E. Norman Veasey
Chase Manhattan Centre
1201 North Market Street
Suite 1402
Wilmington, DE 19801

New York Office
767 Fifth Avenue
New York, NY 10153
ph: 212-310-8664

email: e.normanveasey@weil.com
phone: 302-656-6600

September 13, 2007

Senate Judiciary Committee
The Honorable Patrick Leahy, Chairman
The Honorable Arlen Specter, Ranking Member
United States Congress
Washington, DC

RE: Judiciary Committee Hearings on S. 186

Dear Chairman Leahy, Ranking Member Specter, and Members of the Committee:

I think it might be helpful if I begin by introducing myself. I am submitting this report to you as an individual and on a *pro bono* basis. I have been a member of the Delaware Bar for nearly fifty years, having served as a prosecutor, a member of a private firm, Chief Justice of the Delaware Supreme Court, and again (and currently) as a Senior Partner of a private law firm. A sketch of my biographical material appears in the footnote.[1]

---

[1] The following biographical material is excerpted from the website of my firm [www.weil.com]. Norman Veasey is a senior partner at the firm of Weil, Gotshal & Manges, LLP. He is the former chief justice of Delaware, having stepped down from the Delaware Supreme Court in May 2004, after serving a 12-year term as the top judicial officer and administrator of that state's judicial branch. During his tenure as chief justice, Delaware courts were ranked first in the nation for three consecutive years for their fair, reasonable and efficient litigation environment. Justice Veasey has also been credited with leading nationwide programs to restore professionalism to the practice of law and adopt best practices in the running of America's courts. He was awarded the Order of the First State by Delaware Governor Ruth Ann Minner, the highest honor for meritorious service the state's governor can grant. He has also received various other awards and honorary degrees, as detailed in his curriculum vitae.

As Congress considers passage of the Attorney-Client Privilege Protection Act of 2007, I hope that this report will offer you the opportunity to "hear" from me at least some of the voices and experiences of those who cannot be here to tell you their stories in person. Neither I nor my firm represent any of these entities or individuals in connection with the events related here.

I have been asked to act as a neutral in relating these stories to the Congress by the Association of Corporate Counsel (ACC) and the National Association of Criminal Defense Lawyers (NACDL), representing the Coalition to Protect the Attorney Client Privilege[2] who support this legislation. This anecdotal evidence represents a sampling of the stories of those lawyers for companies who have personally experienced instances of prosecutorial abuses of power in the coercion of the waiver of their clients' attorney client privilege or work product protection or the denial of the rights to counsel or job security protections for their employees in the corporate investigation process.[3]

Chief Justice Veasey was President of the Conference of Chief Justices, chair of the Board of the National Center for State Courts, chair of the Section of Business Law of the American Bar Association, chair of the American Bar Association's Special Committee on Evaluation of the Rules of Professional Conduct (Ethics 2000) and is immediate past chair of the Committee on Corporate Laws of the ABA Section of Business Law. He is a Fellow of the American College of Trial Lawyers. He and his wife, Suzy, have four children and eleven grandchildren.

Justice Veasey received his A.B. degree from Dartmouth College in 1954 and his LL.B. degree from the University of Pennsylvania Law School in 1957. At the University of Pennsylvania Law School, he was a member of the Board of Editors and the senior editor of the *University of Pennsylvania Law Review*.

From 1957 until he took office as chief justice in 1992, Mr. Veasey practiced law with the Wilmington, Delaware, law firm of Richards, Layton & Finger, where he concentrated on business law, corporate transactions, litigation, and counseling. He served at various times as managing partner and the chief executive officer of the firm. During 1961-63, he was Deputy Attorney General and Chief Deputy Attorney of the State of Delaware. In 1982-83, he was President of the Delaware State Bar Association.

[2] The Coalition to preserve the Attorney-Client Privilege includes the American Chemistry Counsel, the American Civil Liberties Union, the Association of Corporate Counsel, Business Civil Liberties, Inc., the Business Roundtable, The Financial Services Roundtable, Frontiers of Freedom, the National Association of Criminal Defense Lawyers, the National Association of Manufacturers, the Retail Industry Leaders Association, and the U.S. Chamber of Commerce. The American Bar Association is prevented from joining coalitions under its internal policies, but works with the Coalition in promoting its goals and the Attorney-Client Privilege Protection Act of 2007.

[3] The Association of Corporate Counsel and the National Association of Criminal Defense Lawyers contacted their membership via email to invite them to participate confidentially in this

I accepted this role because it is clear to me that these lawyers and their clients wish to have their stories heard through a credible neutral party. They believe that this information shows that in a number of cases the government is engaging in inappropriately coercive behavior. The lawyers with whom I spoke are concerned that public identification of their clients could lead to reprisals, and that public disclosure of these stories could further erode their clients' ongoing relationships with prosecutors or enforcement officials with whom they must continue to work. Because their clients are already (or have been) under scrutiny for some alleged or acknowledged failure that has led to a government investigation, many are concerned that they would be professionally remiss if they stepped forward publicly in a way that could identify their clients and further damage their clients' interests.

I have spoken personally to each lawyer whose information appears in this report. The information provided to me by the lawyers is *their* information, not mine. I have not independently verified the accuracy of the underlying facts.[4] I do not submit this report as an advocate for any one position or as a partisan complaining personally of government practices. I offer this report solely as a neutral, whose responsibility is solely to bring forward these stories on behalf of the lawyers who cannot tell you them in person.

In sum, while many respondents acknowledged that the DOJ and other government agencies have made strides to address these concerns by issuing the McNulty Memorandum, those presenting the post-McNulty information believe that practices under that Memorandum often fall short of providing meaningful protections from prosecutorial abuses in the field. Thus, those reporting these events believe that the McNulty Memorandum may not be fully effective in erasing practices that it was designed to address.

---

project if they had anecdotal evidence to recount. ACC created a confidential website reporting form that was "linked" to the email. After explaining my role and what the project to collect this information entailed, it offered respondents the option to submit their contact information, with the promise that they would be contacted to collect their story, draft a written summary of their experience, and then engage in a conversation with me to allow me to verify that the information summarized was an accurate rendering of their experience, that they certified that it happened, and that they had personal knowledge of the facts/experience. This report will not attribute these stories to any company or lawyer, nor will I share the identity of those with whom I certified the accuracy of these reports and to whom I promised confidentiality. My role was to perform the function of a neutral narrator, without endangering any of the respondents or their clients' interests.

[4] As noted above, neither I nor my firm represents these entities or individuals in connection with the stories relayed in this report, although members or associates in my firm may have represented one or more of these parties in unrelated matters.

The Information

Some of the events that are recounted here occurred before, and some after, the Department of Justice (DOJ) issued the McNulty Memorandum in late 2006. The following events described to me are presented somewhat in reverse chronological order, beginning with events that took place (at least in part) after the McNulty Memorandum was issued in December 2006 ("post-McNulty cases"). There are many more stories of abuses that took place or began before the issuance of the McNulty Memorandum ("pre-McNulty cases"), some of which are next included here. These pre-McNulty stories are included to provide a baseline, so that post-McNulty conduct can be compared to examine if the McNulty Memorandum has made meaningful changes.

(1) Allegation under investigation: Fraud
Agency: US Attorneys Office – East Coast

Facts: Begun pre-McNulty, continued post-McNulty – Allegations of fraud arose in the corporate setting. The company hired outside counsel to investigate the allegations and met with the U.S. Attorneys' office. The company has not ultimately been charged, but no declination letter has been received.

This was not a case that involved a panoply of fraud allegations (they were discrete). During the first meeting with prosecutors *after* the McNulty Memorandum had been issued, the prosecutor asked the company to turn over *everything* (including privileged material) – to look behind the internal investigation. When the process required by the McNulty Memorandum was raised by company counsel, the prosecutor's response was, "I don't give a flying ----" about the policy, and further said that the burden was on the company to "appeal" the waiver request up the chain of command at DOJ. [This, of course, is not an accurate reading of the McNulty process.] During continued negotiations, the prosecutor's continued refrain was "I don't care about the [McNulty Memorandum] policy." Ultimately, the client decided to "split the baby" and turn over some material while continuing to assert confidentiality as to some key material.

(2) Allegation under investigation: Accounting fraud
Agency: US Attorneys Office – East Coast

Facts: This situation took place post-McNulty. The company hired outside counsel to investigate allegations of accounting fraud. The company eventually met with representatives from a U.S. Attorneys' office. No charging decision has been made at this time.

During the initial meeting with prosecutors, outside lawyers presented prosecutors with an oral report of the internal investigation – this report included names of individuals who were investigated and other material that was also given to the Board of

Directors, including the conclusions drawn by the lawyers who investigated the matter. The oral presentation, however, did not include accounts of what each witness said.

The prosecutor asked for *all* interview notes and *all* supporting documents, many of which were protected by the attorney client privilege or work product doctrine. Outside counsel responded that the McNulty Memorandum did not permit such a request since, among other reasons, the witnesses/employees were available for interviews. The prosecutor initially responded that the prosecutor was unfamiliar with the McNulty Memorandum's provisions. After presumably becoming familiar with the memo, the prosecutor said that the prosecutor's view of "cooperation" was that the company would be considered to be cooperative if the corporation would waive the privilege and the prosecutor did not actually have to seek higher approval under the McNulty Memorandum in order to demand waiver. [This, of course, is not an accurate reading of the McNulty process.] The company "stuck to its guns" and did not provide the material. The company has not yet received a declination letter since apparently no charging decision on the entity has been made, and the prosecutor has not yet indicated whether individuals may still be charged.

(3) Allegation under investigation: Financial fraud
Agency: U.S. Attorneys Office - East Coast

Facts: This situation took place post-McNulty -- Questions were raised as to how a retail sale that resulted in a merger was ultimately booked. An outside law firm was hired and advised the company that an investigation was appropriate, but that a written report should not be issued given the current climate of privilege waiver. The firm's investigation concluded that there was no material accounting failure, but that internal controls should be improved. In the meantime, a whistleblower alleged that top managers were committing fraud against the company. The company self-reported both of these issues to the U.S. Attorneys' office.

The Assistant United States Attorney ("AUSA") with whom the company met immediately requested the results internal investigation in writing, including any material protected by work-product doctrine and the attorney-client privilege. The company instead provided "hot documents" and an oral synopsis of the facts as adduced in the investigation. When the case was referred to a different branch office within the same district, the company was again asked by a different AUSA for a written internal report which would include privileged and work product information, without consideration to whether the material already provided contained sufficient material for the conduct of the government's inquiry. Company counsel asked the AUSA if his office planned to follow the McNulty Memo guidelines on requesting supervisory permission for demanding privilege waiver, and the AUSA said that *should not be necessary*. No charging decision has been made at this time.

According to counsel, the pressure placed on the company to produce, without McNulty reporting-up protections, is now more subtle, but nonetheless palpable.

(4) Allegation under investigation: Environmental Crime
Agency: Main DOJ Environmental Crimes

Facts: This situation took place post-McNulty. The company self-reported a possible environmental violation. The government used the McNulty Memorandum as an offensive strategy to obtain as much information as possible from the company's outside counsel. The initial meetings with environmental enforcement lawyers occurred after the McNulty Memorandum was issued. The company and its outside counsel were told directly that if it wanted the full benefit of "cooperation," that cooperation would have to be "total" under DOJ criteria, and that the company would have to jump through "all the hoops." The conversation continued until the company finally offered to produce certain privileged material, which in the eyes of the company was not a voluntary offer. Then, the prosecutors explained what little privileged information they would *not* need to see, rather than what they *did* need to see. Counsel took this instruction as a clear indication of a fishing expedition into privileged material. No advice of counsel defense or any other strategy has been asserted that would suggest a necessity for reviewing privileged advice in order to conduct an investigation. Company counsel concluded that the government was setting them up to take away the benefits of having self-reported and having produced all the privileged material that was necessary if they did not turn over *everything*. Moreover, the government denied that they had to write any memos to higher authority under McNulty.

(5) Allegation under investigation: Compliance failure in a regulated industry
Agency: Main DOJ and SEC

Facts: Pre-McNulty 2006 and still pending today (post-McNulty) – The company voluntarily self-reported a Foreign Corrupt Practices Act (FCPA) violation that involved bribes passed between an employee in an overseas subsidiary and a local official. The violation was brought to the General Counsel's attention by the internal controls reporting mechanisms (hotline) employed by the company for these purposes. It was a relatively small case involving a low level "target" as the employee in question. As a result, the company was able to complete about 75% of its own internal investigation (through an outside law firm) before it contacted the government. Thus, the company knew the scope of issues and people involved before anyone expected them to respond to demands or offers of the government to expedite the case while the facts and players were still relatively unknown.

The company's approach, determined by the Board of Directors, was to offer the government full cooperation, providing not only all factual material requested and access to employees, etc., but also certain key privileged documents that the company and the firm were prepared to release to expedite the government's review of the case. As a part of this production of discrete privileged material, the company agreed to provide attorney notes and memos of interviews with employees whom the company had targeted or

considered to be fact witnesses. The accused employees had already been dismissed for what the company believed were their clear violations of corporate policy and law. The company specifically noted, however, that it would not include in their disclosure the memos, presentations, and conversations discussed between the Board and the attorneys reporting this matter, since the Board's decision is all that was important to the disposition of the case, and their decision was to cooperate.

The government lawyers requested counsel to inform them whether the company was paying for lawyers to represent individual employees who were being requested to appear as fact witnesses in the US (many of whom had to travel to the US to meet with the government). They were told: "Yes, the company is paying for that, and it's in your [the government's] interest, or these employees would not likely come and certainly might not want to talk, not knowing what the implications might be to them personally, especially as non-US citizens." To this the government lawyers further queried: "What if an employee refuses to talk to us?" To this the company's lawyers answered: "They must come to talk to you under our policies, but we advise them that they can take the Fifth if they so choose – it's their right."

Counsel's assessment is that even though the company has voluntarily come forward, has proven compliance systems that worked, has conducted an investigation and shared the results, has delivered privileged material, and has taken a variety of remedial measures, including firing the employees who took part in the violation, there is still a hesitancy on the part of the government to end the investigation, and it is still open. Even though the counsel agrees that the government lawyers have been reasonable and responsible to date (having been offered just about everything they could possibly ask for and more), there is no conclusion to the matter and counsel still fears that the prosecutors could conclude that despite the sufficiency of what's been provided, they don't have *all* privileged material. As a result, counsel believes that the government does not seem to be able to decide to let the matter go to remedy and rest. Counsel states: "The only reason we offered privileged material in the first place was our complete belief that nothing less than full waiver would be demanded, and that if we could choose the privileged documents that were relevant and limit disclosure to that -- along with all the factual files we readily produced – that we'd be better off than if we waited for the blanket privilege disclosure demand under Thompson."

Counsel also noted: "They have all the leverage in the relationship between us, and we feel as if we had to give the bully our lunch money before he beat us up on the playground, and he still hasn't decided if he's going to beat us up anyway. In this case, the prosecutor didn't demand privilege waiver, but he sure did tell us they appreciated it, so much so that it seems they're waiting to see if there's any more we'll give without their having to outright ask, given that they are now governed by the McNulty Memo process." The matter is still pending and undecided; the government has not indicated that it needs anything more (factually) to complete its assessment and close the case. And thus, counsel says he wouldn't be surprised if the DOJ came back for the privileged board reports before the day is done. He also believes that if DOJ doesn't ask for it, the

SEC might happen to bring up a request for it under Seaboard's authority, share it with the DOJ, and the end-run around the McNulty Memo would be complete."

(6) Allegation under investigation: Consumer fraud
Agency: U.S. Attorneys Office – Midwest

Facts: The case arose pre-McNulty, under the Thompson Memorandum, and was eventually settled under the terms of a deferred prosecution agreement. The AUSA made it a condition of settlement that the company waive its attorney client privileges and work product protection, which the company did not wish to do because of their concerns about resulting waivers cutting a path into the company's confidential files for possible third party litigation.

The company repeatedly requested the prosecutor to articulate what documents or information was sought, in an effort to figure out how to get that information to the AUSA as a factual production that did not entail blanket privilege waivers. They also asked the prosecutor to indicate which privileged materials were targeted to see if a smaller or limited production of privileged material was possible. It was made clear to the company that a blanket waiver was required as a condition of settlement.

(7) Allegation under investigation:
Environmental crime, obstruction, false statements
Agency: Main DOJ Environmental Crimes

Facts: The case took place pre-McNulty under the Thompson Memo. It originated with a series of media reports about the company. The prosecutors turned quickly to using the company to put enormous pressure on employees, pressuring the company to fire employees who had received target letters, even though the company had not had the opportunity to do its own internal investigation or consider the merits of the allegations. The company was also pressured to provide the government with a broad privilege waiver in exchange for a settlement.

At one point during the lengthy negotiation of this case, the company and line prosecutors reached an agreement about privileged material, and it was decided that a limited amount of fact-based attorney work-product would be supplied. Upon reviewing this agreement, the line prosecutors were overruled by supervisors who maintained under the terms of the Thompson Memorandum that the company must turn over *all* relevant privileged and work product material in exchange for a settlement. The company refused, and the company was indicted; the same negotiations and the same result ensured in separate federal districts with respect to different facilities. It was clear to defense lawyers involved in this case that prosecutors wanted the broad waiver to "fish" for information against the individuals (not the entity) who were ultimately charged and were alleged to be the underlying problem. But both the individuals and the company were indicted, tried, and were found guilty and/or pleaded guilty to violations that were largely comprised of false statement and obstruction charges, as distinct from charges

based on any substantive/environmental crime wrongdoing. The key point that really concerned counsel about the DOJ tactics in this matter is that they were pressing for a waiver of the privilege here. At the same time they were hypocritically saying publicly that they never press for waiver of the privilege.

(8) Allegation under investigation: compliance violation
Federal Regulatory Agency

Facts: Pre-McNulty. In the conduct of a non-public investigatory audit, a flaw in the company's software system (regulating data security) was detected. Because the data related to customers, the flaw was considered a violation by regulators of the company's industry. The company engaged an outside law firm to review past practices to determine if there were process problems that were more significant or that were not resolved by the fixes put in place by the company. Regulators demanded the outside counsel's report, which the company did not wish to produce because it was privileged. The company's counsel repeatedly asked the enforcement officials what they wanted to know, since the company's lawyers assured them they would be happy to provide them with any facts sought. Enforcement officials could not or would not articulate their needs. So, the company's counsel told the enforcement official, in effect, that "I can't give you the report, but if you ask me these specific questions, I can give you answers that will provide you with all the information that's in the report that you need, and I can provide that without waiving my client's privileges if you'll just ask for these facts and not ask for my privileged lawyer's report."

Regulatory officials responded by reminding the company's counsel of the enforcement environment and pressures under which they were working. They then explained that the Thompson Memo was the authority that agencies such as theirs looked to in order to determine a company's cooperation, and that privilege waiver was therefore necessary since it was a listed factor for cooperation (rather than a mere item on a discretionary list to consider). The officials further threatened that if the company did not offer the privileged documents, that such refusal is a bad indicator of "cooperation." The regulators alluded to the availability to them of a cease and desist order in such matters where there is a lack of cooperation. [In the industry involved, a cease and desist order can mean an immediate and large-scale hit to the company's stock price and disastrous impact to the company's reputation in the investment and business community].

The company's counsel reported that the irony was that the privileged report was exculpatory, but its disclosure would have waived the privilege in any third-party law suits that could follow. They paid the fine. Government counsel's comment was that the Thompson Memo was all the authority they felt they needed to demand the waiver of the company's privilege and work product rights.

(9) Allegation under investigation: Conspiracy to disclose national defense information (receipt of NDI) by a Non-Profit Corporation Agency: U.S. Attorney's Office – East Coast

Facts: The case took place pre-McNulty, under the Thompson Memorandum. Individual defendants, along with the Non-Profit as an entity, were investigated as part of a sting operation; the two individual targets were ultimately charged with conspiracy to disclose "NDI" because of their *receipt* of such information. The Non-Profit was ultimately not charged, but before that result was reached, the Non-Profit was forced to agree to conditions that included firing the individuals and cutting off their attorneys' fees.

According to court documents, then-U.S. Attorney Paul McNulty explicitly told the Executive Director of the Non-Profit that it needed to fire the individuals, and explicitly cited the Thompson Memorandum as a guidepost for such cooperative steps. The next business day, the Non-Profit fired both individuals and terminated its joint defense agreement with them. The government then inquired pointedly into whether the Non-Profit was continuing to pay the former employees' attorneys' fees. The Non-Profit responded that it was, pursuant to its own by-laws. Moreover, no one had found them guilty of a crime, nor had they pleaded guilty. Prosecutors also asked whether the Non-Profit was providing severance pay and health benefits to the individuals (one of which suffers from a heart condition that had required recent surgery). Defense counsel for one individual confirmed that these requests were made by prosecutors to counsel and counsel responded in the affirmative.

Two months later, both former employees had been cut off entirely from benefits and payment of attorneys' fees that had been previously provided by the Non-Profit. The individuals were indicted. Both filed motions arguing that their Sixth Amendment right to counsel was violated by the government's conduct as described above. U.S. District Judge T.S. Ellis, III, ruled that the government's pressure was "unseemly and unjust" and that DOJ policy in this area was "obnoxious in general" and "fraught with the risk of constitutional harm." He held, however, that the defendants had not been *actually* prejudiced by their resulting inability to have the entity pay for counsel because, in fact, they were lucky enough to have top defense counsel continue representing them zealously even though payments had ceased. The indictments of the individuals are still pending.

[For an interesting comparison of results where the judge found that government pressure to cut off individual defendant's fees *was found to* affect the employee's constitutional rights to mount a defense, see the ongoing case of the KPMG partners under scrutiny for alleged problems in tax shelters they'd promoted in *United States v. Stein* (2007 U.S. Dist. LEXIS 52053).]

(10) Fraud allegation under investigation
Agency: Originally, the SEC, then joined by West Coast U.S. Attorney's Office

Facts: Begun pre-McNulty under the DOJ's Thompson Memo and the SEC's Seaboard Report – [The Seaboard Report is the SEC's internal policy statement that parallels the DOJ's Thompson Memo, listing criteria for cooperation in the investigation of an SEC enforcement matter and including both privilege waiver and a variety of actions to be taken against employees who are targeted, but not yet found guilty of crimes.]

The company responded to an SEC subpoena requesting information on supplier transactions pursuant to the SEC's investigation of the supplier company (and its high-profile CEO) who were the targets of an alleged securities reporting violation. The company complied. One year later, the AUSA and the SEC asked to speak to one of the company's product managers, which the company facilitated. The AUSA and the SEC enforcement lawyer involved then told the company's in-house lawyers that they should consider getting this employee an attorney.

The company began an investigation. The investigation showed that other employees involved may have engaged in problematic behavior with the targeted company and that their internal controls had not "bubbled up" this matter. The general counsel went to the Board of Directors and presented an extensive discussion of the problem; the result was a decision by the Board to cooperate fully with the government and to provide whatever factual information was needed (and, in fact, to provide even more than what was requested initially by government investigators). This was an effort to admit to the failure, commit to fixing the problems, and to move past this incident as quickly and cleanly as possible. The SEC ultimately recommended a cease and desist action and a disgorgement.

At the first meeting with both the SEC lawyer and the AUSA when a written report of the internal investigation was going to be done and when it was going to be produced to the government, they made repeated demands for a privileged written report that the general counsel and the forensic accountant were preparing. Neither the AUSA nor the SEC lawyer would explain why the privileged material was necessary to pursue a case against the individuals or the corporation or the original targeted company.

In the context of demanding the privilege waiver, the AUSA would periodically make threats about bringing indictments against the individuals and the company. Counsel for the company noted that while the SEC staff was tough on the company, they were uniformly professional in their approach, and they credited the company for the cooperative behavior it had displayed, even as they continued to argue for privileged material production. Company counsel was, however, extremely offended by the AUSA's "bullying" behavior, and what he labeled as an unprofessional "loose cannon" approach which indicated less interest in conducting an investigation than in putting a quick notch on his prosecutorial belt. Counsel intimated that even the SEC lawyers

involved in this case were dismayed by the prosecutors' approach and tactics, finding it unhelpful and inappropriate to the quick resolution of the problem.

(11) Allegation under investigation: Long-running pharmaceutical investigation of a corporation.
Agency: East Coast U.S. Attorney's Office

Facts: Pre-McNulty investigation. Although the company had provided millions of electronic and paper documents, the government, through a United States Attorney (not an AUSA) demanded *everything*, including *all* privileged material in order to "cooperate." The U.S. Attorney even told counsel and the CEO, in effect, that the CEO should direct the company's counsel to waive the privilege "so I can see if you have a good company." Counsel for the company kept asking for specific subject areas where the privilege waiver might be necessary, making clear that a broad, wholesale waiver was not necessary and could have adverse consequences in third party civil suits. The U.S. Attorney insisted on wholesale waiver and that failure to cooperate "will have consequences." Then the U.S. Attorney said, in effect, that "your civil suits are not our problem," insisting that wholesale waiver would "cleanse the company." Ultimately, the government and the corporation agreed to a targeted, discrete waiver in a court proceeding, sanctioned by a court order. Yet the government continued to insist for a time on a broader waiver. The case was, however, ultimately resolved.

(12) Fraud investigation of an individual. East Coast prosecutors and SEC enforcement officials.

Facts: Begun Pre-McNulty and pre-*Stein*. Counsel for an individual employee of a corporation was caught up in a botched investigation that conflated individual and corporate legal representation and the various attorney client privileges. The individual was indicted. The corporation settled with prosecutors. Part of settlement required company to fire the individual and to cut off his legal fees. While *United States v. Stein* was pending before Judge Kaplan in another federal district (SDNY), the individual moved on 6th Amendment grounds challenging the denial of attorneys fees. Counsel sought an evidentiary hearing on the circumstances of the government's requirement to the corporation that it fire the employee and cut off legal fees necessary for his criminal defense. On the eve of the Motion for an Evidentiary Hearing and just days before Judge Kaplan's first decision in *Stein*, the government agreed to permit the corporation to pay the individual's legal fees. The individual's criminal prosecution proceeded and resulted in a defense verdict of "not guilty." The SEC action against the individual is proceeding and is scheduled for trial.

Conclusion

I applaud the efforts by the government's line prosecutors and enforcement professionals to help society ensure that corporate and individual crimes are investigated and that wrong-doers are brought to justice. Nevertheless, if demands for privilege

waiver and the denial of employee rights become abusive tactics, they allow some prosecutors and enforcement professionals to assume the role properly reserved for impartial courts and judges. As a former Chief Justice of the State of Delaware, a former President of the Conference of Chief Justices, and a former State Prosecutor (albeit many years ago), it is my view that the defense rights of employees and decisions regarding the application of the attorney-client privilege and the work product doctrine are protections that courts, not the executive branch, should regulate.

Thus, this debate is not about protecting guilty company executives or about unfairly tying the hands of government investigators. Indeed, in my view, nothing in the legislation before the Congress prevents a prosecutor or enforcement official from vigorously and professionally investigating the facts or bringing the guilty to justice. Nor does it prevent or inhibit a company or an individual from cooperating with prosecutors in the conduct of that investigation. In fact, vigorous investigation and a spirit of cooperation should be fostered. Rather, the question we address here is whether this Congress should enact legislation that will require prosecutors to return to practices that successfully served them for decades and were acknowledged as fair to all parties involved.

Respectfully submitted,

E. Norman Veasey