WHITE COLLAR ENFORCEMENT: ATTORNEY-CLIENT PRIVILEGE AND CORPORATE WAIVERS

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

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Mr. COBLE. Thank you, Mr. Donohue.
Mr. Sullivan.

TESTIMONY OF WILLIAM M. SULLIVAN, JR., LITIGATION PARTNER, WINSTON & STRAWN, LLP

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

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

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

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

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

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

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

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

Incredibly, I was further asked whether or not I was appearing as an advocate for my client, the corporation, or whether I was an

independent third party. Presumably, the regulators had hoped that I would undertake their investigation for them, despite the fact that I would be paid by my client to do so.

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

The waiver of attorney-client communications arriving in connection with a factual roadmap subsequently disclosed to law enforcement extends beyond the disclosure itself and encompasses all communications on that subject matter. The consequences of this result can be extreme, in that even a rudimentary roadmap is the product of information obtained through thousands of hours of legal work spent conducting interviews, parsing statements from hundreds of pages of interview notes, and analyzing thousands and perhaps millions of pages of both privileged and nonprivileged corporate documents.

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

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

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

The issues being addressed today in this Committee meeting are not simply part of an academic debate. Across the country, there are dozens of corporations scrutinized in internal investigations at any one time, with real consequences for real people. These investigations directly impact the lives of thousands of workers and millions of shareholders.

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

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

Thank you, and I look forward to your questions.

[The prepared statement of Mr. Sullivan follows:]

PREPARED STATEMENT OF WILLIAM M. SULLIVAN, JR.

TESTIMONY OF WILLIAM M. SULLIVAN, JR. ESQ.
PARTNER, WINSTON & STRAWN, LLP
BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY
MARCH 7, 2006

Introduction

Good Morning Chairman Coble and members of the Subcomittee. Thank you for your kind invitation to address you today concerning the Department of Justices' policies and practices with regard to seeking attorney-client privilege and work product protection waivers from corporations, and whether the waiver of such privilege and protection should be relevant to assessing the corporation's "cooperation" within the meaning of the Organizational Guidelines.

I am currently a partner at the law firm of Winston & Strawn, LLP where I specialize in white-collar criminal defense and corporate internal investigations. From 1991-2001, I served as an Assistant United States Attorney for the District of Columbia. In these capacities, I have been involved in virtually all facets of white-collar investigations and corporate defense: I have overseen both criminal investigations and internal corporate investigations, and I have represented both corporations and individuals in internal investigations, and before federal law enforcement authorities and regulators, as well as in class action, derivative, and ERISA litigation. My perspective on corporate cooperation and the waiver of attorney-client and attorney work product privileges has therefore been forged not only by my experiences on both sides of the criminal justice system, but by my participation in the civil arena as well.

The Real Issue Is Not The Waiver, But What Is Being Waived, And How It Was Assembled

For business organizations today, the traditional protections afforded by the attorney-client privilege and the attorney work-product doctrine are under siege. Prosecutors and regulators now routinely demand that, in return for the mere prospect of leniency, corporations engage in intensive internal investigations of alleged wrongdoing and submit detailed written reports documenting both the depth and breadth of their inquiry, as well as the basis for their conclusions.

When pressed on this practice, many prosecutors and regulators will publicly insist that they are only seeking a "road map"—the identity of the individuals involved, the crucial acts, and the supporting documentation. However, this has not been my experience. Just last week, I was asked by a government regulator in our very first meeting to broadly waive attorney-client privilege and work product protection and to provide copies of interview notes, even before I had completed my client's internal investigation, and accordingly even before I determined as corporate counsel that cooperation would be in my client's best interest.

Most importantly, however, such "road map" requests fail to relieve the valid concerns of corporations related to privilege and work product waivers. A less than carefully drawn road map risks a broad subject-matter waiver of attorney-client privilege and attorney work-product protection. Under current authority applicable in most jurisdictions, the waiver of attorney-client communications arising in connection with a factual road map subsequently disclosed to law enforcement would extend beyond the disclosure itself and encompass all communications on that subject matter. The consequences of this result can be extreme in that even a rudimentary road map is the product of information obtained through thousands of hours legal work spent conducting interviews, parsing statements from hundreds of pages of interview notes, and

analyzing thousands (perhaps millions) of pages of both privileged and non-privileged corporate documents. Furthermore, the waiver would be applicable not only to the law enforcement officials receiving the information, but would include all future third-parties, including other government agencies and opportunistic plaintiffs' attorneys seeking fodder for class action and derivative strike suits.

In addressing the practice of conditioning leniency for disclosure of otherwise privileged reports, I believe that a balance must be struck between the legitimate interests of law enforcement in pursuing and punishing illegal conduct, the benefits to be obtained by corporations which determine to assist in this process and to take remedial action, and the rights of individual employees. It is imperative that we do not sacrifice accuracy, fundamental fairness and due process for expediency and convenience. An equilibrium must be achieved between the aforementioned competing concerns, and I am prepared today to share my views regarding how that might be accomplished.

An Old Debate
Revitalized By A Harsh New Reality

The discussion regarding the attorney-client privilege in the corporate context is not a novel phenomenon. Commentators have long discussed and disputed the scope of the privilege and its application to corporations and other legal entities. The dialogue has largely revolved around efforts to adapt the attorney-client privilege to the practical realities of business entities: corporations act only through employees (with whom they share limited legal privity) and the conduct of those employees—at all levels of the company—have legal consequences for the entity.[1] Consequently, corporate privilege serves an important purpose in protecting

[1] Indeed, the harsh consequences of cooperation with law enforcement and the waiver of attorney-client privilege, have also been recognized for several decades. The decision in Diversified Industries v. Meredith, the only circuit court decision recognizing selective waiver of attorney-client privilege, was rendered in 1978.

communications between attorneys and their corporate clients so as to facilitate the candid exchange of ideas and information to enable the enterprise to comply with applicable law and regulation. But while the organization itself is recognized as the client, it is incapable of communicating with counsel. This anomaly has been crystallized in the "*Upjohn* Warning," which is premised upon on a 1981 Supreme Court decision and is routinely given to corporate employees by company counsel. This warning seeks to explain that discussions with corporate counsel are privileged, but that the privilege belongs solely to the company and may be waived at any time by the company. Ironically, this explanation inevitably undercuts the privilege's effectiveness by chilling communications. Employees are left with the accurate understanding that anything they say may be disclosed to third parties, including law enforcement, government regulators, and plaintiffs' counsel.

Today, what is driving the renewed concern regarding the waiver of attorney-client privilege is the premium being placed by law enforcement on internal investigative reports and related work product. In the wake of the Holder and Thompson Memoranda, and the Seaboard Report, the corporate defense bar has witnessed an unprecedented surge in government demands for access to privileged communications and work product. It is often said that perception is reality, and on this issue the two easily merge. Whether or not admitted by prosecutors and regulators, cooperation has become synonymous with waiver.

Regardless of this perceived equivalence, corporate counsel must always understand at the outset that choices exist, and that counsel's obligation to the client is to make the best choice based upon an informed understanding of the law and facts. The presumption of innocence should never be forgotten or ignored, and counsel's first responsibility should be to inquire as to whether misconduct in fact took place, and if so, whether there might exist a credible defense.

Common but misunderstood industry practices, newly revised and complex regulatory frameworks, and well-intentioned but ineffectual internal controls are all examples of factors which might negate criminal intent, and all should be fully explored and developed. Nevertheless, in other instances, counsel might be confronted with strong evidence of impropriety, and the best interests of the corporation are only served through cooperation with the government. Having made such a determination in today's environment, however, corporations can sometimes pursue compliance with the waiver demands of law enforcement, only to find themselves rewarded with an indictment. Moreover, because such waivers cannot be recalled or even truly limited under current legal doctrine, the compliant corporation has thereby also imperiled itself to parallel and intractable civil litigation, consuming vast amounts of corporate financial resources and posing a constant distraction to management. In such situations, the only real winners are the lawyers.

Further, there is widespread concern that government demands for waiver in this context blur traditional criminal procedure constraints. Employees interviewed are often compelled to provide statements and to potentially waive their Fifth Amendment right against self-incrimination under threat of losing their employment. Ironically, the Supreme Court in Garrity v. New Jersey[2] held almost thirty years ago that evidence obtained through such coercive pressure was inadmissible against government employees, yet the government currently demands that corporations routinely deploy such duress against their own. Moreover, through corporate counsel, the government can gain direct access to witness statements without negotiating a proffer, immunity or cooperation agreement with counsel for individuals, and without having to specify whether the person interviewed is a witness, subject, or target of its investigation. Of

[2] Garrity v. New Jersey, 385 U.S. 493 (1967).

course, all such information gathered by corporate counsel is obtained free from constitutional protections, especially that of the Fifth Amendment, and can immediately serve as the basis for charging decisions against either the corporation itself or individual employees.

By necessity, therefore, corporate counsel is often placed in a precarious position, one which the Fourth Circuit has described as a "minefield." In re Grand Jury Subpoena Under Seal, 415 F.3d. 333 (4th Cir. 2005). Accordingly, the careful and thoughtful corporate counsel understands and fulfills the obligations imposed by the Rules of Professional Conduct applicable to internal investigations, specifically the responsibility to explain client identity, disclose conflicts of interest, deal fairly with unrepresented persons, and to never employ methods of obtaining evidence that would violate a client's interest or operate in disregard of the rights of third persons.

Nevertheless, we have seen some internal inquiries proceed in a pre-determined way, commissioned by those who have an interest in absolution. In such instances, employees (especially mid-level and lower-level employees) were neither afforded counsel, nor apprised of their right to have counsel present during the interviews at their own expense. In addition, employees were not provided any opportunity to review documents or refresh their memories before or during interviews, even when the events at issue occurred years earlier and were largely indistinguishable from the employee's routine activities. Moreover, even in a well intentioned investigation there are often no assurances that the team of investigators employed to ferret out the truth is thoroughly knowledgeable about the corporation's business and the subject matter under investigation. This is especially true in cases involving complex financial transactions and accounting issues, which are often beyond the expertise of most investigating attorneys. In such circumstances, there is a heightened risk that inaccuracies and misperceptions

will be held by investigators, which in turn can lead to incorrect findings, misplaced blame, and, in some cases, the frustration of the search for truth.

Such observations should never be understood to be a denunciation of the internal investigation process, but rather a call for its continued refinement as an indispensable corporate compliance and governance tool. Today, there are many fine lawyers who are diligently conducting thorough, accurate investigations and, as is their professional responsibility, maintaining fidelity to individual rights, and in particular the rights of unrepresented persons. Nor do I wish to suggest that there should be a single, inflexible approach to conducting an internal investigation. Every scenario is different, and the endless variety of business enterprise precludes drawing conclusions as to a single "correct" way to perform an internal investigation. Yet, as we review the policies related to the waiver of attorney-client privilege and the disclosure of the products of internal investigations, we must be cognizant of the weaknesses of the process and the risks of inaccuracy and injustice, particularly in instances where the fundamental fairness obligations of counsel have gone unrecognized. Once an investigation has been concluded and the attorney-client privilege and work product protection waived, investigative conclusions and findings invariably shape the contours of all the actions that follow—law enforcement and regulatory actions, civil litigation, and public reports and perceptions. The findings become, in essence, the law of the case, and while individual aspects of the report or findings may be questioned or discredited, it is almost impossible to undo the damage of a wholly inaccurate, incomplete or biased report.

Striking The Proper Balance

The attorney-client and work product privileges reflect the public priorities of facilitating the observance of law through the uninhibited communication with counsel and the resultant

effective assistance of counsel. The recent efforts of law enforcement to condition cooperation on the disclosure of detailed written reports and underlying attorney work product implicate society's interest in identifying and punishing crime, the corporation's interest in identifying misconduct and adopting remedial measures, as well as protecting itself from exasperating civil litigation, and the rights of individuals. There is obviously friction in seeking to satisfy all these objectives, but there are a number of possible measures which, if developed, would maximize the benefit to society, while protecting the rights of employees as well.

(i) Consensus on the Type of Information the Government Expects

There is a lack of consensus regarding what the government is actually seeking from corporations. At least some prosecutors have publicly stated that they are merely desirous a "road map" of internal investigations -- the identities of the individuals, the key events, and the supporting documents. In practice, however, many law enforcement authorities require far more, including detailed written reports, interview notes, attorney opinion work product, and other sensitive materials. Discussions of waiver need to be informed by a consensus of what the government will and should accept from corporate cooperators, in exchange for leniency. As developed above, conditioning credit for cooperation on the waiver of privilege and the disclosure of detailed reports and work product chills candor within the corporation and implicates individual rights otherwise left intact by other forms of cooperation. In my view, offering to provide the factual findings of an internal investigation conducted in a manner consistent with the precepts of fundamental fairness should satisfy government representatives while simultaneously preserving privileged communications and work product. Indeed, once in receipt of a factual proffer, the government should be encouraged, and should itself insist, that it perform its own legal analysis.

(ii) Selective Waiver

To the extent law enforcement authorities and regulators continue to insist on the disclosure of internal investigative reports and attorney work product, I believe we must consider implementing a limited version of selective waiver, restricted to specifically negotiated materials, which would permit corporations to make disclosures to the government without sacrificing the privilege with respect to all other third-parties and without effectuating a broad subject-matter waiver. To date, most of the Circuit Courts of Appeals have refused to recognize the idea of selective waiver on the basis that such a practice is fundamentally inconsistent with the traditional application of the waiver and could encourage the use of the waiver as both a "sword and a shield." As a result, a corporation faces a veritable Hobson's choice. The corporation can waive its privilege and thereby receive consideration and credit from the government for its cooperation, but then must face the prospect of enormously expensive civil litigation brought by plaintiffs' counsel seeking to exploit the corporation's own repentant efforts. Alternatively, the corporation may refuse to waive the privilege, but then runs the risk of being perceived by the government as uncooperative, and therefore undeserving of consideration or leniency. Selective waiver cuts through this Gordian Knot by recognizing the benefit to society of the corporation's full and complete cooperation, while at the same time preserving corporate defenses and the interests of innocent shareholders and employees from vexatious litigation.

Far from denigrating the attorney-client privilege as a mere tactical tool as some critics have alleged, the doctrine of selective waiver restores the delicate balance of protecting confidential legal communications from outside parties while still allowing those adverse parties access to the underlying factual material. Perhaps most importantly, however, selective waiver allows the government access to relevant information, without the broadcasting of untested

conclusions about the corporation or its employees to the public in a manner in which no meaningful response is possible, and without unnecessarily encouraging burdensome litigation.

(iii) Standards to Guide Internal Investigations

Under the *status quo*, the most vulnerable group is that of individual employees. Through internal investigations, employees are routinely compelled to participate in interviews under the threat of losing their jobs. These interviews are not necessarily subject to basic notions of fairness and due process. Nevertheless, they can have profound implications for the individual employee, including loss of livelihood, diminution of reputation, compelled waiver of the Fifth Amendment right against self-incrimination, and, ultimately, civil sanctions and/or criminal prosecution. The significance placed on these interviews, and the potential for adverse consequences for the individual, increases dramatically if otherwise privileged records of the interviews are demanded by law enforcement as the price of corporate cooperation.

Should this trend continue, corporate counsel and the legal profession as a whole need to establish compelling guidelines for interacting with individual employees during internal investigations. While the Rules of Professional Responsibility governing the legal profession apply to how internal investigations should be conducted, greater clarity is needed. For, example American Bar Association Model Rule 4.4 provides that "[i]n representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of [third persons]." Such general pronouncements, however, do little to articulate when individuals should be apprised of their right to have individual counsel, what access (if any) the employee should have to corporate records and documents, and whether the employee should be given an opportunity to review and correct interview notes. Not only do such fundamental questions remain

unanswered, but there currently exists no effective mechanism for redressing even clear violations of professional responsibility on the part of corporate investigators.

The call for uniform standards for internal investigations is not merely a prescription for the corporate bar. I believe that law enforcement authorities have an affirmative obligation to be sophisticated consumers of internal investigative reports and to ensure that the search for truth is conducted in a fair and impartial manner consistent with the rules of professional conduct and traditional understandings of fundamental fairness. This proposed procedural review would assist in insuring that conflicting interests within a corporation do not result in an unreliable report and would further refocus internal investigations on what they have always purported to be about -- helping the corporation as an entity to resolve internal problems, and not what they have too frequently become -- an exercise in protecting one constituency of the corporation at the expense of another.

Conclusion

The issues being addressed today in this committee meeting are not simply a part of an academic debate. Across the country there are dozens of corporations scrutinized in internal investigations at any one time, with real consequences for real people. These investigations directly impact the lives of thousands of workers, and millions of shareholders. In conditioning leniency upon the disclosure of otherwise privileged information, we need to accommodate the competing interests of effective law enforcement, the benefits to redound to deserving corporations, and the fundamental rights of individual employees. Reaching a consensus on the information sought by the government, the adoption of a selective waiver for cooperating

corporations, and lucid, comprehensive standards to guide internal investigations, are each important first steps.

Thank you. I look forward to your questions.

Mr. COBLE. Thank you, Mr. Sullivan.

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

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

Your mike is not on, Mr. McCallum.

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

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

So it is not identical, but it affords the type of prosecutorial discretion to the United States Attorney to determine what it will be, and that is coordinated through the Executive Office of United States Attorneys in the Department of Justice as well.

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

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

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

And we were told at that time that a very detailed study of particular cases would be prepared and would be provided to us. And just last week, Mr. Ide, the ABA chairman, indicated to me that that was forthcoming. That will allow us to dig down into the specifics because each case is really unique, Mr. Chairman. And it is that sort of detailed analysis that will be necessary to determine or refute the "routineness" with which these waivers are requested. We do not believe that they are "routinely" requested.

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

Mr. Thornburgh, during your many years of public service, were you ever aware of any criminal case in which the Justice Depart-