Written Testimony
United States Senate Committee on the Judiciary
"Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum"
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Good morning Chairman Leahy, Ranking Member Specter, 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 a Director of the Department of Justice's Enron Task Force and Special Counsel to the Director of the Federal Bureau of Investigation.

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 cooperating with law enforcement. The Thompson Memorandum, while surely undertaken in all good faith, contained provisions that have not all proved beneficial in practice. Although the DOJ has sought to remedy certain provisions of the Thompson Memorandum through the McNulty Memorandum in December 2006, real problems still remain. I will make four points regarding the McNulty Memorandum.

1. <u>The Corporate Charging Decision</u>

The advisability of promulgating a statutory solution to the infringement of the attorney-client privilege by the DOJ must be examined in the context of the unique nature of the corporate criminal charging decision.

First, the mere indictment of a company carries with it the *risk* of it being the equivalent of a death sentence for the company and resulting in severe consequences to hundreds or even thousands of innocent people. 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 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 at the behest of the DOJ. The financial risks are simply too great. Indeed, the DOJ itself recognizes as much since it is largely due to these unique consequences that the DOJ has special guidelines for charging a corporation.

Second, a corporation of any significant size will inevitably be subject to possible criminal prosecution at some point during its existence. This is so because of the current overbroad 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 if only two conditions are met: the employee acted within the scope of her employment, and the employee was motivated at least in part to benefit the corporation. 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. This standard for vicarious liability is not the creation of any Congressional statute, nor of any decision of the Supreme Court – which has never ruled on the issue of the scope of vicarious criminal liability applicable to corporations. It is the product of a series of appellate rulings that have defined the legal standard and become accepted wisdom.[1]

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 -- prosecutors have 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 one that has been spotlighted in the decisions by Judge Kaplan in the *United States v. Stein* case. In those decisions, the Court essentially equated the actions of the firm to those of the government, because the disproportionate power of the government was deemed to have turned the company into a mere amanuensis of the prosecution. The Bristol Myers prosecution is another notable example illustrating the effects of such disproportionate power: the company

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[1] The only Supreme Court decision to have directly dealt with a similar issue, *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481 (1909), merely held that it was constitutional for Congress to enact a statute permitting imputation to a company of its agents and officers' illegal grants of rebates for purpose of finding *corporate* criminal liability. *See generally* Weissmann, Andrew, "Rethinking Criminal Corporate Liability," Indiana Law Journal, Vol. 82, No. 2, Spring 2007, available at SSRN: http://ssrn.com/abstract=979055. For representative appellate decisions, see: *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); *Texas-Oklahoma Express, Inc. v. United States*, 429 F.2d 100 (10th Cir. 1970); *United States v. Dye Constr. Co.*, 510 F.2d 78 (10th Cir. 1975).

there acceded to a request by the lead prosecutor to endow a chair at the prosecutor's alma mater in order to resolve the investigation short of indictment.

This background explains why the charging decision at DOJ is so critical, as a company cannot afford to risk being indicted and never having its day in court. Thus, I disagree with suggestions that the pressures on a company are analogous to the pressures that the DOJ brings to bear routinely with respect to individuals, who are offered reduced sentences if they plead guilty and waive their numerous trial rights. An individual is subject to liability for conduct that she controls absolutely; not so, a corporation. A company can face indictment based on the conduct of any one of thousands of employees, and regardless of its efforts to detect and deter the conduct at issue. An individual also does not risk a death sentence *before* she ever stands trial. And the potential collateral consequences to an individual, although they can be painful and severe, pale in comparison to the scope of such consequences in a corporate prosecution where innumerable innocent victims can suffer such a fate.

Because of the unilateral nature of the charging decision, the standard for corporate criminal liability, and the collateral consequences at stake, it is vital that the government's policies governing that decision be subject to the strictest scrutiny within the DOJ and here by this committee. I turn now to where I believe those DOJ policies have been wanting and would be remedied by the Senate bill.

2. Lack of Oversight of Corporate Charging Decisions

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 DOJ does not require the decision to charge a corporation 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 I know from personal experience that there is considerable expertise in the leadership of the Criminal Division and elsewhere at Main Justice in wrestling with these issues. That knowledge and guidance should be brought to bear on these difficult judgment calls regarding when and how to prosecute corporations.

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 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 good reason to believe that little has been done to train federal prosecutors on its dictates and to measure diligently compliance with its provisions. Even assuming good faith and dedication to public service by all federal prosecutors, they are not receiving the necessary guidance or being sufficiently monitored. My experience alone in defending corporate cases under the Thompson and McNulty Memoranda regimes is that line AUSAs have scant knowledge of their

provisions or inclination to follow their dictates. The DOJ would never tolerate such a situation in a corporation it was investigating – a mere "paper" compliance program would be seen for what it is. The DOJ should require no less of itself: it should assure that its strictures are not merely on paper, but are consistently carried out in the field, with detailed statistics to measure and demonstrate compliance.

National guidance and oversight in this area is needed. In spite of the potentially devastating consequences of a corporate indictment, 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. Similarly, detailed records are kept regarding death penalty determinations, yet no such detailed records appear to be extant with respect to corporate charging decisions. 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 larger decision regarding whether to charge the company receives no such scrutiny.

3. Penalizing Assertions of a Constitutional Right

The 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 DOJ as uncooperative simply because they do not fire employees who refuse to speak with the government based on their assertion of the Fifth Amendment.[2] By contrast, the bill introduced by Senator Specter in December 2006 and

[2] *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.").

reintroduced this January would appropriately prohibit the government (not just the DOJ) from considering an employee's assertion of the Fifth Amendment in evaluating whether to charge the individual's employer.[3]

The Senate bill 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 tax or OFAC 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.[4] 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 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. Under these circumstances, the court found that KPMG's conduct could be legally attributed to the government. Because the government had coerced the pre-trial proffer statements of two defendants – coercion that was only

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[3] 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").

[4] *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).

possible due to DOJ's enormous bargaining power in corporate investigations -- Judge Kaplan suppressed them. Of note, the court found that the prosecution raised with KPMG the issue of whether it would punish employees who asserted the Fifth Amendment *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 and employee behavior, by causing the company to punish employees who refused to speak to the prosecution.[5]

The factual situation in KPMG is not unique. Across the country numerous corporations have instituted strict policies that call for firing 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

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[5] 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.

McNulty Memorandum. The Senate 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 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.[6]

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

Yet another problem under the McNulty Memorandum – which the Senate bill would remedy -- is that companies will continue to feel undue pressure to waive the privilege because the memorandum still permits a prosecutor to consider a company's refusal to waive in various circumstances and also still gives "credit" to those companies for waiver. Although the McNulty Memorandum 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 between what is "purely factual" and what contains attorney work product is rarely clear-cut. Moreover, information that is deemed by the McNulty Memorandum 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 of purported "purely factual" information illustrate the problem. As examples of "purely factual" material, the memorandum lists: "*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*."[7] 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 company's defense strategy and the attorney's 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

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[6] *See* 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.

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

which an adversary is entitled."[8] 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 Memorandum fails to provide the attorney client relationship with the protection it needs to serve its important role in our justice system.

Moreover, my own experience prosecuting corporate crime as Chief of the Criminal Division in the U.S. Attorney's Office in Brooklyn and as Director of the Enron Task Force belies the notion that a prosecutor must have such waivers in order to prosecute successfully corporate criminal cases. No doubt, exacting such waivers can cause the investigation to proceed more expeditiously and save government resources. But there are myriad ways for a company that seeks to cooperate to provide the government with valuable information, all without waiving the privilege. For instance, a company can give the government documents that will further its investigation and steer investigators to company employees with critical information. It can also give the government an attorney proffer of salient information. None of that requires the company to waive the attorney-client privilege.

Conclusion: The Propriety of a Senate Bill

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 most of the problems I have addressed are embedded in the McNulty Memorandum. Moreover, even the beneficial provisions in the McNulty Memorandum have not been shown to be working in practice. The McNulty Memorandum was issued, as its author candidly admitted, to forestall more sweeping legislation. For such a stratagem to work it is incumbent on the DOJ to show, with clear statistics, that it is having the intended effect. But a survey by the National Association of Criminal Defense Lawyers, which is consonant with my own experience, confirms that it is not in fact being applied uniformly in the field. It is thus no wonder that such groups are calling for passage of legislation to remedy the situation. Although legislation may not be the preferred route, it may well be necessary where important rights are still being infringed, in spite of ample opportunity for the agency to remedy the situation.

The Senate bill would not be unprecedented or onerous. Federal prosecutors have numerous strictures on their conduct imposed by statute and rules, from the McDade bill requiring them to adhere to state ethics rules in conducting investigations, to the Federal

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[8] 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).

Rules of Criminal Procedure and Federal Rules of Evidence, which limit how they can investigate and prosecute a case. Like these various strictures on prosecutors' conduct, the Senate bill would leave completely intact the prosecutor's sole discretion as to whether to bring charges, when to do so, and what charges are appropriately lodged against any potential person or company. It would merely restrict the ability to exact waivers of a sacrosanct privilege as a sign of a company's *bona fides* that it is cooperating with law enforcement.

Thank you for the opportunity to address this committee.