July 30, 2007

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
433 Russell Senate Office Bldg.
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
711 Hart Senate Office Bldg.
Washington, D.C. 20510

The Honorable John T. Conyers, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
2426 Rayburn House Office Bldg.
Washington, D.C. 20515

The Honorable Lamar S. Smith
Ranking Member
Committee on the Judiciary
United States House of Representatives
2409 Rayburn House Office Building
Washington, D.C. 20515

Re: S. 186 and H.R. 3013, the "Attorney-Client Privilege Protection Act of 2007"

Dear Members of Congress:

We, the undersigned former senior Justice Department officials, write to enlist your support for enacting S. 186 and H.R. 3013—both known as the "Attorney-Client Privilege Protection Act of 2007"—or other similar legislation. These bills provide a measured legislative solution to the continued erosion of the attorney-client privilege, the work-product doctrine, and employee rights caused by the policies of the Department of Justice and other federal agencies regarding evaluation of a business entity's "cooperation" with a government investigation in order to avoid indictment. We share the belief expressed by many in the legal and business communities that congressional involvement is now appropriate.

Last fall, we wrote a letter to Attorney General Alberto Gonzales expressing our appreciation for the Department's efforts to fight corporate crime but explaining that although the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum" that superseded it were well-intentioned, their actual effect has been to "undermin[e] rather than strengthen[]" corporations' efforts to comply with the law—the opposite of what the Department intended. Our letter (a copy of which is attached) explained the reasons for that conclusion.

Thereafter, the Department of Justice issued revised cooperation standards under the auspices of Deputy Attorney General Paul McNulty. We applaud the Department for

its attempt to respond to legitimate criticism. We believe, however, that the McNulty Memorandum maintains the fundamental flaws of the prior regime.

The McNulty Memorandum, for example, does not remove from consideration a company's willingness to punish employees who assert their constitutional rights, or to enter into valid joint-defense or information-sharing agreements with the employees. In addition, although it bars prosecutors from urging companies not to pay their employees' legal fees in cases where such payment is statutorily or contractually required, that bar does not apply when payment is discretionary or in those instances, identified in Footnote 3 of the Memorandum, in which prosecutors believe that "the totality of the circumstances show that it was intended to impede a criminal investigation." In either of those instances, the Memorandum continues to allow prosecutors to reward companies that refuse to pay legal fees.[1]

On the issue of waiver of attorney-client privilege and work-product protections, the McNulty Memorandum also continues to raise concerns. Most important, entities still receive credit for turning over work product (as well as material that may be privileged) labeled "Category I" in the Memorandum, including witness statements, interview memoranda, internal reports, and the like, and may be considered uncooperative for not doing so. Moreover, entities still receive credit for turning over highly sensitive materials labeled "Category II," including their attorney's opinion work product, the contemporaneous advice of counsel, lawyer mental impressions, and other legal advice.[2] Accordingly, at an oversight hearing conducted by the U.S. House of Representatives in March 2007, witnesses from the American Bar Association, the Association of Corporate Counsel, and the defense bar agreed that the expectations of the Department of Justice, as well as the practices of counsel for businesses, have not changed under the new policy.

We encourage Congress to restore the proper balance between the tools that the government needs to fight corporate crime and the rights of individual and corporate citizens. Accordingly, we hope that you and your colleagues will support the prompt enactment of the Attorney-Client Privilege Protection Act of 2007 or other similar legislation.

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[1] One federal district court has held that practices such as pressuring companies not to pay lawyers' fees and to fire employees who assert their Fifth Amendment rights are unconstitutional. *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006); *United States v. Stein*, 440 F. Supp. 2d 315 (S.D.N.Y. 2006).

[2] The McNulty Memorandum requires approval from the U.S. Attorney in consultation with the Assistant Attorney General for information covered by "Category I" and approval from the Deputy Attorney General for "Category II" material. But because the incentive system remains intact, business organizations are highly likely to conclude that it is still necessary to turn over this material in order to avoid indictment, regardless of whether a formal request is made. *Cf. United States v. Stein*, ___ F. Supp. 2d ___, 2007 WL 2050921 at *2-*5 (S.D.N.Y. Jul. 16, 2007) (dismissing indictments against 13 former employees and reaffirming the court's earlier finding that Thompson Memorandum policies on their face improperly pressure companies into taking steps to ensure that their employees cooperate with a criminal investigation).

Sincerely,

Stuart M. Gerson
Acting Attorney General
(1993)
Assistant Attorney General,
Civil Division
(1989-1993)

Edwin Meese III
Attorney General
(1985-1988)

Dick Thornburgh
Attorney General
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Carol E. Dinkins
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Jamie Gorelick
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Walter E. Dellinger III
Acting Solicitor General
(1996-1997)

Theodore B. Olson
Solicitor General
(2001-2004)

Kenneth W. Starr
Solicitor General
(1989-1993)

Seth P. Waxman
Solicitor General
(1997-2001)

Attachment

cc: All other Members of the Senate Judiciary Committee
All other Members of the House Judiciary Committee

ATTACHMENT

September 5, 2006

The Honorable Alberto Gonzales
Attorney General
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re: Proposed Revisions to Department of Justice Policy Regarding Waiver of the Attorney-Client Privilege and Work-Product Doctrine

Dear Mr. Attorney General:

We, the undersigned former senior Justice Department officials, write to enlist your support in preserving the attorney-client privilege and work-product doctrine. We believe that current Departmental policies and practices are seriously eroding these protections, and we urge you to take steps to change these policies and stop the practice of federal prosecutors requiring organizations to waive attorney-client privilege and work-product protections as a condition of receiving credit for cooperating during investigations.

As former Department officials, we appreciate and support your ongoing efforts to fight corporate crime. Unfortunately, we believe that the Department's current policy embodied in the 1999 "Holder Memorandum" and the 2003 "Thompson Memorandum," which encourages individual federal prosecutors to demand waiver of the attorney-client privilege and the work-product doctrine in return for cooperation credit, is undermining rather than strengthening compliance in a number of ways. In practice, companies who are all aware of the policies outlined in the Thompson Memorandum have no choice but to waive these protections. The threat of being labeled "uncooperative" simply poses too great a risk of indictment to do otherwise.

The Department's carrot-and-stick approach to waiving attorney-client privilege and work-product protections gravely weakens the attorney-client relationship between companies and their lawyers by discouraging corporate personnel at all levels from consulting with counsel on close issues. Lawyers are indispensable in helping companies and their officials understand and comply with complex laws and act in the entity's best interests. In order to fulfill this important function, lawyers must enjoy the trust and confidence of the board, management, and line operating personnel, so that they may represent the entity effectively and ensure that compliance is maintained (or that noncompliance is quickly remedied). By making waiver of privilege and work-product protections nearly assured, the Department's policies discourage personnel within companies and other organizations from consulting with their lawyers, thereby impeding the lawyers' ability effectively to counsel compliance with the law. This, in turn, harms not only the corporate client, but the investing public as well.

The Department's policies also make detection of corporate misconduct more difficult by undermining companies' internal compliance programs and procedures. These mechanisms, which often include internal investigations conducted by the company's in-house or outside lawyers, have become one of the most effective tools for detecting and flushing out malfeasance. Indeed, Congress recognized the value of these compliance tools when it enacted the Sarbanes-Oxley Act in 2002. Because the effectiveness of internal investigations depends on the ability of employees to speak candidly and confidentially with the lawyer conducting the investigation, any uncertainty as to whether attorney-client privilege and work-product protections will be honored makes it harder for companies to detect and remedy wrongdoing early. As a result, we believe that the Department's consideration of waiver as an element of cooperation undermines, rather than promotes, good compliance practices.

Finally, we believe that the Department's position with regard to privilege waiver encourages excessive "follow-on" civil litigation. In virtually all jurisdictions, waiver of attorney-client privilege or work-product protections for one party constitutes waiver to all parties, including subsequent civil litigants. Forcing companies and other entities routinely to waive their privileges during criminal investigations provides plaintiffs' lawyers with a great deal of sensitive – and sometimes confidential – information that can be used against the entities in class action, derivative, and similar suits, to the detriment of the entity's employees and shareholders. This risk of future litigation and all its related costs unfairly penalizes organizations that choose to cooperate on the government's terms. Those who determine that they cannot do so – in order to preserve their defenses for subsequent actions that appear to involve great financial risk – instead face the government's wrath.

We are not alone in voicing these concerns. According to a survey conducted earlier this year of over 1,200 in-house and outside corporate counsel, which is available at http://www.acca.com/Surveys/attyclient2.pdf, almost 75 percent of the respondents agreed with the statement that a "culture of waiver" has evolved in which governmental agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client or work-product protections. Corporate counsel also indicated that when prosecutors give a reason for requesting privilege waiver, the policy contained in the Holder/Thompson memoranda was most frequently cited.

We recognize that, in an attempt to address the growing concern being expressed about government-induced waiver, then-Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Component Heads last October instructing each of them to adopt a "written waiver review process for your district or component." It is our understanding that U.S. Attorneys are now in the process of implementing this directive. Though well-intentioned, the McCallum Memorandum likely will result in numerous different waiver policies being established throughout the country, many of which may impose only token restraints on the ability of prosecutors to demand waiver. More importantly, it fails to acknowledge and address the many problems arising from the specter of forced waiver.

As you probably know, these views were expressed forcefully to Mr. McCallum on March 7 at a hearing of the House Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland Security. The U.S. Sentencing Commission also validated these concerns when it voted on April 5, over the Department's objection, to rescind the "waiver as cooperation" amendment it had made only two years earlier to the commentary on its Organizational Sentencing Guidelines.

We agree with the position taken by the American Bar Association, as well as by the members of a broad coalition to preserve the attorney-client privilege representing virtually every business and legal organization in this country: Prosecutors can obtain needed information in ways that do not impinge upon the attorney-client relationship – for example, through corporate counsel identifying relevant data and documents and assisting prosecutors in understanding them, making available witnesses with knowledge of the events under investigation, and conveying the results of internal investigations in ways that do not implicate privileged material.

In sum, we believe that the Thompson Memorandum is seriously flawed and undermines, rather than enhances, compliance with the law and the many other societal benefits that arise from the confidential attorney-client relationship. Therefore, we urge the Department to revise its policy to state affirmatively that waiver of attorney-client privilege and work-product protections should not be a factor in determining whether an organization has cooperated with the government in an investigation.

Thank you for considering our views on this subject, which is of such vital importance to our adversarial system of justice.

Sincerely,

Griffin B. Bell
Attorney General
(1977-1979)

Stuart M. Gerson
Acting Attorney General
(1993)
Assistant Attorney General,
Civil Division (1989-1993)

Dick Thornburgh
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