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**WHITE COLLAR ENFORCEMENT (PART 1):**  
**ATTORNEY-CLIENT PRIVILEGE AND CORPORATE**  
**WAIVERS**

Tuesday, March 7, 2006

House of Representatives,

Subcommittee on Crime, Terrorism, and Homeland Security,

Committee on the Judiciary,

Washington, D.C.

**Committee Hearings**

of the

**U.S. HOUSE OF REPRESENTATIVES**



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10 |       The subcommittee met, pursuant to notice, at 12:00 p.m.,  
11 | in Room 2141, Rayburn House Office Building, Hon. Howard  
12 | Coble [chairman of the subcommittee] presiding.

13 Mr. COBLE. Good afternoon, ladies and gentlemen. We  
14 welcome you to this important oversight hearing on white  
15 collar crime and the issue of the attorney-client privilege  
16 and waivers by corporations in criminal investigations.

17 At first blush, some may say that this topic is an  
18 arcane legal issue with little relevance to the general  
19 public. In fact, the attorney-client privilege is deeply  
20 rooted in our values and the legal profession. It encourages  
21 openness and honesty between clients and their attorneys so  
22 that clients hopefully can receive effective advice and  
23 counsel.

24 But this privilege is not inviolate. When it comes to  
25 corporate crime, there is and probably always will be an  
26 institutional tension between preserving corporate  
27 attorney-client and work product privileges and a  
28 prosecutor's quest to unearth the truth about criminal acts.

29 I know that one of the most important engines in our  
30 criminal justice system is cooperation. By encouraging and  
31 rewarding cooperation, prosecutors are able to unearth  
32 sophisticated fraud schemes which cause devastating harm to  
33 investors and employees and undermine our faith in the  
34 markets.

35 But the possible benefits of cooperation cannot be used  
36 to support a prosecutor's laundry list of demands for a  
37 cooperating corporation. Prosecutors must be zealous and

38 | vigorous in their efforts to bring corporate actors to  
39 | justice. However, zeal does not in my opinion equate with  
40 | coercion in fair enforcement of these laws.

41 |         To me, the important question is whether prosecutors  
42 | seeking to investigate corporate crimes can gain access to  
43 | the information without requiring a waiver of the  
44 | attorney-client privilege. There is no excuse for  
45 | prosecutors to require privilege waivers as a routine matter,  
46 | it seems to me.

47 |         The subcommittee will examine the important issue with a  
48 | keen eye to determine whether Federal prosecutors are  
49 | routinely requiring cooperating corporations to waive such  
50 | privilege. Then-Acting Deputy Attorney General McCallum  
51 | issued a memorandum on October 21, 2005 which mandated a  
52 | change in Justice Department policy to try to establish a  
53 | more uniform review procedure for any such requirement  
54 | imposed by a prosecutor.

55 |         This is a welcome development, and the subcommittee is  
56 | interested in determining how that policy has been  
57 | implemented. I am also aware of the fact that the Sentencing  
58 | Commission is examining its current policy of encouraging  
59 | such waivers when determining the nature and extent of  
60 | cooperation.

61 |         While the guidelines do not explicitly mandate a waiver  
62 | of privileges for the full benefit of cooperation, in

63 | practical terms we have to make sure that they do not operate  
64 | to impose such a requirement. Our subcommittee needs to  
65 | examine this issue, work closely with the Sentencing  
66 | Commission, the defense bar, and the Justice Department to  
67 | make sure that a fair balance is struck.

68 | I look forward to hearing from our distinguished panel  
69 | of witnesses today, and I am now pleased to recognize the  
70 | distinguished gentleman from Virginia, the Ranking Member of  
71 | the subcommittee, Mr. Bobby Scott.

72 | [The statement of Mr. Coble follows:]

73 | \*\*\*\*\* SUBCOMMITTEE INSERT \*\*\*\*\*

74 | Mr. SCOTT. Thank you, Mr. Chairman. And I want to  
75 | thank you for holding this hearing on attorney-client  
76 | privilege and corporate waivers of that privilege.

77 | Attorney-client privilege is more usually associated  
78 | with the context of protecting an individual from having to  
79 | disclose communications with his or her lawyer for the  
80 | purpose of criminal or civil prosecution, corporations or  
81 | persons, for the sake of legal processes that are also  
82 | entitled to attorney-client privilege.

83 | As noted by the United States Supreme Court in Upjohn  
84 | vs. U.S., the attorney-client privilege is the oldest of  
85 | privileges for confidential communications known to common  
86 | law. Its purpose is to encourage full and frank  
87 | communications between attorneys and their clients so that  
88 | sound legal advice and advocacy can be given by counsel.  
89 | Such advice or activity depends upon the lawyer being fully  
90 | informed by the client.

91 | As noted in other cases, the lawyer-client privilege  
92 | rests on the need for the advocate and counselor to know all  
93 | that relates to the client's reasons for seeking  
94 | representation if the professional mission is to be carried  
95 | out. This purpose can only be effectively carried out when  
96 | the client is free from consequences or apprehensions  
97 | regarding the possibility of disclosure of the information.

98 | Exceptions to protections of the attorney--excuse me.

99 | Exceptions to the protections of the privilege do exist, but  
100 | they have generally been limited to the crime-fraud  
101 | exception, which holds that the privilege does not apply to  
102 | an attorney-client communication in furtherance of a crime,  
103 | or other cases where the client has already waived the  
104 | privilege through disclosure to a non-privileged third party.

105 |         Now it appears that the Department of Justice has  
106 | determined that there may be another exception, that is, when  
107 | it wishes the corporation to waive the privilege in the  
108 | context of a criminal investigation. For some time now I  
109 | have been concerned about reports that the Department of  
110 | Justice is coercing corporations to waive their  
111 | attorney-client privilege during criminal investigations of  
112 | the corporation and its employees by making waiver a  
113 | prerequisite for consideration by the Department and its  
114 | recommendation for not challenging leniency should criminal  
115 | conduct be established.

116 |         Now, this is particularly significant because under  
117 | mandatory minimums and sentencing guidelines, prosecutorial  
118 | motions for leniency may be the only way to get a sentence  
119 | under the mandatory minimum. So in this case, a prosecutor  
120 | often has more control over sentencing than the judge.

121 |         While the attorney-client privilege doctrine does apply  
122 | to corporations, complications arise when the client is a  
123 | corporation since the corporate privilege has to be asserted

124 | by persons who may themselves be the target of a criminal  
125 | investigation or subject to criminal charges based on the  
126 | disclosed attorney-client information. Disclosed information  
127 | can be used either in criminal prosecutions or civil  
128 | prosecutions. Whatever fiduciary duty an official may have  
129 | to the corporation and its shareholders, it is probably  
130 | superseded by the official's own self-interest in the  
131 | criminal investigation.

132 |         And there is no protection for employees of the  
133 | corporation against waivers of the attorney-client privilege  
134 | by officials who may have their own self-interest at heart.  
135 | This includes information provided by employees to corporate  
136 | counsel to assist internal investigations by the corporation,  
137 | even if the information was under threat of an employee being  
138 | fired and even if the information constituted  
139 | self-incrimination by the employee.

140 |         It is one thing for officials of a corporation to break  
141 | the attorney-client privilege in their own self-interest by  
142 | their own volition. It is another thing for the Department  
143 | to require or coerce it by making leniency considerations  
144 | contingent upon it, even when it is merely on a fishing  
145 | expedition on the part of the Department. Complaints have  
146 | indicated that the practice of requiring a waiver of the  
147 | corporate attorney-client privilege has become routine. And,  
148 | of course, why wouldn't it be the case? What is the



149 advantage to the Department of not requiring a waiver in the  
150 corporate investigation?

151 Now, because of the exclusionary rule, when a confession  
152 is coerced or a search is conducted illegally, anything that  
153 is found of that becomes fruit of a poisonous tree and can't  
154 be used in a criminal prosecution. So police and prosecutors  
155 who jeopardize the case by such tainted evidence are  
156 generally disparaged by their colleagues, and thus there is a  
157 disincentive for them to pursue and collect such evidence in  
158 the first place. There is no incentive to collect evidence  
159 if it is going to ruin the case.

160 Although coerced confessions and illegal searches are  
161 always improper, before the exclusionary rule there was an  
162 incentive for police to coerce confessions and illegally  
163 obtain information because they could make a case based on  
164 it, and there was no penalty.

165 Here we have the same incentives with respect to the  
166 waiver of corporate privilege. So, not surprisingly, reports  
167 are the demand for waivers are rising, not only by the  
168 Department but by other entities as well, such as auditors as  
169 a prerequisite of issuing a clean audit.

170 Now, coercing corporate attorney-client privileges has  
171 not been--has not long been the practice in the Department.  
172 It has really been the last two administrations that have  
173 practiced this, and it has been growing by leaps and bounds.

174 Corporate attorney-client privilege has not always been the  
175 prerequisite for leniency. Providing non-privileged  
176 documents and information and providing broad access to  
177 corporate premises and employees have been traditional ways  
178 to receive benefits of corporate cooperation.

179 Some nine U.S. Attorneys General, Deputy Attorneys  
180 General, and Solicitors General have expressed their concerns  
181 about the current Departmental waiver policy. We will hear  
182 from witnesses today who have prosecuted corporate cases  
183 without requiring such waiver. And so, Mr. Chairman, we look  
184 forward to the testimony by witnesses and to working with you  
185 to address the concerns regarding the Department's corporate  
186 attorney-client waiver policy.

187 [The statement of Mr. Scott follows:]

188 \*\*\*\*\* SUBCOMMITTEE INSERT \*\*\*\*\*

189 Mr. COBLE. Thank you, Mr. Scott. And gentlemen, we  
190 have been joined by the distinguished gentleman from  
191 California, Mr. Lungren, the distinguished gentleman from  
192 Florida, Mr. Feeney, and distinguished gentleman from  
193 Massachusetts, Mr. Delahunt.

194 Gentlemen, what I am about to do I am very awkward in  
195 doing it. It is customary for the subcommittee to administer  
196 the oath to the panelists. I know you all. I know you don't  
197 need to be sworn in to tell the truth. But if you don't  
198 mind, would each of you please stand and raise your hands.

199 [Witnesses sworn.]

200 Mr. COBLE. Let the record show each witness answered in  
201 the affirmative. And I have had the fear if I depart with  
202 you all, then the next panel is going to wonder why I don't  
203 depart from them. But you all, I am not worried about what  
204 you all say violating the truth in any way.

205 As I said before, we have four distinguished witnesses  
206 with us today. Our first witness is Mr. Robert McCallum,  
207 Jr., Associate Attorney General of the Department of Justice.  
208 In this capacity, Mr. McCallum advises and assists the  
209 Attorney General and the Deputy Attorney General in  
210 formulating policies pertaining to a broad range of civil  
211 justice, Federal and local law enforcement, and public safety  
212 matters. Prior to this appointment, he served as Assistant  
213 Attorney General for the Civil Division. Mr. McCallum

214 | received his undergraduate and law degrees from Yale  
215 | University, and was a Rhodes Scholar at Oxford University.

216 |         Our second witness is returning to the Hill after some  
217 | extended absence, the Honorable Dick Thornburgh of  
218 | Kirkpatrick & Lockhart Nicholson Graham. Mr. Thornburgh's  
219 | distinguished public career extends over a quarter of a  
220 | century. He previously served as Governor of Pennsylvania,  
221 | Attorney General under Presidents Reagan and Bush, and  
222 | Undersecretary General of the United Nations.

223 |         Mr. Thornburgh has been awarded honorary degrees by 31  
224 | colleges and universities, and previously served as Director  
225 | of the Institute of Politics at Harvard's John F. Kennedy  
226 | School of Government. Mr. Thornburgh earned his  
227 | undergraduate degree at Yale and his law degree at the  
228 | University of Pittsburgh School of Law.

229 |         Our third witness is Mr. Thomas Donohue, President and  
230 | CEO of the United States Chamber of Commerce. In his current  
231 | capacity, Mr. Donohue has expanded the influence of the  
232 | Chamber across the globe. He engaged the Chamber Institute  
233 | for Legal Reform and revitalized the National Chamber  
234 | Foundation. Previously, Mr. Donohue served for 13 years as  
235 | President and CEO of the American Trucking Association, and  
236 | was awarded his bachelors degree from St. Johns University  
237 | and a masters degree from Adelphi University.

238 |         Our fourth and final witness today is Mr. William

239 Sullivan, Jr., litigation partner at Winston & Strawn. In  
240 this capacity, Mr. Sullivan concentrates on corporate  
241 internal investigations, trial practice, white collar  
242 criminal defense, and complex securities litigation.

243 Previously, he served for over 10 years as an Assistant  
244 United States Attorney for the District of Columbia, and has  
245 worked in private practice as a litigator. Additionally, Mr.  
246 Sullivan has addressed the World Trade Organization on  
247 Sarbanes-Oxley issues. He received his bachelors and masters  
248 degrees from Tufts University and his law degree from Cornell  
249 University.

250 Gentlemen, it is good to have you all with us. And as  
251 we have previously told you, without hamstringing you too  
252 severely, we try to apply the 5-minute rule here. And when  
253 you all see that amber light on your panel appear, that tells  
254 you that the ice on which you are skating is becoming thin.  
255 You have about a minute to go. And we're not going to  
256 keelhaul anybody for violating it, but if you can wrap up in  
257 as close to 5 minutes as you can.

258 Mr. McCallum, why don't you kick us off.

259 TESTIMONY OF ROBERT D. McCALLUM, JR., ASSOCIATE ATTORNEY  
260 GENERAL, U.S. DEPARTMENT OF JUSTICE; HON. DICK THORNBURGH,  
261 KIRKPATRICK & LOCKHART NICHOLSON GRAHAM LLP; THOMAS J.  
262 DONOHUE, PRESIDENT AND CEO, U.S. CHAMBER OF COMMERCE; AND  
263 WILLIAM M. SULLIVAN, JR., LITIGATION PARTNER, WINSTON &  
264 STRAWN

265 TESTIMONY OF ROBERT D. McCALLUM, JR.

266 Mr. MCCALLUM. Thank you, Mr. Chairman, Ranking Member  
267 Scott, and members of the committee. We appreciate at the  
268 Department of Justice this opportunity to appear before you  
269 today.

270 Now, President Bush, this Congress, and the American  
271 people have all embraced a zero tolerance policy when it  
272 comes to corporate fraud. In passing the landmark  
273 Sarbanes-Oxley legislation in 2002, Congress gave the  
274 Department of Justice clear marching orders: prosecute fully  
275 those who would use their positions of power and influence in  
276 corporate America to enrich themselves unlawfully, and  
277 thereby restore confidence in our financial markets.

278 And we have done exactly that, Mr. Chairman. From July  
279 2002 through December 2005, the Department has secured more  
280 than 900 corporate fraud convictions, including 85  
281 presidents, 82 chief executive officers, 40 chief financial

282 officers, 14 chief operating officers, 17 corporate counsel  
283 or attorneys, and 98 vice presidents, as well as millions of  
284 dollars in damages for victims of fraud.

285 Much of our success depends on our ability to secure  
286 cooperation. As Chairman Sensenbrenner noted recently, and I  
287 quote, ``By encouraging and rewarding corporate cooperation,  
288 our laws serve the public interest in promoting corporate  
289 compliance, minimizing use of our enforcement resources, and  
290 leading to the prosecution and punishment of the most  
291 culpable actors.''

292 The Department's approach to corporate fraud is set  
293 forth in the so-called Thompson Memorandum, issued by Larry  
294 D. Thompson as Deputy Attorney General. Pursuant to that  
295 memorandum, the degree to which a corporation cooperates with  
296 a criminal investigation may be a factor to be considered by  
297 prosecutors when determining whether or not to charge the  
298 corporation with criminal misconduct.

299 Cooperation in turn depends on--and here I quote the  
300 Thompson Memorandum--``the corporation's willingness to  
301 identify the culprits within the corporation, including  
302 senior executives; to make witnesses available; to disclose  
303 the complete results of its internal investigation; and to  
304 waive attorney-client and work product protections.''

305 Some critics have suggested that the Department is  
306 contemptuous of legal privileges. Nothing could be further

307 | from the truth. We recognize the ability to communicate  
308 | freely with counsel can serve legitimate and important  
309 | functions and encourage responsible corporate stewardship and  
310 | corporate governance.

311 |         But at the same time, we all must recognize that  
312 | corporate fraud is often highly difficult to detect. Indeed,  
313 | in recent years we have witnessed a series of highly complex  
314 | corporate scandals which would have been difficult to  
315 | prosecute in a timely and efficient manner without corporate  
316 | cooperation, including in some instances the waiver of  
317 | privileges.

318 |         The Thompson Memorandum carefully balances the  
319 | legitimate interests furthered by the privilege, and the  
320 | societal benefits of rigorous enforcement of the laws  
321 | supporting ethical standards of conduct.

322 |         There is also a so-called McCallum Memorandum, issued  
323 | during my tenure as Acting Deputy Attorney General last year,  
324 | which adds to this balancing of the competing interests. The  
325 | McCallum memorandum first ensures that no Federal prosecutor  
326 | may request a waiver without supervisory review. And second,  
327 | it requires each United States Office to institute a written  
328 | waiver review policy governing such requests.

329 |         Mr. Chairman, I recognize that despite these limitations  
330 | and restrictions, there are some critics of the Department's  
331 | approach. While I look forward to addressing specific



332 | concerns of the members of this subcommittee that may occur  
333 | during the questioning, let me make a few preliminary  
334 | observations.

335 |         First, voluntary disclosure is but one factor in  
336 | assessing cooperation, and cooperation in turn is but one  
337 | factor among many considered in any charging decisions.  
338 | Disclosures thus is not required to obtain credit for  
339 | cooperation in all cases; cooperation may be had by  
340 | corporations most readily without waiving anything, simply by  
341 | identifying the employees best situated to provide the  
342 | Government with relevant information.

343 |         Nor can the Government compel corporations to give  
344 | waivers. Corporations are generally represented by  
345 | sophisticated and accomplished counsel who are fully capable  
346 | of calculating the benefits or harms of disclosures.  
347 | Sometimes they agree; sometimes they do not agree. Whether  
348 | to disclose information voluntarily always remains within the  
349 | corporation's choice. And in fact, voluntary disclosures are  
350 | frequently initiated by the corporate counsel and not by the  
351 | Government.

352 |         Second, under our process, waivers of privileges should  
353 | not be routinely sought, and we believe are not routinely  
354 | sought. Indeed, they should be sought based upon a need for  
355 | three things: timely, complete, and accurate information.  
356 | And they should be requested pursuant to the established

357 | guidelines, and only with supervisory approval.

358 |         Third, our approach does not diminish a corporation's  
359 | willingness to undertake investigations, in our view. Wholly  
360 | apart from the Government's criminal investigations,  
361 | corporate management owes to its shareholders, not to itself  
362 | or to its employees, but to its shareholders, a fiduciary  
363 | duty to investigate potential wrongdoing and to take  
364 | corrective action. To the extent that shareholders are best  
365 | served by timely internal investigations, responsible  
366 | management will always do so.

367 |         And finally, in some jurisdictions, voluntary disclosure  
368 | to the Government waives privileges in civil litigation  
369 | seeking monetary damages, thus, it is said, compounding the  
370 | corporation's litigation risk. Addressing this concern, the  
371 | committee should be aware that the Evidence Committee of the  
372 | Advisory Rules of the Judicial Conference is currently  
373 | considering a rule that would limit use by others of  
374 | privileged material voluntarily provided by a corporation in  
375 | its cooperation with a Government investigation. We at the  
376 | Department of Justice will be involved in the Federal Rules  
377 | Advisory Committee on Evidence considering that, and we will  
378 | watch that debate with interest.

379 |         In sum, Mr. Chairman, we believe that the Department has  
380 | struck an appropriate balance between traditional privileges  
381 | and the American people's legitimate law enforcement needs

382 | and the necessity of establishing standards.

383 | Thank you for the opportunity to testify.

384 | [The statement of Mr. McCallum follows:]

385 | \*\*\*\*\* INSERT \*\*\*\*\*

386 | Mr. COBLE. Thank you, Mr. McCallum.

387 | Mr. Thornburgh.

388 TESTIMONY OF HON. DICK THORNBURGH

389 Mr. THORNBURGH. Chairman Coble, Ranking Member Scott,  
390 members of the subcommittee, I want to thank you for the  
391 invitation to speak to you today about the grave dangers  
392 posed to the attorney-client privilege and work product  
393 doctrine by current governmental policies and practices.

394 At the outset, let me commend you for being the first  
395 Congressional body to convene a hearing on this very  
396 worrisome situation. The attorney-client privilege, as we  
397 all know, is a fundamental element of the American system of  
398 justice, and I fear that we have all been too slow in  
399 recognizing how seriously the privilege has been undermined  
400 in the past several years by Government action. Your focus  
401 on this issue today is vitally needed and much appreciated.

402 The attorney-client privilege is the oldest of the  
403 evidentiary privileges originating in the common law of  
404 England in the 1500s. Although the privilege shields from  
405 disclosure evidence that might otherwise be admissible,  
406 courts have found that this potential loss of evidence is  
407 outweighed by the benefits to the immediate client, who  
408 receives better advice, and to society as a whole, which  
409 obtains the benefits of voluntary legal compliance.

410 These ideas have been embraced time and time again by  
411 our courts. In the words of the Supreme Court, the privilege

412 encourages ``full and frank communication between attorneys  
413 and their clients, and thereby promotes broader public  
414 interest in the observance of law and the administration of  
415 justice.'' The attorney-client privilege is thus a core  
416 element in a law-abiding society and a well-ordered  
417 commercial world.

418         And yet the previously solid protection that  
419 attorney-client communications have enjoyed has been  
420 profoundly shaken by a trend in law enforcement for the  
421 Government to, in effect, demand a waiver of a corporation's  
422 privilege as a precondition for granting the benefits of  
423 cooperation that might prevent indictment or diminish  
424 punishment. These pressures emanate chiefly from the  
425 Department of Justice and the Securities and Exchange  
426 Commission.

427         Beginning with the 1999 Holder Memorandum, and as more  
428 forcefully stated in the 2003 Thompson Memorandum, the  
429 Department of Justice has made clear its policy that waiver  
430 of the attorney-client and work product protections is an  
431 important element in determining whether a corporation may  
432 get favorable treatment for cooperation. The SEC, in a  
433 public report issued at the conclusion of an investigation,  
434 outlined a similar policy.

435         Finally, the U.S. Sentencing Commission in 2004 amended  
436 the commentary to its sentencing guidelines so that waiver of

437 | privilege becomes a significant factor in determining whether  
438 | an organization has engaged in timely and thorough  
439 | cooperation necessary for obtaining leniency. Following the  
440 | Federal lead, State law enforcement officials are beginning  
441 | to demand broad privilege waivers, as are self-regulatory  
442 | organizations and the auditing profession.

443 |         While the tone of these documents may be moderate, and  
444 | officials representing these entities stress their intent to  
445 | implement them in reasonable ways, it has now become  
446 | abundantly clear that in actual practice, these policies pose  
447 | overwhelming temptations to prosecutors seeking to save time  
448 | and resources and to target organizations desperate to save  
449 | their very existence. And each waiver has a ripple effect  
450 | that creates more demands for greater disclosures, both in  
451 | individual cases and as a matter of practice. Once a  
452 | corporation discloses a certain amount of information, then  
453 | the bar is raised for the next situation, and each subsequent  
454 | corporation will need to provide more information to be  
455 | deemed cooperative.

456 |         The result is documented in a survey released just this  
457 | week to which over 1400 in-house and outside counsel  
458 | responded, in which almost 75 percent of both groups  
459 | agreed--almost 40 percent agreeing strongly--that a culture  
460 | of waiver has evolved in which Government agencies believe it  
461 | is reasonable and appropriate for them to expect a company

462 | under investigation to broadly waive attorney-client  
463 | privilege or work product protections.

464 |       I practice law at a major firm with a significant white  
465 | collar criminal defense practice. My partners generally  
466 | report that they now encounter waiver requests in virtually  
467 | every organizational criminal investigation in which they are  
468 | involved. In their experience, waiver has become a standard  
469 | expectation of Federal prosecutors. Others with whom I have  
470 | spoken in the white collar defense bar tell me the same  
471 | thing.

472 |       I am prepared to concede that the significance of these  
473 | developments took some time to penetrate beyond the Beltway  
474 | and the relatively small community of white collar defense  
475 | lawyers. It is clear, however, that as the legal profession  
476 | has become aware of the problem, it has resulted in a strong  
477 | and impassioned defense of the attorney-client privilege and  
478 | the work product protection.

479 |       This issue was the hottest topic at last summer's annual  
480 | meeting of the American Bar Association, and at its  
481 | conclusion, the ABA House of Delegates unanimously passed a  
482 | resolution that strongly supports the preservation of the  
483 | attorney-client privilege and opposes policies, practices,  
484 | and procedures of Government bodies that have the effect of  
485 | eroding the attorney-client privilege.

486 |       I was one of those nine former Department of Justice



487 officials from both Republican and Democratic administrations  
488 who, as the Chairman noted, signed a letter to the Sentencing  
489 Commission last summer urging it to reconsider its recent  
490 amendment regarding waiver.

491 It is never a simple matter to enlist such endorsements,  
492 particularly in the summertime and on short notice. And yet  
493 it was not difficult at all to secure those nine signatures  
494 because all feel so strongly about the fundamental role the  
495 attorney-client privilege and work product protections play  
496 in our system of justice.

497 We feel just as strongly that the other governmental  
498 policies and practices outlined above seriously undermine  
499 those protections. As you know, I served as a Federal  
500 prosecutor for many years, and I supervised other Federal  
501 prosecutors in my capacities as U.S. Attorney, Assistant  
502 Attorney General in charge of the Criminal Division, and  
503 Attorney General of the United States. Throughout those  
504 years, requests to organizations we were investigating to  
505 hand over privileged information never came to my attention.  
506 One wonders what has changed in the past decade to warrant  
507 such a dramatic encroachment on the attorney-client  
508 privilege.

509 Clearly, in order to be deemed cooperative, an  
510 organization under investigation must provide to the  
511 Government all relevant factual information and documents in



512 | its possession, and it should assist the Government by  
513 | explaining the relevant facts and identifying individuals  
514 | with knowledge of them. But in doing so, it should not have  
515 | to reveal privileged communications or attorney work product.

516 |       That limitation is necessary to maintain the primacy of  
517 | those protections in our system of justice. It is a fair  
518 | limitation on prosecutors, who have extraordinary powers to  
519 | gather information for themselves. This balance is one I  
520 | found workable in my years of Federal service, and it should  
521 | be restored.

522 |       I was pleased to see the Sentencing Commission earlier  
523 | this year request comment on whether it should delete or  
524 | amend the commentary sentence regarding waiver. In testimony  
525 | last fall, I urged it to provide affirmatively that waiver  
526 | should not be a factor in assessing cooperation. I  
527 | understand that the American Bar Association will shortly  
528 | approach the Department of Justice with a request that the  
529 | Thompson Memorandum be revised in similar fashion. These are  
530 | promising developments.

531 |       Mr. Chairman, I thank you again for beginning a  
532 | much-needed process of Congressional oversight of the  
533 | privilege waiver crisis. This is not an issue that  
534 | Washington lobby groups have orchestrated, but it is one that  
535 | likely will take Congressional attention to resolve.

536 |       Thank you. I look forward to your questions.

537

[The statement of Mr. Thornburgh follows:]

538

\*\*\*\*\* INSERT \*\*\*\*\*

539 Mr. COBLE. Thank you, Mr. Thornburgh.

540 And Mr. Donohue, in a sense of equity and fairness,  
541 since I permitted Mr. McCallum and Mr. Thornburgh to exceed  
542 the red light, I will not crack the hammer on you once that  
543 red light illuminates.

544 You are now recognized.

545 TESTIMONY OF THOMAS J. DONOHUE

546 Mr. DONOHUE. Thank you, Mr. Chairman, Mr. Scott,  
547 members of the committee.

548 I am here today representing the Chamber and on behalf  
549 of a coalition to preserve the attorney-client privilege,  
550 which includes many of the major legal and business  
551 associations in our country, including the American Chemistry  
552 Council, the American Civil Liberties Union, the Association  
553 of Corporate Counsel, the Business Civil Liberties, Inc., the  
554 Business Roundtable, the Financial Services Roundtable,  
555 Frontiers of Freedom, the National Association of Criminal  
556 Defense Lawyers, the National Association of Manufacturers,  
557 the National Defense Industrial Association, the Retail  
558 Industry Leaders Association, and the Washington Legal  
559 Foundation.

560 I should add that the coalition is working closely with  
561 the American Bar Association, which has separately submitted  
562 written testimony here today detailing its concerns about the  
563 erosion of the attorney-client privilege. ABA policy  
564 prevents the organization from being listed as a member of  
565 broader coalitions.

566 The privilege to consult with an attorney freely,  
567 candidly, and confidentially is a fundamental constitutional  
568 right that in our opinion is under attack. Recent policy

569 | changes at the Department of Justice and, very importantly,  
570 | at the SEC have permitted and encouraged the Government to  
571 | demand or expect companies to waive their attorney-client  
572 | privilege or work product protections during an  
573 | investigation.

574 |         A company is required to waive its privilege in order to  
575 | be seen as cooperating with Federal investigators. A company  
576 | that refuses to waive its privilege risks being labeled as  
577 | uncooperative, which all but guarantees that it will not get  
578 | a chance to come to a settlement or receive, if it needs to,  
579 | leniency in sentencing or fines.

580 |         But it goes far beyond that, Mr. Chairman. The  
581 | uncooperative label can severely damage a company's brand,  
582 | its shareholder value, their relationship with suppliers and  
583 | customers, and their very ability to survive.

584 |         The enforcement agencies argue that waiver of  
585 | attorney-client privilege is necessary for improving  
586 | compliance and conducting effective and thorough  
587 | investigation. The opposite, in my opinion, is true. An  
588 | uncertain and unprotected attorney-client privilege actually  
589 | diminishes compliance with the law.

590 |         If company employees responsible for compliance with  
591 | complicated statutes and regulations know that their  
592 | conversations with attorneys are not protected, they will  
593 | simply choose not to seek appropriate legal guidance. The

594 result is that companies may fall out of compliance, often  
595 not intentionally, but because of a lack of communication and  
596 trust between a company's employees and its attorneys.

597 Similarly, during an investigation, if employees suspect  
598 that anything they say to their attorneys can be used against  
599 them, they won't say anything at all. That means that both  
600 the company and the Government will be unable to find out  
601 what went wrong, to punish wrongdoers, and to correct the  
602 company's compliance system.

603 And there is one other major consequence. Once the  
604 privilege is waived, third party private plaintiffs' lawyers  
605 can gain access to attorney-client conversations and use them  
606 to sue the company or other massive settlements. By the way,  
607 right now there are some arguments in the court about partial  
608 protection in waiving, and the question has been raised that  
609 perhaps the Government cannot even guarantee that.

610 How pervasive has this waiving of the attorney-client  
611 privilege become? Well, last November we presented findings  
612 to the U.S. Sentencing Commission showing that approximately  
613 a third of inside counsel respondents, and as many as 48  
614 percent of outside counsel respondents, say they had  
615 personally experienced erosion of attorney-client privilege  
616 or work product protections.

617 After that presentation, the Sentencing Commission asked  
618 us for even more information about the frequency of waivers



619 | and their impact. So our coalition commissioned a second,  
620 | more detailed survey and got an even greater response rate  
621 | from the members of our coalition partners. We publicly  
622 | released the results of this second survey just this morning.

623 | They have been provided to the committee, along with more  
624 | detailed coalition written statements on the subject.

625 |         Here are a couple of highlights, and I am going to skip  
626 | them because General Thornburgh mentioned them, but 75  
627 | percent of both inside and outside counsel agreed with the  
628 | statement that a culture of waiver has evolved to the point  
629 | the Government agencies believe it is responsible and  
630 | appropriate to expect a company under investigation to  
631 | broadly waive attorney-client privilege or waiver  
632 | protections. Of those who have been investigated, 55 percent  
633 | of outside counsel say that that is the experience that they  
634 | had.

635 |         Now, our coalition is aggressively seeking to reverse  
636 | this erosion of confidence in the attorney-client provision  
637 | and the conversations covered there. We are pleased that the  
638 | U.S. Sentencing Committee has decided to revisit recently  
639 | amended commentary to the guidelines that allow the waiver to  
640 | be a cooperation factor in sentencing, and we have submitted  
641 | more detailed materials to them.

642 |         We would encourage this committee to weigh in with its  
643 | support of the attorney-client privilege to the Sentencing

644 Commission as it reconsiders its guidelines. It is important  
645 to note that the Department of Justice and other regulatory  
646 agencies have created this erosion of the privilege without  
647 seeking input, oversight, or approval from the Congress or  
648 the judiciary. And the plan, Mr. Chairman, that is on the  
649 table now, would allow all 92 jurisdictions of the Department  
650 of Justice across the country to have their own plan, their  
651 own determination, of what is covered and what is protected.  
652 That is going to be a circus.

653 We seek your input and strongly urge you to exercise  
654 your oversight of the Department of Justice and the SEC to  
655 ensure the protection of attorney-client privilege. Now, let  
656 me be very clear as I close: Our efforts are not about  
657 trying to protect corrupt companies or businesspeople.  
658 Nobody wants corporate wrongdoers caught and punished more  
659 than I do and the legitimate and honest businesspeople that I  
660 represent. Rather, this is about protecting a  
661 well-established and vital constitutional right.

662 Mr. Chairman, I thank you and the members of the  
663 committee, and I look forward to your questions.

664 [The statement of Mr. Donohue follows:]

665 \*\*\*\*\* INSERT \*\*\*\*\*

666 | Mr. COBLE. Thank you, Mr. Donohue.

667 | Mr. Sullivan.

668 DBO

669 TESTIMONY OF WILLIAM M. SULLIVAN, JR.

670 Mr. SULLIVAN. Thank you. Good afternoon, Chairman  
671 Coble, Ranking Member Scott, and members of the subcommittee.  
672 Thank you for your kind invitation to address you today  
673 concerning the Department of Justice policies and practices  
674 with regard to seeking attorney-client privilege and work  
675 product protection waivers from corporations, and whether the  
676 waiver of such privilege and protection should be relevant to  
677 assessing the corporations' cooperation efforts within the  
678 meaning of the organizational guidelines.

679 I am currently a partner at the law firm of Winston &  
680 Strawn, where I specialize in white collar criminal defense  
681 and corporate internal investigations. For 10 years, from  
682 1991 to 2001, I served as an assistant U.S. Attorney for the  
683 District of Columbia. In these capacities, I have been  
684 involved in virtually all aspects of white collar  
685 investigations and corporate defense.

686 I have overseen both criminal investigations as a  
687 prosecutor and internal corporate investigations as a defense  
688 attorney. And I have represented both corporations and  
689 individuals in internal investigations and before Federal law  
690 enforcement authorities and regulators as well as in class  
691 action, derivative, and ERISA litigation.

692 My perspective on corporate cooperation and the waiver  
693 of attorney-client and attorney work product privileges has  
694 therefore been forged not only by my experiences on both  
695 sides of the criminal justice system, but by my participation  
696 in the civil arena as well. This afternoon, I am eager to  
697 give you a view from the arena.

698 The real issue is not the waiver but what is being  
699 waived and how it was assembled. For business organizations  
700 today, the traditional protections afforded by the  
701 attorney-client privilege and the work product doctrine are  
702 under siege. The privilege reflects the public priority of  
703 facilitating the observance of law through candor with  
704 counsel.

705 Prosecutors and regulators now routinely demand that in  
706 return for the mere prospect of leniency, corporations engage  
707 in intensive internal investigations of alleged wrongdoing  
708 and submit detailed written reports documenting both the  
709 depth and breadth of their inquiry as well as the basis for  
710 their conclusions. Attorney impressions, opinions, and  
711 evaluations are necessarily included.

712 When pressed on this practice, many prosecutors and  
713 regulators will publicly insist that they are only seeking a  
714 roadmap--the identity of the individuals involved, the  
715 crucial acts, and the supporting documentation. However,  
716 this has not been my personal experience.

717 Just last week I was asked by a Government regulator in  
718 our very first meeting to broadly waive attorney-client  
719 private and work product protection and to provide copies of  
720 interview notes, even before I had completed my client's  
721 internal investigation myself, and accordingly, even before I  
722 had determined as corporate counsel that cooperation would be  
723 in my client's best interest.

724 Incredibly, I was further asked whether or not I was  
725 appearing as an advocate for my client the corporation or  
726 whether I was an independent third party. Presumably, the  
727 regulators had hoped that I would undertake their  
728 investigation for them, despite the fact that I would be paid  
729 by my client to do so.

730 Most importantly, however, such roadmap requests fail to  
731 relieve the valid concerns of corporations related to  
732 privilege and work product waivers. A less than carefully  
733 drawn roadmap risks a broad subject matter waiver of  
734 attorney-client privilege and attorney work product  
735 protection under a current authority applicable in just about  
736 every jurisdiction.

737 The waiver of attorney-client communications arriving in  
738 connection with a factual roadmap subsequently disclosed to  
739 law enforcement extends beyond the disclosure itself and  
740 encompasses all communications on that subject matter. The  
741 consequences of this result can be extreme, in that even a

742 rudimentary roadmap is the product of information obtained  
743 through thousands of hours of legal work spent conducting  
744 interviews, parsing statements from hundreds of pages of  
745 interview notes, and analyzing thousands and perhaps millions  
746 of pages of both privileged and nonprivileged corporate  
747 documents.

748 Furthermore, the waiver would be applicable not only to  
749 the law enforcement officials receiving the information, but  
750 would also embrace future third parties, including other  
751 Government agencies and opportunistic plaintiffs' counsel  
752 seeking fodder for class action and derivative strike suits.

753 In addressing the practice of conditioning leniency for  
754 disclosure of otherwise privileged reports, I believe that a  
755 balance must be struck between the legitimate interests of  
756 law enforcement in pursuing and punishing the legal conduct,  
757 the benefits to be retained by corporations which assist this  
758 process and determine to take remedial action, and the rights  
759 of individual employees.

760 It is imperative that we do not sacrifice accuracy and  
761 fundamental fairness for expedience and convenience now  
762 routinely requested by the Government. An equilibrium much  
763 achieved between the aforementioned competing concerns.

764 The issues being addressed today in this committee  
765 meeting are not simply part of an academic debate. Across  
766 the country, there are dozens of corporations scrutinized in

767 | internal investigations at any one time, with real  
768 | consequences for real people. These investigations directly  
769 | impact the lives of thousands of workers and millions of  
770 | shareholders.

771 |         In conditioning leniency upon the disclosure of  
772 | otherwise privileged information, we need to accommodate the  
773 | competing interests of effective law enforcement, the  
774 | benefits down to deserving corporations, the corporation's  
775 | own interests and its ability to observe law through  
776 | consultation with counsel, and the fundamental rights of  
777 | individual employees.

778 |         Reaching a consensus on the information sought by the  
779 | Government, limiting that information to non-opinion factual  
780 | work product or perhaps the adoption of a selective waiver  
781 | for cooperating corporations, and lucid, comprehensive  
782 | standards to guide internal investigations, are each  
783 | important first steps.

784 |         Thank you, and I look forward to your questions.

785 |         [The statement of Mr. Sullivan follows:]

786 | \*\*\*\*\* SUBCOMMITTEE INSERT \*\*\*\*\*



787 Mr. COBLE. Thank you, Mr. Sullivan.

788 Mr. McCallum, I think--by the way, we apply the 5-minute  
789 rule to ourselves as well, so we will try to move along here.

790 Mr. McCallum, I think Mr. Donohue may have touched on  
791 this. And where I am coming from is: Does the policy  
792 require uniform review? That is to say, a United States  
793 Attorney in the Middle District of North Carolina, would it  
794 be likely or unlikely that he or she would be operating under  
795 a policy that would be identical to the Eastern District of  
796 Virginia?

797 Your mike is not on, Mr. McCallum.

798 Mr. MCCALLUM. Mr. Chairman, in response to that  
799 question, the memorandum that I issued does allow for the  
800 different United States Attorneys to institute a review  
801 policy in accordance with the peculiar circumstance of their  
802 particular district.

803 For instance, the Southern District of New York may be  
804 very different than the District of Montana in terms of the  
805 number of sophisticated corporate cases that involve  
806 allegations of corporate fraud, and therefore the number of  
807 people that are in the Southern District of New York, the  
808 number of Assistant United States Attorneys that are  
809 available for the review process, may be very different than  
810 the number of attorneys that are in a different district.

811 So it is not identical, but it affords the type of

812 prosecutorial discretion in the United States Attorney to  
813 determine what it will be, and that is coordinated through  
814 the Executive Office of United States Attorneys in the  
815 Department of Justice as well.

816 Mr. COBLE. I thank you, sir. Now, you indicated, Mr.  
817 McCallum, that in some instances, the corporate defendant may  
818 well be the one to initiate the waiver. Do you have any  
819 figures as to, comparatively speaking, Government initiated  
820 or defendant initiated?

821 Mr. MCCALLUM. Mr. Chairman, we do not have statistical  
822 figures like that. And most of the surveys, including, we  
823 believe, the survey that we have not yet seen that the  
824 Chamber of Commerce just issued this morning, are based more  
825 on perception and anecdotal evidence than they are on very,  
826 very specific identification of particular cases.

827 We have been involved in a dialogue with various  
828 business representatives, including the task force of the  
829 American Bar Association that is dealing with this issue,  
830 with its chairman. And we invited him and Jamie Conrad, who  
831 is here today, to come out and talk with the United States  
832 Attorneys last year at their annual conference to make sure  
833 that the United States Attorneys were aware of exactly the  
834 concerns and the issues that the business community was  
835 seeing in this.

836 And we were told at that time that a very detailed study

837 | of particular cases would be prepared and would be provided  
838 | to us. And just last week, Mr. Ide, the ABA chairman,  
839 | indicated to me that that was forthcoming. That will allow  
840 | us to dig down into the specifics because each case is really  
841 | unique, Mr. Chairman. And it is that sort of detailed  
842 | analysis that will be necessary to determine or refute the  
843 | ``routineness`` with which these waivers are requested. We  
844 | do not believe that they are ``routinely`` requested.

845 |         Mr. COBLE. I thank you, Mr. McCallum.

846 |         Mr. Thornburgh, during your many years of public  
847 | service, were you ever aware of any criminal case in which  
848 | the Justice Department sought or required an attorney-client  
849 | privilege waiver from a cooperating corporation, A; and if  
850 | so, what was and is your position on that issue?

851 |         Mr. THORNBURGH. I am not aware of any such request, Mr.  
852 | Chairman, although I can't absolutely verify that such a  
853 | request was not made at any time during the 25 years that I  
854 | have been affiliated one way or another with the Department  
855 | of Justice. It is a development of the last decade or so.

856 |         I would just like to add a footnote to Mr. McCallum's  
857 | response. It seems to me that the Department is giving up  
858 | too much by permitting each United States Attorney to frame  
859 | his own set of policies on this kind of question. Uniformity  
860 | and internal Department of Justice review has been adopted in  
861 | any number of areas that are sensitive, such as issuing a

862 subpoena to an attorney or to a reporter, or using undercover  
863 sting operations. Those are not within the discretion of the  
864 U.S. Attorney. And when we are dealing with such a sensitive  
865 and venerable privilege as the attorney-client privilege, it  
866 seems to me that ought to be the kind of rule that is  
867 applied.

868       Secondly, I think that there is a controversy, at least,  
869 with regard to statistics about whether or not frequent use  
870 is made of this waiver request. And the easiest way to do  
871 that is to promulgate a review process within the Department  
872 so that you have readily available at your fingertips the  
873 absolute number of times it has been carried out.

874       If, as the Department claims, these are limited and  
875 infrequent, it would not impose any undue burden. If, on the  
876 other hand, they are as the perceptions indicate from this  
877 report, it would provide a solid base for evaluating whether  
878 or not this process is going forward in the right manner.

879       Mr. COBLE. I thank you, Mr. Thornburgh. I see my time  
880 has expired. Gentlemen, we probably will have a second round  
881 of questioning because I have questions for Mr. Sullivan and  
882 Mr. Donohue. This is significant enough, I think, to do  
883 that.

884       The gentleman from Virginia.

885       Mr. SCOTT. Thank you, Mr. Chairman.

886       Mr. Chairman, we have a public policy on the

887 attorney-client privilege which we are trying to protect.  
888 There are other kind of public policies that can't be--where  
889 you can't use certain things as evidence when you are trying  
890 to investigate and fix a problem. You can't--the fact that  
891 you fixed a product subsequently can't be used to show  
892 negligence of the former product because that would obviously  
893 discourage fixing. Evidence that you tried to settle a case  
894 can't be used as an admission because that would discourage  
895 settlements.

896 Is there a public policy that we want to protect in  
897 trying to protect, to the extent possible, the  
898 attorney-client privilege, Mr. McCallum?

899 Mr. MCCALLUM. Ranking Member Scott, there is  
900 unquestionably recognized within the Department of Justice  
901 the societal benefits that attend to the attorney-client  
902 privilege and work product privilege and various other  
903 privileges. And it is certainly something that the United  
904 States Attorneys are--and the other Federal prosecutors are  
905 mindful of.

906 And I think that one of the things that you are alluding  
907 to is something that all three of my distinguished panelists  
908 have touched on, and that is the providing of information to  
909 the Government, whether to a regulator or to a prosecutor,  
910 and the consequences of that disclosure in the civil  
911 litigation area.

912 Now, that, I mentioned previously, is an area that the  
913 Federal Rules Advisory Committee on Evidence is looking at.  
914 It is also an area that there have been bills introduced and  
915 the Congress to address that issue. So I think that there is  
916 certainly recognition.

917 Mr. SCOTT. Well, I think Mr. Donohue kind of alluded to  
918 civil litigation because if somebody blurts something out in  
919 a criminal investigation totally unrelated to what may be  
920 said affecting civil litigation, you could open yourself up  
921 to all kinds of problems including massive punitive damages  
922 if all that information got out. Is that right?

923 Mr. MCCALLUM. There is a consequence of a waiver of  
924 attorney-client privilege, and one context being a waiver in  
925 other contexts. That is correct, Mr. Scott.

926 Mr. SCOTT. Okay. Well, have you ever asked for waivers  
927 in individual cases?

928 Mr. MCCALLUM. I am sure that, like former Attorney  
929 General Thornburgh, I can't tell you that that has never  
930 happened. I am--it has never happened in any case that I am  
931 involved in. And I think there is one issue that needs to be  
932 focused on here, is that there is an issue of attorney-client  
933 waivers, privilege waivers, by the corporation. That is, the  
934 lawyers who represent the corporation. In my opening  
935 statement, I made the point that they do not represent the  
936 management. They do not represent employees.

937 |           And I am sure that Mr. Sullivan, every time he does an  
938 | internal investigation and interviews a witness, he explains  
939 | to them exactly who he represents, i.e., that it is the  
940 | corporation, and that that individual who is being  
941 | interviewed is not his client and there is no attorney-client  
942 | privilege between him and that individual.

943 |           Mr. SCOTT. Well, I mean, in an individual criminal case  
944 | where an individual is the defendant, have you ever asked for  
945 | a waiver of attorney-client privilege?

946 |           Mr. MCCALLUM. I never have, Mr. Scott. But my  
947 | experience over my 35-year career has been predominately in  
948 | the civil litigation area. So I would not be someone who  
949 | would be able to respond to that effectively.

950 |           Mr. SCOTT. Have you ever had cases that the defendant,  
951 | the corporate defendant, got leniency for cooperation when  
952 | they had not waived attorney-client privilege?

953 |           Mr. MCCALLUM. I cannot personally testify to that. I  
954 | can tell you that within the Department, I am informed by  
955 | those that have extensive experience in the criminal area  
956 | that that is indeed the case, that cooperation is but one  
957 | factor in the Thompson Memorandum in determining whether to  
958 | indict someone. And it is a factor, of course, in the  
959 | Sentencing Commission current matters.

960 |           Mr. SCOTT. Can you get the cooperation benefit without  
961 | waiving attorney-client privilege?

962 Mr. MCCALLUM. There are--there are any number of  
963 instances, I am informed, in which that is indeed the case,  
964 yes, and that the circumstances of a corporation providing  
965 information may not require the waiver of attorney-client  
966 privileged information of work product information.

967 Mr. SCOTT. Let me ask one further question. Mr.  
968 Sullivan, you represent corporations, many of whom have  
969 multi-jurisdictional activities. Would there be a problem in  
970 having 92 different processes in terms of what the  
971 attorney-client privilege may be?

972 Mr. SULLIVAN. Ranking Member Scott, yes. I think that  
973 would be a very difficult road to navigate. It is difficult  
974 enough working with prosecutors and regulators who are  
975 insistent that you do their work for them. And in fact, if I  
976 am in a situation where I am evaluating a cooperative mode  
977 for purposes of obtaining favorable treatment by the  
978 Government in exchange for a new compliance program,  
979 ferreting out wrongdoing--which would be my obligation in any  
980 event--to the extent that I would have to, in a  
981 multi-district context, deal with a variety of competing  
982 considerations along the same lines would make my job much  
983 more difficult and would also cause intractable problems on  
984 the part of the corporation in terms of negotiating a  
985 resolution.

986 Let me also add that I know the context here is



987 cooperation, but I don't think the presumption of innocence  
988 should be forgotten. And when I addressed the committee a  
989 few minutes ago and mentioned that at the very first meeting  
990 I was asked to waive the privilege, I also mentioned that I  
991 had not even conducted an internal investigation and  
992 therefore had not made up my mind as to whether I have  
993 defensible conduct or not. So I think that also illuminates  
994 the mindset that corporate counsel are dealing with today.

995 Mr. COBLE. I thank the gentleman.

996 We have been joined by the distinguished gentleman from  
997 Ohio, Mr. Chabot.

998 And in order of appearance, the Chair recognizes the  
999 distinguished gentleman from Florida, Mr. Feeney.

1000 Mr. FEENEY. Thank you, Mr. Chairman. And I am grateful  
1001 for the testimony from all our distinguished panel.

1002 You know, I had an observation I thought perhaps you  
1003 could talk a little bit about because I think you have gone  
1004 into some details about the importance historically of the  
1005 attorney-client privilege.

1006 By the way, I would point out that most of us who, you  
1007 know, practiced law at one point think of this more in the  
1008 context of criminal--of violent crime as opposed to corporate  
1009 crime, exactly for the reasons that former Attorney General  
1010 Thornburgh laid out. This really hasn't been used until the  
1011 last 8 or 10 years, this waiver requirement.

1012 But the average violent criminal doesn't have deep  
1013 pockets. And other than the fact that if he fails to comply  
1014 and waive privilege, for example, there is very little  
1015 incentive. He is not subject to fines because he has got the  
1016 empty pocket defense. He is not worried about civil  
1017 litigants. But for a lot of the reasons that Mr. Donohue  
1018 laid out, the pressure on corporate clients and business  
1019 clients is immense to find favor as they cooperate, and there  
1020 is an enormous pressure on them.

1021 I do understand the necessity at times to try in a  
1022 corporate context, especially with respect to fraud, to find  
1023 out what everybody knew, and that would include corporate  
1024 counsel. What I am worried about, and I guess I want to put  
1025 it in this respect--Mr. Sullivan might be the best person to  
1026 answer this--we live in a very new climate on Wall Street. I  
1027 mean, investors appropriately expect a lot more transparency.  
1028 We had things like Enron and WorldCom.

1029 But in some ways, we may have overreacted.  
1030 Post-Sarbanes-Oxley, directors have some real problems.  
1031 Number one, we don't have a standard set of accounting  
1032 principles, so that a major international corporate firm may  
1033 be responsible, and the directors individually liable, to  
1034 know where every box of pencils or paper clips are. And we  
1035 don't have standards to protect people based on de minimis  
1036 standards.

1037 |       When directors or executives with corporations go and  
1038 | they hire an independent auditor nowadays, they are not  
1039 | allowed to seek the guidance of their auditor. They can't  
1040 | get help from one of the top four accounting firms that they  
1041 | have to pay. That firm is not allowed to tell them how to  
1042 | comply with Sarbanes-Oxley.

1043 |       Now we are in a position where if we are going to have  
1044 | what amounts to blanket waivers or, in some jurisdictions,  
1045 | anyway, what amounts to blanket waivers, where corporate  
1046 | executives and corporate directors, who are going to be held  
1047 | personally responsible even if they didn't necessarily know  
1048 | about mis-actions that somebody else in the corporation took  
1049 | over, can't be candid with their lawyer and cannot count on  
1050 | candid advice back.

1051 |       That type of chilling effect makes it almost impossible  
1052 | for anybody with any sense to agree to be a member of the  
1053 | board of directors today, and I thought maybe Mr. Sullivan  
1054 | and Mr. Donohue could talk about this in the totality of the  
1055 | circumstances today in corporate law. I mean, this is just  
1056 | one more burden that makes it almost impossible to try to do  
1057 | your job in an honest way as a member of a board or an  
1058 | executive at a major corporation.

1059 |       Mr. Sullivan, go ahead.

1060 |       Mr. SULLIVAN. Thank you, Mr. Feeney. Well, in fact,  
1061 | you are absolutely correct. Corporations have noticed a

1062 dearth of willing applicants in terms of individuals who are  
1063 willing to serve on boards. What is attempted these days is  
1064 to maintain a level of independence, both with outside  
1065 counsel as well as special audit committees, special  
1066 litigation committees, and as you mentioned, even  
1067 accountants.

1068 But it also goes right back to what Mr. McCallum said,  
1069 and he is absolutely correct. I am well aware of the Upjohn  
1070 warnings, and when I am pursuing an internal investigation, I  
1071 am obligated and I do advise the individuals whom I am  
1072 interviewing that I do not represent them.

1073 But in fact, if we move forward and they are led to  
1074 believe that not only do I not represent them but I am also  
1075 going to turn over everything they say to the Government at a  
1076 moment's notice, upon caprice or whim because I am interested  
1077 in maintaining the best possible position of the corporation,  
1078 we are in a situation where, as Mr. Donohue mentioned, I  
1079 won't get any information at all.

1080 The corporate entity is an artificial entity, true. It  
1081 has legal responsibilities, true. But it also is run and  
1082 managed by people. The acts of the employees are imputed to  
1083 the corporation. So you must deal with the people because  
1084 they are the ones who bind the corporation.

1085 And for my--from my perspective as well as the  
1086 perspective of independent directors or board members or

1087 | auditors or management, we need to be able to access facts.  
1088 | We need to be able to do it freely, without any concerns  
1089 | about where those facts may ultimately go. And we need to be  
1090 | able to manage the information we have so that we can  
1091 | evaluate properly how to respond to Government inquiries.

1092 |       As I mentioned before, all too often the first mode that  
1093 | a corporation will pursue is cooperation. They will find or  
1094 | seek to find responsible employees and throw them under the  
1095 | bus. That is not necessarily the best policy. In a  
1096 | free-flowing exchange of information environment where the  
1097 | lawyer can carefully evaluate the information he has, he can  
1098 | make the best decision for that corporation in how to deal  
1099 | with regulators and ultimately save everybody a lot of money,  
1100 | shareholders and individual investors.

1101 |       Mr. SCOTT. Mr. Donohue?

1102 |       Mr. DONOHUE. I serve on three public company boards of  
1103 | directors. And I will say in response to your inquiry that,  
1104 | first of all, it is getting harder and harder to attract  
1105 | competent directors, not only because of the fear of  
1106 | liability, which is getting greater, but because of the  
1107 | extraordinary amount of time and process that has to be  
1108 | followed following the Sarbanes-Oxley rules and their  
1109 | implementation.

1110 |       What directors most worry about, other than running the  
1111 | company, leading the company and having good management that

1112 | operates in an honorable way, are two things, and that is  
1113 | dealing with regulators of every type and shape and dealing  
1114 | with the Justice Department. And by the way, when you get  
1115 | people like Mr. McCallum here, if he were to come out and  
1116 | deal with the issues that individual companies have to deal  
1117 | with, we would do fine.

1118 |         But they have the greatest collection of young,  
1119 | soon-to-make-it, want-to-be-famous kinds of lawyers all  
1120 | around the country who, by the way, don't have the same  
1121 | amount of judgment and experience, and many have little or no  
1122 | idea what corporations do and how they are supposed to work.

1123 |         So when 92 different groups--by the way, and when there  
1124 | is an approval, it will be approval by the U.S. Attorney for  
1125 | one of his underlings--they are going to have 92 different  
1126 | approaches to do this, it is going to get a little more  
1127 | complicated for most of the companies on whose boards I  
1128 | serve.

1129 |         And I am not--we are not talking about huge criminal  
1130 | issues; there are always questions with the SEC and others.  
1131 | And it gets very, very complicated when everybody has got a  
1132 | different rule. Everybody has got a different way of  
1133 | approaching it. And standing behind them like vultures on a  
1134 | fence are the class action and the mass action lawyers that  
1135 | are sucking the vitality out of American industry. And they  
1136 | are doing it, maybe unintended, but they are doing it with

1137 | the help of our Government, who is putting us in that kind of  
1138 | a position that it shouldn't happen.

1139 |         Mr. COBLE. The gentleman's time has expired.

1140 |         The distinguished gentleman from Massachusetts, Mr.  
1141 | Delahunt, recognized for 5 minutes.

1142 |         Mr. DELAHUNT. I would think, Mr. Sullivan, that you  
1143 | must find yourself in a position where not only do you have  
1144 | to inform the employee that you are not his lawyer, but there  
1145 | is going to be a likelihood that what he tells you will  
1146 | become--you will at some point in time be compelled to reveal  
1147 | to the Government exactly what he says.

1148 |         Have you run into that situation?

1149 |         Mr. SULLIVAN. Yes, Mr. Delahunt. As part of the Upjohn  
1150 | warnings, I am required to advise the employee that I  
1151 | represent the company, that the privilege resides with the  
1152 | company, and that the privilege can be waived by the company  
1153 | at any time--

1154 |         Mr. DELAHUNT. And that--

1155 |         Mr. SULLIVAN. --and in any manner.

1156 |         Mr. DELAHUNT. --in a significant number of cases, the  
1157 | privilege is waived.

1158 |         You know what I can't understand, Mr. McCallum, is what  
1159 | happened in the past 10 years? You know, for 20 years of my  
1160 | own professional life, I was a--I was a prosecutor. Did a  
1161 | number of sophisticated white collar crime investigations.

1162 And, I mean, there are grand juries. There is the use of  
1163 informants. You know, we knew how to squeeze people without  
1164 sacrificing or eroding the attorney-client privilege.

1165 You know, I just have this very uneasy feeling that it  
1166 is the easy way to do it, you know. There is a certain level  
1167 of, you know, why should I--why should I have to really  
1168 exercise myself to secure the truth?

1169 You know, from what I understand, there has been no  
1170 review in terms of the frequency of the waiver. There is no  
1171 data. There is nothing empirical. But, you know, Mr.  
1172 Thornburgh and Mr. Sullivan, you know, I am sure they have  
1173 had extensive practices. At least anecdotally, you know,  
1174 they are here. They are concerned.

1175 Is there something that I am missing that the  
1176 traditional law enforcement investigatory techniques were  
1177 insufficient?

1178 Mr. MCCALLUM. Mr. Delahunt--

1179 Mr. DELAHUNT. I got to tell you something. I am a  
1180 little annoyed with the Sentencing Commission, too, making  
1181 this a factor. You know, where did that come from? Go  
1182 ahead.

1183 Mr. MCCALLUM. I believe it came from the defense bar,  
1184 who wanted to pin down for certain that if there was a  
1185 waiver--to answer the second question first--

1186 Mr. DELAHUNT. Sure. Thanks.



1187 | Mr. MCCALLUM. --if there was a waiver, that it would  
1188 | necessarily be deemed cooperation for purposes of a downward  
1189 | departure. But let me--

1190 | Mr. DELAHUNT. Well, I would just dwell on that for a  
1191 | minute because we will get a second round.

1192 | Mr. MCCALLUM. Okay.

1193 | Mr. DELAHUNT. I would want to--I would want to hear  
1194 | that coming from, you know, some criminal defense lawyer,  
1195 | saying that that is the import of it. Because that tells me  
1196 | that if they are looking for that kind of certainty, that  
1197 | this is being used frequently. This is--this is becoming the  
1198 | rule rather than the exception. But go ahead and take a shot  
1199 | at my--

1200 | Mr. MCCALLUM. Let me respond to the first question, Mr.  
1201 | Delahunt, and that is what has happened recently over the  
1202 | years? I think we only have to look back to the 1997 through  
1203 | 2006 era to see a spate of very complicated, very complex,  
1204 | very arcane, very difficult to determine corporate frauds of  
1205 | immense proportions in terms of the dollar amounts involved  
1206 | which also--

1207 | Mr. DELAHUNT. With all due respect, Mr. McCallum, I got  
1208 | to tell you something. That just doesn't--that doesn't hold  
1209 | water. You know, I am sure immense complex fraud has been  
1210 | being perpetrated, you know, since the days of the robber  
1211 | barons. If we don't have the resources in the Department of

1212 Justice to conduct the necessary investigations to deal with  
1213 it, then let's assess it on a resource basis. Let's not do  
1214 it the easy way that erodes, I believe, a fundamental  
1215 principal of American jurisprudence.

1216 I mean, if that is what you are telling me, I won't  
1217 accept it because of my own experience. You know, fraud is  
1218 nothing new. Uncovering it maybe is, but, I mean, there  
1219 is--you have--you know, you can use immunity. There are  
1220 informants. There are grand juries. There are all kinds of  
1221 ways to do it.

1222 And I am sure Mr. Thornburgh, being a former Attorney  
1223 General and a former, I think, Attorney General in a State, I  
1224 am sure he supervised or conducted a series of heavy  
1225 investigations that are as complex as anything that, you  
1226 know, occurred from 1997 to date, and did it in a way that  
1227 didn't erode significant legal principles that are embedded  
1228 in our jurisprudence.

1229 I will be back, and you can think about the question.

1230 Mr. MCCALLUM. Thank you.

1231 Mr. COBLE. The gentleman's time has expired.

1232 The distinguished gentleman from California.

1233 Mr. LUNGREN. Mr. Chairman, it is always fun being with  
1234 my friend from Massachusetts. I was trying to figure out  
1235 what he said when he said "partay," and then I thought he  
1236 was talking about getting a drink and going out someplace.

1237 [Laughter.]

1238 Mr. DELAHUNT. I can't understand what you are talking  
1239 about.

1240 Mr. LUNGREN. But I understand. You weren't talking  
1241 about a party, you were talking about a part A. I got that.  
1242 Okay.

1243 And Mr. Sullivan, I have been informed by counsel here  
1244 that the two of you used to work together, so that you used  
1245 to be one of those fellows that resembled the remarks of Mr.  
1246 Donohue.

1247 [Laughter.]

1248 Mr. LUNGREN. But now you have made it.

1249 Mr. SULLIVAN. Mr. Volkoff was a fine mentor.

1250 Mr. LUNGREN. And I wondered if you had to deal with 92  
1251 different jurisdictions. It would certainly improve your  
1252 billables.

1253 [Laughter.]

1254 Mr. SULLIVAN. I try to get involved in--

1255 Mr. LUNGREN. But those Italian suits could be kept up,  
1256 as it was.

1257 Just to put it on the record, I have submitted a letter  
1258 last August to the Sentencing Commission regarding my  
1259 concerns about the Sentencing Commission's commentary with  
1260 respect to the rule. It looks to me like that amendment  
1261 authorizes and encourages the Government to require entities

1262 | to waive the attorney-client privilege and work product  
1263 | protections as a condition of showing cooperation. And that  
1264 | is the huge concern I have here.

1265 |         Let me ask you this, Mr. McCallum: Should we in the  
1266 | Congress believe that any time the administration refuses to  
1267 | waive executive privilege, that the administration is not  
1268 | cooperating with the Congress?

1269 |         Mr. MCCALLUM. Absolutely not, Mr. Lungren. I would--I  
1270 | would hesitate to make that argument. There are benefits,  
1271 | and I think that in my opening statement I described that  
1272 | there are definitely benefits, societal benefits, from  
1273 | attorney-client privilege.

1274 |         Mr. LUNGREN. But, see, that--I understand. See, that  
1275 | is my problem. If we in the Congress were to every time the  
1276 | President says that there is a reason to protect executive  
1277 | privilege, not only for his administration but for future  
1278 | administrations, that every time he did that he was violating  
1279 | the sense of cooperation that should prevail between two  
1280 | equal branches of government, I think we would be wrong.

1281 |         And I see the Justice Department taking a position that  
1282 | if a corporate defendant or potential defendant refuses to  
1283 | waive that privilege, that is a priori evidence of the fact  
1284 | that they are not cooperating. And that is the problem I  
1285 | really have here.

1286 |         See, the President makes the arguments--and I think that

1287 | you should--and the Department makes the arguments that there  
1288 | is a reason for those privileges that at the executive branch  
1289 | has. And the reason is part institutional, but part to have  
1290 | that ability to speak within yourselves, that is, that  
1291 | institution of the administration, which is more than the  
1292 | President but is personified by the President. He can talk  
1293 | to his advisors without believing that we are going to hear  
1294 | everything he says.

1295 |         And here you have a situation where you want a  
1296 | corporation to follow the law, I presume. And you would want  
1297 | the corporation to listen to good counsel, I would think.  
1298 | And here we have got a rule that seems to me to work in the  
1299 | opposite direction.

1300 |         And I think that that weighs heavy on me and other  
1301 | members here on this panel. And so I would ask, don't you  
1302 | see the creeping intrusion here? I mean, first you have the  
1303 | first memorandum. Now we have the second memorandum, which  
1304 | is a little tighter and a little tougher. And then,  
1305 | following that, you have the Sentencing Commission saying,  
1306 | well, that is a bad idea. As a matter of fact, we are going  
1307 | to have that as evidence of cooperation, and the lack of it  
1308 | as evidence of lack of cooperation.

1309 |         What is a corporate counsel to do under those  
1310 | circumstances?

1311 |         Mr. MCCALLUM. Well, there are a series of questions

1312 | there, Mr. Lungren. Number one, with respect to the  
1313 | Sentencing Commission, the Department's position has been we  
1314 | would be comfortable with the Sentencing Commission going  
1315 | back to where it was before that amendment.

1316 |         Mr. LUNGREN. Well, is that your position? Is that the  
1317 | administration's position?

1318 |         Mr. MCCALLUM. I believe that that is the Department of  
1319 | Justice's review--

1320 |         Mr. LUNGREN. That is what I mean.

1321 |         Mr. MCCALLUM. --underway at this particular time. I do  
1322 | not know whether that has been absolutely finalized. But my  
1323 | review of that is that there would not necessarily be an  
1324 | objection to going back to the way it was before, where it  
1325 | was not addressed.

1326 |         Number two, let me talk about the issue of cooperation.  
1327 | Attorney-client privilege waivers are only one factor with  
1328 | respect to cooperation. There are many other ways for a  
1329 | corporation under the Thompson Memorandum to indicate and to  
1330 | provide a degree of cooperation that will impact both the  
1331 | decisions on the charging of the corporation and on the  
1332 | determination of recommendations to be made to any sentencing  
1333 | commission about--or to any sentencing body about a downward  
1334 | deviation. So I don't--I don't think that it is accurate to  
1335 | assert that privilege waivers are the sine qua non or the  
1336 | absolute requirement in order to achieve a status of

1337 cooperation with prosecutors.

1338 With respect to the diversity of jurisdictions, the 92  
1339 different districts, as I indicated previously, this is not a  
1340 situation in which one size fits all. And what the McCallum  
1341 Memorandum really did was to recognize a best practices that  
1342 was, in my view, attendant to United States Attorneys across  
1343 the United States in which privilege waiver requests, formal  
1344 ones from the Government, as opposed to privilege waiver  
1345 offers voluntarily from corporations, would go through some  
1346 sort of supervisory review that would preserve for the  
1347 peculiar circumstances of that particular district and the  
1348 United States Attorney there a degree of flexibility.

1349 But all of that would be done in coordination through  
1350 the Executive Office of United States Attorneys. So I don't  
1351 think it is an accurate picture to paint, 92 different  
1352 definitions of what is attorney-client privileged and what is  
1353 not attorney-client privileged. It is a second set of eyes  
1354 to reassure that there is a deliberate and considered process  
1355 before attorney-client privilege waivers are requested by the  
1356 Department of Justice.

1357 Mr. LUNGREN. Thank you.

1358 Mr. COBLE. The gentleman's time is expired.

1359 The distinguished gentleman from Ohio, Mr. Chabot.

1360 Mr. CHABOT. Thank you, Mr. Chairman.

1361 Mr. Donohue, if I could begin with you. Can you give

1362 | the subcommittee any examples from your members of instances  
1363 | where a request for a Department of Justice--for an  
1364 | attorney-client waiver resulted in unnecessary consequences  
1365 | for the corporation, perhaps a third party suit, for example,  
1366 | and arguably the information could have been gathered without  
1367 | a waiver?

1368 |         Mr. DONOHUE. Well, sir, you have just put your finger  
1369 | on why this is a very difficult matter to challenge, either  
1370 | here in the Congress or in the courts, because most companies  
1371 | that have been painted into this box are not going to come  
1372 | forward and give you an example. I know many examples. I  
1373 | would suggest it is probably in our mutual best interests not  
1374 | to lay out the names of a bunch of companies.

1375 |         I could tell you a couple of interesting points. In one  
1376 | matter that I am aware of, the prosecutor in a jurisdiction  
1377 | gave a public speech and said, in our jurisdiction, anybody  
1378 | failing to waive the privilege will be considered guilty. I  
1379 | passed that material on to the Justice Department; I don't  
1380 | know how it was used.

1381 |         But if you were to go--and by the way, it is very, very  
1382 | important to understand that the SEC and the Justice  
1383 | Department have hundreds and thousands of investigations  
1384 | going on. And the great amount of these have nothing to do  
1385 | with fraud. They have arguments about proper accounting and  
1386 | all kinds of other issues.



1387 |       Where there is fraud, there should be a vigorous  
1388 | investigation. But, you know, I was trying to think of a  
1389 | good example that I might use. You know, the Inquisition  
1390 | supposedly had the blessing of the Church, but their means  
1391 | weren't very appropriate. And when Mr. McCallum began today,  
1392 | he laid out a rationale of why they should be able to do  
1393 | these things because of the assignment they were given to  
1394 | respond to Sarbanes-Oxley.

1395 |       My understanding is that the privilege is a  
1396 | constitutional protection, and that the end does not justify  
1397 | the means, and that the serious nature of this--and I think  
1398 | the point made about resources did not--should not put the  
1399 | companies in the position of conducting investigations, which  
1400 | I am aware of many, to supplement the work and actually do to  
1401 | the work of the prosecutors.

1402 |       And I ended my statement by saying if people  
1403 | maliciously, directly, and intentionally go out and violate  
1404 | the law and they are in the American business community, lock  
1405 | them up. But you try and go out, as Mr. Sullivan indicated,  
1406 | and deal with these prosecutors--and you have got two sets of  
1407 | them; you got the SEC and you got the Justice Department, and  
1408 | they are playing off each other, and they are sitting in the  
1409 | same rooms, you know, when you have a civil issue and you  
1410 | have a criminal issue. And I would just say, you know, if  
1411 | you and I want to walk down a hall one day, I will give you

1412 | four or five examples. But with the Chairman's permission  
1413 | and protection, I am not going to do that here.

1414 | [Laughter.]

1415 | Mr. CHABOT. Thank you very much.

1416 | Mr. Sullivan, if I could ask you the next question.

1417 | What alternative techniques are available to prosecutors to  
1418 | obtain the needed information from a corporation without  
1419 | requiring a waiver of the attorney-client privilege?

1420 | Mr. SULLIVAN. Mr. Delahunt alluded to many, drawing  
1421 | upon his hears as a prosecutor. There are all types of  
1422 | investigative techniques. There is cooperation undertaken by  
1423 | individuals within the corporation. There is the grand jury  
1424 | process, with subpoenas. There are wires.

1425 | What also is available, and which I suggested, for  
1426 | purposes of a corporation who is--which is interested in  
1427 | cooperating is the factual recitation, which is actually  
1428 | quite common: a factual review of what the outside counsel's  
1429 | investigation has yielded, with a view toward working in  
1430 | concert with the Government, ferreting out the criminal  
1431 | activity as it is perhaps determined to be a rogue element or  
1432 | an independent group working without knowledge of management.

1433 | We see that in export control cases, for example, where  
1434 | shipments are made abroad by individuals who have an  
1435 | incentive for sales commissions without the knowledge of  
1436 | management or at least without management understanding that

1437 | ineffective internal controls were in place.

1438 |       All of this suggests that the corporate entity itself  
1439 | and outside counsel, certainly responsible management, as Mr.  
1440 | Donohue has mentioned, has an interest in abiding by the law.

1441 |       And to the extent that it becomes aware of problems with the  
1442 | law, either through its own inquiry or through an external  
1443 | source, a subpoena or whatnot, outside counsel working with  
1444 | in-house counsel wants to ferret that out and find it out.

1445 |       And we will assist the Government to the extent that it  
1446 | is in our best interests to provide them with the roadmap,  
1447 | with the factual outline, who you should talk to, what this  
1448 | document means. But we shouldn't have to and we don't want  
1449 | to provide them with our mental impressions, our specific  
1450 | interview notes, our opinion work product, and our sensitive  
1451 | discussions with employees because we want to preserve the  
1452 | ability to talk to them again about another problem so that  
1453 | we can continue to observe the law.

1454 |       And the factual recitation is not something that is  
1455 | ultimately going to be a problem. Factual recitations are  
1456 | found in indictments every day in every public context. If  
1457 | you want to learn what happened in a particular case, what  
1458 | went wrong, read the Government's indictment. And we will  
1459 | help you with that factual outline to preserve our ability to  
1460 | interact with you and to get credit for cooperation. But you  
1461 | should be encouraged, Mr. Prosecutor, and you should insist

1462 | on doing your own legal analysis.

1463 |       Mr. CHABOT. Thank you.

1464 |       Mr. COBLE. The gentleman's time is expired. I thank  
1465 | the gentleman.

1466 |       Gentlemen, as I said earlier, I think this issue  
1467 | warrants a second round, so we will commence that now.

1468 |       Mr. Donohue, I may be repetitive, but I want to be sure  
1469 | this is in the record. In your testimony, you mentioned that  
1470 | erosion of the attorney-client privilege will frustrate  
1471 | corporate efforts to comply with regulations and statutes.  
1472 | Elaborate a little bit more in detail about that.

1473 |       Mr. DONOHUE. Mr. Chairman, what happens in a company is  
1474 | when issues of significance--it happens with me every  
1475 | day--come up that we are dealing with some Federal  
1476 | regulation, some political regulation, whatever it is, the  
1477 | first thing we do is call the general counsel. When we are  
1478 | sued, as people are on a regular basis, the first thing we do  
1479 | is call the general counsel. And these are all civil  
1480 | matters.

1481 |       But I want to have a feeling that when I sit down and  
1482 | talk to Steve Bokat, who is the general counsel of the United  
1483 | States Chamber of Commerce, that what I am talking about is  
1484 | going to stay there. And if I had a feeling that in matters  
1485 | where there may be differences with the Government, there may  
1486 | be differences with regulars, if I talk to him, if anybody

1487 | wanted to bring an action against us, he is going to be up  
1488 | sitting--talking about what we discussed, I am not too sure I  
1489 | am going to talk to him. Nor am I going to go and get my  
1490 | regulatory counsel, nor am I going to go down and get my  
1491 | outside counsel.

1492 |         At least--you know, the term ``counsel'' is used up here  
1493 | a great deal. And if you look to your right, you have your  
1494 | counsel, and you sure want to make sure that what you are  
1495 | talking to him about is not blabbed all over this place.

1496 |         Mr. COBLE. Yes. Well, that is what I thought you--

1497 |         Mr. DONOHUE. And I think we have a constitutional right  
1498 | to do that.

1499 |         Mr. COBLE. Thank you, Mr. Donohue.

1500 |         Mr. Sullivan, in your testimony, you noted that you  
1501 | represented a client before a regulator who requested a  
1502 | waiver prior to your client's declining to cooperate or  
1503 | deciding to cooperate.

1504 |         What impact would such a waiver have on your ability to  
1505 | represent a client corporation, given--under those facts?

1506 |         Mr. SULLIVAN. Thank you, Mr. Chairman. Of course, I  
1507 | declined that request immediately. And in fact, as Mr.  
1508 | Donohue so perceptively referenced only upon hearing my  
1509 | anecdote, there were more than one law enforcement agency  
1510 | representative in there. There was the tag team, as he  
1511 | referenced a few moments ago.

1512 | As I said before, this was a very early meeting, a meet  
1513 | and greet, if you will, where I was attempting to outline to  
1514 | them what my preliminary view of the evidence I had gathered  
1515 | after only a couple weeks would suggest as a function of how  
1516 | to address their concerns.

1517 | I had not made up my mind as to what I would do in terms  
1518 | of seeking cooperation or defending. As I said before, we  
1519 | should never forget about the presumption of innocence as a  
1520 | corporate representative, as a corporate lawyer, and we  
1521 | should always ferret out the facts and then have a good  
1522 | understanding of the law on those facts to understand whether  
1523 | or not there was a crime committed and whether or not there  
1524 | was a credible defense.

1525 | But to go directly to answer your question, if I had  
1526 | undertaken to waive the privilege, how would I walk into that  
1527 | company's office the following day? We had not determined  
1528 | that a crime had been committed or that there were regulatory  
1529 | problems. I needed to find out what went on, and in the best  
1530 | way possible, so that I could represent that client in an  
1531 | informed way.

1532 | Who would speak to me, Mr. Chairman? What type of  
1533 | evidence would I be able to gain? I would be nothing more  
1534 | than an arm of the Government. I would in fact have been  
1535 | deputized. My role would be completely eliminated. It makes  
1536 | no sense, particularly when, if I found there was wrongdoing

1537 | and I needed to work with the Government, I would be most  
1538 | pleased to do so by rendering factual, non-opinion work  
1539 | product.

1540 |       Mr. COBLE. I thank the gentleman.

1541 |       The gentleman from Virginia. The distinguished  
1542 | gentleman from Virginia.

1543 |       [Laughter.]

1544 |       Mr. SCOTT. Thank you, Mr. Chairman.

1545 |       Mr. Sullivan, why would a corporation do an in-depth  
1546 | investigation of suspected employee misconduct if the report  
1547 | of that investigation has to be turned over to the  
1548 | prosecutors?

1549 |       Mr. SULLIVAN. Well, frequently reports are turned over  
1550 | to prosecutors. In fact, we see public reports very  
1551 | frequently. We just saw a very public Fannie Mae report.  
1552 | Shell has got a report. Baker Botts has got Freddie Mac's  
1553 | report on its website.

1554 |       The difference is, again, reports outlining factual  
1555 | undertakings and understandings as opposed to attorney work  
1556 | product and attorney-client communications. And--

1557 |       Mr. SCOTT. Well, let me ask it another way. If you are  
1558 | writing such a report, would you be writing it to be read by  
1559 | the president of the corporation or by the prosecutor? I  
1560 | mean, you know, you would say things differently depending on  
1561 | who the audience is.

1562 Mr. SULLIVAN. Sure. And it depends who I represent and  
1563 what my charge might be. The individuals who, for example,  
1564 are writing the Fannie Mae report may have been reporting to  
1565 an independent board, an independent accounting board or an  
1566 independent board of directors, coming in after the fact to  
1567 outline what facts happened. I think they would be very  
1568 cautious in outlining any opinion work product in that  
1569 report.

1570 And to be fair to the Justice Department, I have not  
1571 seen requests for waiver of attorney-client communications.  
1572 It is all work product. And I am not saying that in any way  
1573 to suggest that it is any less nefarious. It is the opinion  
1574 attorney work product, which is perhaps the most dangerous.

1575 But to the extent that I would undertake to write a  
1576 report, a report for the general counsel or for the board of  
1577 directors, I would insist that it be a privileged document,  
1578 that it would include my mental impressions and opinions,  
1579 thereby covering it as work product, perhaps made in  
1580 anticipation of litigation as well. It would certainly be an  
1581 attorney-client communication because I would be proffering  
1582 it to the general counsel. But I would never want that to go  
1583 elsewhere. A parsed, very narrowly drawn factual recitation  
1584 I might be persuaded to part company with.

1585 One thing I would like to also mention, Ranking Member  
1586 Scott. You earlier in the hearing talked about public



1587 policies regarding inadmissible information and material. I  
1588 think that was a very important point. I would like to bring  
1589 out that I have represented Federal prosecutors in internal  
1590 DOJ investigations, OPR investigations, Office of  
1591 Professional Responsibility.

1592 There is no compelled waiver of the Fifth Amendment.  
1593 There is no compelled self-incrimination under pain of losing  
1594 your job in the Justice Department. There is a Supreme Court  
1595 case on that, Garrity. Nevertheless, I am literally asked by  
1596 Justice Department officials to bring my employees in and to  
1597 tell them they either tell me everything or they walk.

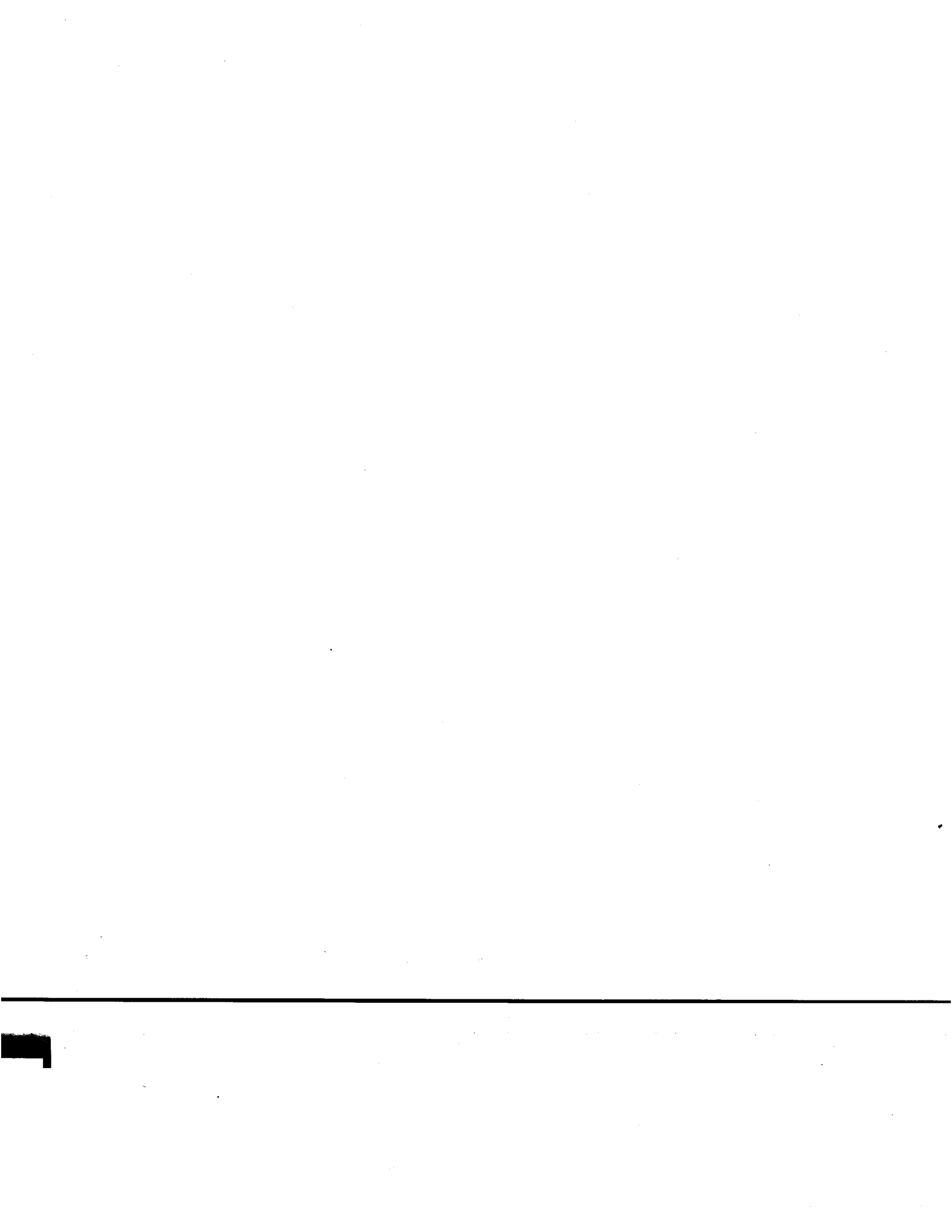
1598 And I have no problem doing that because there is no  
1599 specific type of due process in a corporation. But the next  
1600 step is, and by the way, once you get something from that  
1601 employee and if it is an incriminatory Fifth Amendment  
1602 waiver, I did it, I want it, Mr. Sullivan. And that is where  
1603 I draw the line.

1604 They don't extract from their own employees. Why should  
1605 they ask that kind of duress of mine, or of my clients?

1606 Mr. SCOTT. Thank you. Exactly who can waive the  
1607 privilege?

1608 Mr. SULLIVAN. The corporation, to the extent that the  
1609 corporation has the privilege when we are dealing with  
1610 corporations and employees.

1611 Mr. SCOTT. Who? Who? The CEO?



1612 Mr. SULLIVAN. We would have to get that consent of  
1613 representative management, whoever is running the program,  
1614 the board, in consultation with counsel.

1615 Mr. SCOTT. Can the CEO waive the privilege?

1616 Mr. SULLIVAN. Not as an individual. He has got to only  
1617 do it on behalf of the corporation as a function of his role  
1618 as a corporate representative.

1619 Mr. SCOTT. Is that right, Mr. Donohue?

1620 Mr. DONOHUE. I believe procedurally the CEO could move,  
1621 with probably advice of his lawyer, to waive the privilege.  
1622 But in these kinds of instances, this would be so sensitive  
1623 that it would already be up to the board, and the board would  
1624 be informed of that change in circumstance.

1625 Mr. SULLIVAN. and that is what I meant by--

1626 Mr. DONOHUE. That probably wouldn't have been done four  
1627 or five years ago, but it would sure be done today.

1628 Mr. SCOTT. Are you aware of--the Department indicated  
1629 that they don't--you can get full cooperation without a  
1630 waiver. Are you aware of cases where full cooperation credit  
1631 on sentencing was given without a waiver of attorney-client  
1632 privilege?

1633 Mr. DONOHUE. Mr. Scott, I am sure it has. I cannot  
1634 give you a definitive case. The more difficult the case, the  
1635 more visible the Justice Department and the SEC has been in  
1636 announcing the case and how they are going to be successful

1637 | and all these terrible things that have happened before they  
1638 | have had their full investigation, the more aggressive the  
1639 | SEC and Justice Department lawyers are going to be to try and  
1640 | make sure that they are successful.

1641 |         And when they are having problems in finding what they  
1642 | thought they were going to find, then they want the company  
1643 | to investigate it for them, and they want people to break the  
1644 | privilege. We are not trying to protect criminals. We are  
1645 | trying to protect a constitutional protection that is given  
1646 | to individuals and corporate individuals, and we believe it  
1647 | is being eroded.

1648 |         Mr. SCOTT. Mr. Chairman, could I ask one other  
1649 | question?

1650 |         In terms of corporate organization, which attorney--do  
1651 | all attorneys in the corporation have the privilege, or is it  
1652 | just corporate counsel we are talking about? And let me  
1653 | follow up on that by saying, I mean, there is some--if you  
1654 | are trying to discuss certain activities, trying to come up  
1655 | with a process that may be kind of borderline legal, would  
1656 | you help yourself by having the person in that position you  
1657 | are talking to be an attorney where you wouldn't get that  
1658 | privilege if it was not an attorney? And do you find people  
1659 | hiring lawyers in kind of non-lawyer positions to try to get  
1660 | a privilege?

1661 |         Mr. DONOHUE. Mr. Scott, I am going to respond and then

1662 ask Mr. Sullivan if he would make sure I am correct. But I  
1663 am not sending him a fee.

1664 [Laughter.]

1665 Mr. DONOHUE. You know, generally, when one is dealing  
1666 with broad corporate matters, the general counsel of the  
1667 corporation, who is an officer of the court by his own  
1668 professional standing, would be the person that would have  
1669 this role with the CEO or other executives.

1670 There are, however, issues, for example, on SEC  
1671 questions or environmental questions or other matters where  
1672 there are senior lawyers within the institution, probably but  
1673 not necessarily working for the general counsel, who on those  
1674 matters would be seen as the more senior person with whom  
1675 discussions and therefore protected discussions could have  
1676 been held.

1677 Mr. Sullivan, you have had a minute to think about that.

1678 Mr. SULLIVAN. You are absolutely right. My experience  
1679 has been working with the general counsel and other lawyers  
1680 in the company who hold particular expertise in various areas  
1681 as questions may arise. But no privilege determinations are  
1682 made without the assent and consent of the board or a special  
1683 committee who is operating in a joint way--a special  
1684 committee on accounting, a special litigation committee--so  
1685 that there is usually a board approval at the highest levels  
1686 for such--

1687 Mr. SCOTT. Board approval to determine who has a  
1688 privilege and who doesn't?

1689 Mr. SULLIVAN. Well, board approval relating to waiver  
1690 of the privilege.

1691 Mr. SCOTT. Well, I mean, if you have in a certain  
1692 department--for example, sometimes a person may be hired as a  
1693 lawyer; sometimes they may have expertise and are not a  
1694 lawyer. Would the lawyer have--would there be a privilege  
1695 when the person happens to be a lawyer and a privilege when  
1696 the person does not happen to be a lawyer, and would there be  
1697 an advantage in hiring somebody for that position who is a  
1698 lawyer?

1699 Mr. SULLIVAN. The privilege is held by the corporation.  
1700 And to the extent that, for example, outside counsel is  
1701 acting at the behest of the corporation for purposes of  
1702 pursuing an internal investigation, individual employees who  
1703 are interviewed by that counsel does not hold a privilege  
1704 relationship with that investigating counsel. The privilege  
1705 is held by the corporate entity, and it can be waived only  
1706 through the exercise of a determination by management in  
1707 consultation with the board.

1708 Mr. DONOHUE. But Mr. Scott--

1709 Mr. SCOTT. That is if you have a lawyer. If you have a  
1710 non-lawyer in that position, he wouldn't have a privilege.  
1711 Is that right?

1712 Mr. DONOHUE. Yes. But even the lawyer--for example, as  
1713 you can imagine in this town, the Chamber is full of lawyers.  
1714 So if we looked at it as if it were a public company and I  
1715 walked in the door and talked to any of the lot of lawyers,  
1716 there is no implied privilege there.

1717 The privilege is when you seek legal guidance from those  
1718 people who are in a corporate position to give it and protect  
1719 it. And so walking down to the cafeteria with any number of  
1720 the lawyers that work for us in some other--and I think Mr.  
1721 Sullivan--again, I am not paying him a fee--I think he would  
1722 suggest that there would be no implied privilege there.

1723 Mr. SULLIVAN. I would agree.

1724 Mr. COBLE. The gentleman's time is expired.

1725 The distinguished gentleman from Florida.

1726 Mr. FEENEY. Thank you.

1727 General Thornburgh, you said you don't recall using this  
1728 required waiver in prosecutions during your tenure as AG.  
1729 You can think of, you know, briefly a hypothetical where it  
1730 would be appropriate in order for a corporation to have  
1731 considered to have cooperated where the attorney-client  
1732 privilege would be waived, can you not?

1733 Mr. THORNBURGH. I think there are certainly going to be  
1734 situations where the corporation itself may take the  
1735 initiative to waive the privilege in order to make available  
1736 to the Government--

1737 Mr. FEENEY. But off the top of your head, you can't  
1738 think of where it would be appropriate for the Justice  
1739 Department to waive--to require a waiver in order for the  
1740 corporation to have considered cooperating?

1741 Mr. THORNBURGH. I can't, but I wouldn't want to rule it  
1742 out. I mean, there might be--

1743 Mr. FEENEY. Okay. I think that is very telling.

1744 And with that, you know, Mr. McCallum, I have to tell  
1745 you, I am, you know, typically a huge supporter of giving the  
1746 Justice Department the tools that it needs because these are  
1747 very dangerous times, and we want to clean up Wall Street,  
1748 Enron, and WorldCom. We're a disaster for investors.

1749 But I would ask you: Have there been any successful  
1750 prosecutions that you know of of major Wall Street fraud that  
1751 would not have been successful in the absence of a required  
1752 waiver?

1753 Mr. MCCALLUM. I can't speak to that because I was not  
1754 personally involved to a degree to be able to assess the  
1755 strength or weaknesses of any of those cases.

1756 I would, in response to the previous question, indicate  
1757 to you, Mr. Feeney, that with respect to circumstances in  
1758 which it would be clear that a waiver of attorney-client  
1759 privilege might be necessary would be when the investigation  
1760 implicates or creates suspicion regarding the general  
1761 counsel's activity and whether that person is complicit



1762 | within the fraud. That would be one, you know, prime example  
1763 | that is obvious.

1764 | But I can't talk to you with regard to the second  
1765 | question. I can't address the issue of would the prosecution  
1766 | of X have succeeded without a--

1767 | Mr. FEENEY. If you would be willing to give us a list,  
1768 | I think I would like to know that, Mr. Chairman, with  
1769 | unanimous consent of the committee, if you would be willing  
1770 | to go back and get us that information.

1771 | General Thornburgh?

1772 | Mr. THORNBURGH. Yeah. I want to amplify a bit my  
1773 | response. Under the crime-fraud exception, there is no  
1774 | privilege. So it's not a waiver of a privilege; it is that  
1775 | the privilege doesn't arise in the first place.

1776 | I want to say one thing, if I might. Having been one of  
1777 | those young, zealous prosecutors that Tom Donohue so  
1778 | eloquently described earlier on, I want to come to their  
1779 | defense. We want our prosecutors to use every single tool  
1780 | that is legally available to them. On the other hand, I  
1781 | don't want to castigate those prosecutors for the faults that  
1782 | we are speaking about today.

1783 | This, unfortunately, is a matter of Department policy.  
1784 | And they are empowered to pursue these waivers by the policy  
1785 | of the Department of Justice. And it is that level upon  
1786 | which this requires some redress.

1787 Mr. FEENEY. I thank you, General Thornburgh. And on  
1788 that one, I wanted to go back to Mr. McCallum.

1789 Mr. McCallum, as I said, I tend to be a huge supporter  
1790 of the tools the Justice Department needs. But I am not  
1791 persuaded by the position of the Justice Department in this  
1792 case--in this case yet. I mean, you start out your remarks  
1793 by talking about the number of prosecutions.

1794 My goal would be investor confidence and investor  
1795 security. Prosecuting successfully lots of directors, CFOs,  
1796 CEOs, and COOs is not necessarily the type of successful,  
1797 clean Wall Street that I want to see.

1798 And towards that end, you know, Mr. Donohue suggested  
1799 that a lot of directors nowadays and top level management are  
1800 spending a good portion, if not the majority of their time,  
1801 not only building a better, cheaper, quality mousetrap, but  
1802 on compliance with regulatory burdens and legal burdens. It  
1803 doesn't seem like that helps investors, and it doesn't seem  
1804 like that helps a solid corporate governance strategy.

1805 You know, one of the concerns that I have is that if I  
1806 am a director--let's assume hypothetically I am a director  
1807 trying to do the right thing, which is to make profits for  
1808 the shareholders and succeed in business. And let's assume  
1809 for purposes of my hypothetical that even though I am a  
1810 Congressman, I am an ethical guy. And let's assume, since it  
1811 is my hypothetical, that I am trying to do the right thing.

1812           If I have an accounting question, I want to go to my  
1813 independent auditor. I am not allowed to do that under  
1814 Sarbanes-Oxley. If there is a close call on a legal or  
1815 ethical issue, I want to go to the corporation's general  
1816 counsel. I am terrified to do that for the same reason that  
1817 if I were a Catholic and there was no protection for things I  
1818 said to my priest, I would be afraid to confess some of my  
1819 sins and I would not be able to get the absolution that I  
1820 were seeking.

1821           So can you see that some of the things that we want to  
1822 accomplish with solid corporate governance, with people  
1823 focused on doing the right thing but making a profit for  
1824 their shareholders, providing a better widget for the  
1825 marketplace, can you see how some of these concerns--I am not  
1826 worried about the Enron fraud case. I am worried about the  
1827 guy trying to do the right thing and how he is afraid to talk  
1828 to, in the one case, his accountants, and in this case, his  
1829 lawyers.

1830           Mr. MCCALLUM. Mr. Feeney, we certainly hear the  
1831 arguments that are made by the business community on that  
1832 side relating to the chilling effect. I would submit to you  
1833 that our view of the compliance environment is indeed that  
1834 corporations are spending more time on compliance. There is  
1835 more regulatory supervision and oversight that has been  
1836 imposed as a result of the corporate frauds. And I think

1837 | that corporate governance is better off for it.

1838 |       Rather than being deterred from seeking counsel from the  
1839 | general counsel, we believe that management is--in fact has  
1840 | been encouraged to seek advice and counsel, and there are any  
1841 | number of institutional investors who assess the legal risks  
1842 | and who try to determine whether there are compliance  
1843 | programs in place that are vigorously followed and that are  
1844 | effective. That has become part of the investment decision  
1845 | that institutional investors make these days because of the  
1846 | frauds that--corporate frauds that have been experienced in  
1847 | the financial community over the--over the past 6, 7, 8  
1848 | years.

1849 |       Mr. FEENEY. Well, just one brief follow-up. If that is  
1850 | part of the investor decision-making process, does that  
1851 | account for the enormous flight into international  
1852 | investments and the fact that since Sarbanes-Oxley, for  
1853 | example, at that time 90 percent of foreign firms that went  
1854 | public raised 90 percent of their capital in the U.S. Today  
1855 | it's the reverse. Foreign corporations, not just because of  
1856 | Sarbanes-Oxley but because of the legal burden, are fleeing,  
1857 | and capital markets are moving overseas where there is no  
1858 | requirement for some of these things and these burdens.

1859 |       Mr. MCCALLUM. Well, I think that doesn't speak to the  
1860 | issue of the improvements in corporate governance, corporate  
1861 | standards, and corporate citizenship within the United

1862 States. And there has been, I would submit, a restoration of  
1863 confidence in the American corporate culture and in the  
1864 American financial markets as a result of many of the  
1865 regulatory oversight matters that have been instituted by the  
1866 Congress and enforced by the Department of Justice.

1867 Mr. COBLE. The gentleman's time is expired.

1868 The distinguished gentleman from Massachusetts.

1869 Mr. DELAHUNT. Mr. McCallum, let me give you a chance to  
1870 respond to part A. You know, what happened in the past  
1871 decade since I left, you know, my previous career as a  
1872 prosecutor? You know, what information do you receive now  
1873 from waiver of the attorney-client privilege that absolutely  
1874 cannot be developed from other mechanisms, other tools that  
1875 have existed, you know, for the past 30, 40 years?

1876 Mr. MCCALLUM. Well, Mr. Delahunt, there are three  
1877 standards that are articulated in the Thompson Memorandum.

1878 Mr. DELAHUNT. I am not interested in the standards.  
1879 What I am interested in, you know, is in the course of an  
1880 investigation, there are--there is a litany of investigative  
1881 methods, mechanisms, and tools--we could repeat them--that  
1882 are insufficient that have increased the reliance on the  
1883 waiver.

1884 Mr. MCCALLUM. All right. There are issues regarding  
1885 the timeliness of the information and whether or not a  
1886 particular criminal activity and the consequences of it can

1887 | be addressed regardless of the investment of significant  
1888 | resources in an adequately--in a timely manner to respond to  
1889 | both the public need, the financial market needs.

1890 |         Number two, the completeness of the information. I  
1891 | would submit to you that even in the investigations that you  
1892 | diligently pursued, you were not always confident that  
1893 | despite all of the efforts that you had used and all of the  
1894 | tools that you had used, that the information that you found  
1895 | was, in fact, complete. the whole story, all the facts, with  
1896 | all of the documents. And then--

1897 |         Mr. DELAHUNT. I--go ahead. I am.

1898 |         Mr. MCCALLUM. Excuse me. And then thirdly is the  
1899 | accuracy of that information. That is, there are subjective  
1900 | judgments that are necessarily made regarding the credibility  
1901 | of witnesses, the credibility of documentation, and all of  
1902 | that is--

1903 |         Mr. DELAHUNT. Right. But documentation and witness  
1904 | credibility, they can all be tested via grand jury testimony.  
1905 | I mean, everything that you say I can envision occurring  
1906 | without the need to secure the waiver.

1907 |         What I am concerned about, even--I think that, you know,  
1908 | there has been a restoration of confidence. I think that  
1909 | that in fact has happened as a result of legislative policy.  
1910 | I think it has happened probably because of aggressive  
1911 | enforcement. And I think that is good for our financial

1912 | markets, and over time, I think it would attract capital as  
1913 | opposed to encourage its flight.

1914 |         But I am concerned about the attorney-client privilege  
1915 | because I can see slippage in that privilege. You know,  
1916 | today it's, you know, the corporation. You know, tomorrow  
1917 | it's that priest, you know, that I might have gone to  
1918 | confession to. All right? I mean, it makes me very, very  
1919 | uncomfortable, and I really do think that this is a shortcut  
1920 | method to secure evidence that can be developed by  
1921 | alternative means.

1922 |         You know, I thought Mr. Thornburgh made a good  
1923 | suggestion in terms of the review that alluded to. I would  
1924 | like to see you, the Department on its own, conduct a review.

1925 |         Get us some information. You know, get us some data. I  
1926 | mean, who is doing this and who is initiating it? Because it  
1927 | is a concern.

1928 |         And, you know, I think that you can probably sense by  
1929 | the questions that have been posed, as well as observations  
1930 | by individual members, that there is a real concern here.  
1931 | And you don't want someone like Lungren from California, you  
1932 | know a far right conservative Republican, and Delahunt, this  
1933 | Northeast liberal, filing legislation on this because I think  
1934 | that is the order of magnitude that is being expressed here.

1935 |         So respectfully, that is a message that I think you can  
1936 | bring back to Justice, is that there is concern about the

1937 Thompson/McCallum Memorandum. Okay?

1938 Mr. MCCALLUM. I will certainly take that message back,

1939 Mr. Delahunt.

1940 Mr. COBLE. And for the record, let me say that far

1941 left-winger and that far right-winger are both pretty good

1942 guys.

1943 Gentlemen, before I forget it, I want to introduce into

1944 the record, without objection, coalition letters to preserve

1945 the attorney-client privilege.

1946 [The coalition letters follow:]

1947 \*\*\*\*\* INSERT \*\*\*\*\*



1948 Mr. COBLE. Gentleman, we thank you all very much for  
1949 being here. In order to ensure a full record and adequate  
1950 consideration of this issue, the record will be left open for  
1951 additional submissions for 7 days. Any written questions  
1952 that a member of the subcommittee wants to submit should also  
1953 be submitted within the same 7-day period.

1954 This concludes the oversight hearing on white collar  
1955 enforcement, part 1, attorney-client privilege and corporate  
1956 waivers. Thank you again, gentlemen. And the subcommittee  
1957 stands adjourned.

1958 [Whereupon, at 1:50 p.m., the subcommittee was  
1959 adjourned.]

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SPEAKER LISTING  
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