Act

Senator Claire McCaskill