Transcript of House Judiciary Committee Markup of H.R. 3013, the "Attorney-Client Privilege Protection Act of 2007"

August 1, 2007

CONYERS:
Good morning, subcommittee. The committee will come to order.
We have a pretty large agenda: War Profiteering Prevention Act; Free Flow of Information; Attorney-Client Privilege Protection Act; MEJA Expansion and Enforcement Act; Purple Heart Family Equity Act.

…Pursuant to notice, the chair calls up H.R. 3013, the Attorney- Client Privilege Protection Act, and asks the clerk to report the bill.

CLERK:
H.R. 3013, a bill to provide appropriate protection to attorney-client privileged communications and attorney work product.

CONYERS:
Without objection, the bill will be considered read and open to amendment at any point.
And I ask the chairman of Crime Committee, Bobby Scott of Virginia, to introduce a description of this measure.

SCOTT:
Thank you, Mr. Chairman.
Mr. Chairman, the Subcommittee on Crime, Terrorism and Homeland Security reports favorably the bill H.R. 3013 and moves its favorable recommendation to the full House.
And I want to thank you, Mr. Chairman, for holding today's markup on this important bill. H.R. 3013, the Attorney-Client Privilege Protection Act of 2007, was introduced July 12th, and I was joined by eight original co-sponsors, including yourself, Mr. Chairman, Ranking Member Smith, Subcommittee Ranking Member Forbes, Representatives Coble, Davis, Lungren, Feeney and Roskam. I'd like to take a moment to personally thank each one of them for their support.
The purpose of the bill is fairly simple and straightforward. It's designed to prevent a practice that has regrettably become far too common in many of the federal government's recent investigations into corporate wrongdoing. I'm specifically referring to the government's use of coercion to gain access to sensitive communications that otherwise would remain private and protected under the doctrine of attorney-client privilege.
Coercive waivers of corporate attorney-client privilege has not always been a practice among federal prosecutors. Formerly, a company could evidence its cooperation with such prosecutors by providing insight and relevant corporate information, as well as providing general access to the company's workplace and its employees. After all, back then, the standard for establishing meaningful cooperation didn't require production of legally privileged communication or access to an attorney's work product materials.
Unfortunately, since that time, however, memoranda issued by the Department of Justice suggests that a clear change in policy has taken place, namely one that now exposes corporations to an

increased risk of prosecution and increased punishment if they claim constitutionally protected privilege.

The first such memorandum was issued in 1999, and other memorandums have been issued since then. Today, the current department policies relating to corporation attorney-client privilege and work product privilege waivers are embodied in the McNulty memorandum issued in December 2006. And while this new memorandum does state that waiver requests should be the exception rather than the rule, it continues to threaten the viability of the attorney- client privilege in business organizations.

I fully recognize that the department faces many hurdles when undertaking the investigation and prosecution of corporate malfeasance, but, Mr. Chairman, I think this is a reasonable response to what's been going on.

I'd ask, Mr. Chairman, unanimous consent to offer into the record the Washington Post editorial Tuesday, July 24th, in support of legislation in this matter.

CONYERS:
Without objection.

SCOTT:
I yield back.

CONYERS:
I thank the gentleman.
The ranking member, Lamar Smith.

SMITH:
Thank you, Mr. Chairman.

H.R. 3013 would bar federal prosecutors from requiring a waiver of attorney-client privilege by corporations. H.R. 3013 would not prohibit a corporation from voluntarily waiving the attorney-client privilege, though it's designed to remedy overreaching by federal prosecutors and will protect the attorney-client privilege, which is deeply rooted in our jurisprudence and the legal profession.

I yield my remaining time to the ranking member of the Crime Subcommittee, the gentleman from Virginia, Mr. Forbes.

FORBES:
Thank you, Ranking Member Smith.

And as mentioned by Chairman Scott, I'm an original co-sponsor of H.R. 3013, the Attorney-Client Privilege Protection Act of 2007. The subcommittee held two hearings on this issue, one in the 109th Congress and another in this Congress. Our main concern is that prosecutors may be overreaching by routinely demanding the corporations waive their attorney-client privilege as a condition of cooperation and a decision not to indict a company.

The attorney-client privilege encourages frank and open communication between clients and their attorneys so that clients, hopefully, can receive effective advice and counsel. I know that cooperation in the criminal justice system is an important engine of truth. To me, the critical question is whether prosecutors seeking to investigate corporation crimes can gain access to the information without requiring a waiver of the attorney-client privilege. There's simply no reason for prosecutors to require privilege waivers as a routine matter.

The proposed legislation will prevent prosecutors from overreaching by demanding waivers from corporations. Of course, corporations will continue to have the ability to waive the privilege if they voluntarily decide to do so.

I urge my colleagues to support the bill, and I yield back to the ranking member.

SMITH:
Mr. Chairman, I yield back.

CONYERS:
Thank you.
Are there any amendments to this bill?
Mr. Schiff?

SCHIFF:
Mr. Chairman, I move to strike the last word.

CONYERS:
The gentleman is recognized.

SCHIFF:
I thank the chairman. I know I'm probably begging his indulgence today. I've talked enough. But I'll be brief, and I don't have an amendment, but I would like to comment on some of the concerns I have about the bill that go to the unique nature of prosecuting a corporate defendant.

A defendant only acts through its officers, directors and employees. The corporation itself doesn't act. But the corporation is the holder of a privilege. It's not the employees that are the holders of the privilege. And in most corporations, when a corporation wants to protect its communications, it will routinely send those communications to the corporate counsel. They then become attorney-client privileged or work product.

So you can cover basically almost all the communications within a company if you want to by sending them to the legal counsel. They then become arguably, if not in fact, attorney-client work product. So when an employee does something wrong and the investigators and prosecutors look at whether they charge just the employee or they charge the corporation, the corporation will often want to cooperate with that investigation.

They may have disciplined the employee. They may have fired the employee. They may not have agreed at all with what the employee did. But it's own internal investigation is considered work product. Any communications they got from the errant employee could be arguably attorney-client privileged or work product. And a corporation that wants to cooperate, that doesn't want to be indicted, the board of directors of that corporation that want to protect the company and the shareholders and don't agree with what the errant employee did will have a hard time, I think, cooperating if this prohibition is written too broadly.

It's one thing to want to make sure that prosecutors aren't abusing it. And I know our chairman of the subcommittee is really trying to do this, and I really appreciate and compliment his efforts in this regard, but I want to make sure that we don't prohibit corporations from cooperating when they choose to.

And in a circumstance when a corporation says to a prosecutor, "Hey, look, we didn't know this was going on. As soon as we found out, we did something about it. We did an investigation on it. We want to cooperate; we're happy to cooperate in any way." If the prosecutor then says, Well, will you give us the results of your internal investigation?" that would, I think, violate this section, because it hasn't been offered and the prosecutor has asked for it.

Now, in point of fact, prosecutors ask individual defendants to waive rights all the time, constitutional rights. In the case of a corporation, it's not a constitutional right. A corporation as an artificial person doesn't have constitutional rights. But in the case of an individual, a prosecutor will often ask them to cooperate. And if they're willing to cooperate and waive their Fifth Amendment rights and testify, they can often get a reduced sentence by that cooperation.

So it's not unique to ask a corporate defender to cooperate; in fact, it's really less of an issue with the corporate defendant since they don't have a constitutional right. It's a statutorily created right. So I think we need to be careful.

I'm not sure that we have exactly the right balance here, in terms of not discouraging corporate cooperation, not making it harder to pursue these investigations. I know the chairman of the subcommittee had a hearing in subcommittee on the McNulty memo. I think the full committee would benefit from having more input about whether this is really being abused and whether we need to take action and, if so, whether we've struck the right balance here.

But my concern is that we don't deter corporations that want to cooperate with law enforcement and we don't hamstring prosecutors who want to ask for that cooperation. But where a corporation does say they want to cooperate, and where a prosecutor says, "Well, that's great. You know, can we have your internal investigation or your work product?" It seems to me this language would then empower the individual actor, the individual employee or officer, the errant officer, to say that that evidence cannot be used against him because the corporation was coerced into giving it under an offer of more lenient treatment or the corporation not be indicted.

And I think this could pose a real impediment to the prosecution of white-collar cases. And with that, I yield back.

CONYERS:
Thank you.
The chair recognizes...

LUNGREN:
Mr. Chairman?

CONYERS:
OK, Dan Lungren of California, you're recognized.

LUNGREN:
Thank you very much. I move to strike the requisite number of words.

CONYERS:
The gentleman is recognized.

LUNGREN:
Mr. Chairman, I rise in support of this bill. The common law privilege between attorney and client should be sacrosanct. It is one of those issues which should transcend partisanship. And it's for that reason that my colleague from Massachusetts, Mr. Delahunt, and I began working on this issue with respect to the United States' sentencing guidelines.

And although it was satisfying that the sentencing commission reversed its earlier decision to factor the waiver of the privilege into the sentencing guidelines, the Department of Justice, the Securities and Exchange Commission, and other federal agencies continue to pursue policies which encourage the erosion of this privilege.

Unfortunately, I must say that the attempt by the Department of Justice to cut the proverbial baby in half is less than satisfactory. Allowing the waiver to be considered as a plus factor under the McNulty memorandum does not assuage those of us who believe the attorney-client privilege must be protected.

Ironically, I believe that interference with the privilege will have the opposite effect that those who support the current process seek; that is, it will have the effect of undermining internal legal

compliance programs. We should remember that an ounce of prevention is worth a pound of cure, and we must keep in mind that lawyers play a key role in helping companies understand the complex legal environment in which they operate.

As the United States Supreme Court observed, the privilege encourages, quote, "full and frank communication between attorneys and their clients and thereby promotes broader public interest in the observance of law and the administration of justice." I would think we would want to encourage corporations to seek appropriate legal counsel from their counsel such that they do not run afoul of the law.

The current Department of Justice guidelines, even after the McNulty memorandum, do not serve this important public policy objective. Furthermore, manipulation of the attorney-client privilege is entirely unnecessary to successful prosecution. As Attorney General Dick Thornburgh testified before us, in his nine years at the Department of Justice, including that time when he was the attorney general, he could not remember a single case where the government felt it was necessary to obtain attorney-client privileged material.

In fact, the committee has received a letter supporting H.R. 3013 from a bipartisan group of former attorneys general, solicitor generals, and top Justice Department officials signed by Ed Meese, Dick Thornburgh, Seth Waxman, Kenneth Starr, Ted Olsen, Walter Dellinger, Jamie Gorelick, Carol Dinkins [correction of the original “Gerald Binken (ph)”] and Stuart Gerson.

They acknowledge the need, quote, "to restore the proper balance between the tools that the government needs to fight corporate crime and the rights of individual and corporate citizens." They ask us further, quote, "to support the prompt enactment of the Attorney- Client Privilege Protection Act of 2007 or other similar legislation."

I might just mention that, in Hickman v. Taylor, the United States Supreme Court talked about what the gentleman from California has referred, that is attorney work product. At page 510, the Supreme Court said this: "Not even the most liberal discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney. It is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."

"Proper preparation of a client's case demands that he assembles information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue or needless interference. That is the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their client's interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways, aptly though roughly terms by the Circuit of Appeals in this case as the work product of a lawyer."

And the court continues, "But the general policy against invading the privacy of an attorney's course of preparation is so well- recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reason to justify production through a subpoena or court order."

It's for this reason that I support this bill. We have seen the Justice Department attempt to come back from the precipice on which they've found themselves with the original memorandum, but as they have gone in the various iterations, they still come to this position of undermining the essential attorney-client privilege and work product doctrine.

And as I say, I think we would want corporations to rely on legal counsel rather than avoid legal counsel because of the developments that we have seen. It went through the Justice Department, and then we saw it in the sentencing commission. We managed to bring the sentencing commission back. We've been unable to bring the Justice Department back to a sufficient level to protect this interest, and I think it is up to this Congress to restore the attorney-client privilege, which has served the Anglo-American legal system from time immemorial.

And with that, I yield back.

CONYERS:
I thank the gentleman. Could I ask him if this issue came up when he was working in California in a law enforcement...

LUNGREN:
I do not recall this being a specific request by my attorneys saying that we needed the demand, this as a means of showing cooperation. And also, when the gentleman from California is concerned about voluntary disclosures, we have tried to address that on page six of the bill, lines 21 to 25.

I understand the gentleman's concern, but I thought by the definition of voluntary disclosures, we go about as far as we possibly can on that. And I would think the Justice Department would be clever enough to be able to come within the ambit of the voluntary disclosures in the circumstance that the gentleman mentioned.

CONYERS:
I thank the gentleman.

The chair recognizes the gentleman from Virginia, Mr. Boucher.

BOUCHER:
Thank you very much, Mr. Chairman.

I would like to yield my time to the gentleman from Virginia, Mr. Scott.

SCOTT:
Thank you, Mr. Chairman.

Just very briefly, I'd like to respond to the comments from the gentleman from California. I think the other gentleman from California made most of the comments that needed to be made. I would just point out that it's I think unreasonable to punish people for exercising their constitutional rights.

The Justice Department indicates that they're not punishing people for exercising their rights; they're just not giving them a discount for waiving their rights. And that creates one sentence if you insist on your rights, another sentence if you don't. You can call that discount; you can call that punishment. There is a difference, and you are punished for exercising your rights.

They can waive their rights if they want, but they shouldn't be coerced into waiving their rights. And I think the Justice Department has just gone too far, and that's why the Washington Post wrote the editorial that legislation was needed.

SCHIFF:
Would the gentleman yield for a moment?

SCOTT:
It's my colleague from Virginia's time.

SCHIFF:
Would Mr. Boucher yield?

BOUCHER:
I would be pleased to yield.

SCHIFF:
I appreciate the comments of my friend from Virginia, and I agree with him, certainly. I'm not suggesting that I think that anyone should be coerced into giving up their privilege or their rights.

But I don't see as different in kind when you ask a defendant, an individual, to cooperate with law enforcement and you ask them to testify. They have a Fifth Amendment right not to testify. You ask them to cooperate and testify, they do so, they waive that right. They get better treatment as a result of cooperating.

Now, you could say that they've been coerced into giving up a right or you could say that they have agreed to cooperate and then given a benefit. The same is true in the case of a corporation that agrees to give up its work product. You can say that they're being coerced into it, or you can say they're being given better treatment because of it. But I think, frankly, I'd be more concerned about coercion when you're talking about an individual giving up their right against self-incrimination than I would the artificial person of a corporation given up their statutory work product privilege.

So I agree, and I think that, if there's coercion going on, we shouldn't allow coercion. But I also don't want to prohibit companies that in good faith want to cooperate from being able to do so.

And I would yield back my time.

WATERS:

Would the gentleman yield, Mr. Boucher?

BOUCHER:

I'll be happy to yield to the gentlelady.

WATERS:

Yes, I listened very carefully to Mr. Schiff talking about voluntary cooperation. What I think I'm concerned about is encouraging individuals or organizations to waive their attorney-client privileges in exchange for not getting indicted. And that is hard to resist, I'm sure, in many cases, and that's the kind of coercion that I'm really concerned about. That's why this bill is very important.

I yield back the balance of my time.

BOUCHER:

Thank you very much. No one else seeking recognition?

Thank you, Mr. Chairman, I yield back.

CONYERS:

Thank you.

Ladies and gentlemen, we're going to vote on this matter, and then I wish to remind all members of the committee that, at 3:30, we have a FISA briefing for the members of the House of Representatives. Many of you had been at yesterday for the exclusive briefing for the Judiciary Committee. At 3:30, that committee will be meeting in 2118, the Armed Services Committee, and all are invited to join it. It's very important, and Lamar Smith and I will be there, and we will be going through this material yet again.

COBLE:

Mr. Chairman?

CONYERS:

Yes, sir?

COBLE:

Mr. Chairman, will this be a repeat of yesterday or something in addition to yesterday?

CONYERS:
No, it will be essentially a repeat. But depending on who's there, you always get different questions.

COBLE:
All right, thank you, sir.

CONYERS:
Thank you.
If there are no amendments and a reporting quorum is present, the question on reporting this bill favorably to the House will now take place.
All those in favor signifying -- all those in favor of the bill will signify by saying aye.
Those opposed, say no.
The ayes have it, and the bill is ordered reported favorably to the House.
We now have a bill that will be reported -- a bill in which the staff will be directed to make any technical and conforming changes, and all members have two days to submit additional views.
That concludes our business for today, and we stand in recess until -- well, subject to the call of the chair. We've notified the ranking member, Lamar Smith, and we will reconvene to finish our pending business, of which there's an agenda of three measures. I will be back to you to advise you as to when the committee will be meeting. And for now, I thank you for your cooperation.

And the committee stands in recess, subject to the call of the chair. Thank you.

CQ Transcriptions, Aug. 1, 2007

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