

this donation and perhaps a report of "suspicious behavior" from an overzealous neighbor, the permanent resident could be brought in for questioning, denied a lawyer, confined, and even tortured. Such a person would have no recourse in the courts for years, for decades, forever.

Many people viewed this kind of nightmare scenario as fanciful, just the rhetoric of a politician. It was not. It is all spelled out clearly in the language of the law that this body passed. In November, the scenario I spelled out was confirmed by the Department of Justice itself in a legal brief submitted in federal court in Virginia. The Justice Department, in a brief to dismiss a detainee's habeas case, said that the Military Commissions Act allows the Government to detain any non-citizen designated an enemy combatant without giving that person any ability to challenge his detention in court. This is true, the Justice Department said, even for someone arrested and imprisoned in the United States. The Washington Post wrote that the brief "raises the possibility that any of the millions of immigrants living in the United States could be subject to indefinite detention if they are accused of ties to terrorist groups."

In fact, the situation is even more stark than The Washington Post story suggested. The Justice Department's brief says that the Government can detain any non-citizen declared to be an enemy combatant. But the law this Congress passed says the Government need not even make that declaration: They can hold people indefinitely who are awaiting determination whether or not they are enemy combatants.

It gets worse. Republican leaders in the Senate followed the White House's lead and greatly expanded the definition of "enemy combatants" in the dark of night in the final days before the bill's passage, so that enemy combatants need not be soldiers on any battlefield. They can be people who donate small amounts of money, or people that any group of decision-makers selected by the President decides to call enemy combatants. The possibilities are chilling.

The Administration has made it clear that they intend to use every expansive definition and unchecked power given to them by the new law. November's Justice Department brief made clear that any of our legal immigrants could be held indefinitely without recourse in court. Earlier in November, the Justice Department went to court to say that detainees who had been held in secret CIA prisons could not even meet with lawyers because they might tell their lawyers about the cruel interrogation techniques used against them. In other words, if our Government tortures somebody, that person loses his right to a lawyer because he might tell the lawyer about having been tortured. A law professor was quoted as saying about the Government's position in that case: "Kafka-esque doesn't do it justice. This is 'Alice in Wonderland.'"

We have eliminated basic legal and human rights for the 12 million lawful permanent residents who live and work among us, to say nothing of the millions of other legal immigrants and visitors who we welcome to our shores each year. We have removed a vital check that our legal system provides against the government arbitrarily detaining people for life without charge. We may well have also made many of our remaining limits against torture and cruel and inhuman treatment obsolete because they are unenforceable. We have removed the mechanism the Constitution provides to check government overreaching and lawlessness.

This is wrong. It is unconstitutional. It is un-American. It is designed to ensure that the Bush-Cheney Administration will never again be embarrassed by a United States Supreme Court decision reviewing its unlawful abuses of power. The conservative Supreme Court, with seven of its nine members appointed by Republican Presidents, has been the only check on this Administration's lawlessness. Certainly the last Congress did not do it. With passage of the Military Commissions Act, the Republican Congress completed the job of eviscerating its role as a check and balance on the Administration.

Some Senators uneasy about the Military Commissions Act's disastrous habeas provision took solace in the thought that it would be struck down by the courts. Instead, the first court to consider that provision, a federal court in the District of Columbia, upheld the provision. We should not outsource our moral, legal and constitutional responsibility to the courts. Congress must be accountable for its actions and we should act to right this wrong.

Abolishing habeas corpus for anyone who the Government thinks might have assisted enemies of the United States is unnecessary and morally wrong. It is a betrayal of the most basic values of freedom for which America stands. It makes a mockery of the administration's lofty rhetoric about exporting freedom across the globe.

We should take steps to ensure that our enemies can be brought to justice efficiently and quickly. I introduced a bill to do that back in 2002, as did Senator SPECTER, when we each proposed a set of laws to establish military commissions. The Bush-Cheney Administration rejected our efforts and designed a regime the United States Supreme Court determined to be unlawful. Establishing appropriate military commissions is not the question. We all agree to do that. What we need to revisit is the suspension of the writ of habeas corpus for millions of legal immigrants and others, denying their right to challenge indefinite detainment on the government's say-so.

It is from strength that America should defend our values and our Constitution. It takes commitment to those values to demand accountability

from the Government. In standing up for American values and security, I will keep working on this issue until we restore the checks and balances that are fundamental to preserving the liberties that define us as a nation. We can ensure our security without giving up our liberty.

By Mr. SPECTER:

S. 186. A bill to provide appropriate protection to attorney-client privileged communications and attorney work product; to the Committee on the Judiciary.

Mr. SPECTER. Mr. President, the legislation which I am introducing is the Attorney-Client Privilege Protection Act. This legislation was previously introduced in the 109th Congress.

In 2003, the Department of Justice adopted the provisions of the so-called Thompson Memorandum, which allowed prosecutors to request that companies under investigation waive their attorney-client privilege, and that, absent such a waiver, prosecutors may consider the company's refusal to waive privilege in the charging process. As a result, the legal and business community complained that, if the attorney-client privilege is not waived, the corporation and individuals may get a stiffer charge.

The Department of Justice has recently revised the Thompson Memorandum, with Deputy Attorney General McNulty substituting what is now known as the McNulty Memorandum. Prior to the release of the McNulty Memorandum, I had a number of discussions with Department of Justice officials, and I thank the Department of Justice for the effort which they have made, but it is not sufficient. The new memorandum is inadequate in its protection of the attorney-client privilege.

Although the McNulty Memorandum is inadequate in failing to protect attorney-client privilege, it does improve another part of the Department of Justice's prior procedure under the Thompson Memorandum, which effectively denied the payment of counsel fees so that people who were charged were unable to defend themselves without bankrupting themselves in defense. That provision of the earlier Thompson Memorandum was declared unconstitutional in a case in the Southern District of New York.

Mr. President, again, I ask unanimous consent that the full text of my statement be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

ATTORNEY-CLIENT PRIVILEGE PROTECTION ACT
OF 2006

Mr. SPECTER. Mr. President, I seek recognition today to introduce the "Attorney-Client Privilege Protection Act of 2007," which remains necessary despite Deputy Attorney General Paul McNulty's issuance of a new set of corporate prosecution guidelines on December 12 of last year. Although the new McNulty memorandum, which replaces

the memorandum issued by former Deputy Attorney General Larry Thompson, makes some improvements, the revision continues to erode the attorney-client relationship by allowing prosecutors to request privileged information backed by the hammer of prosecution if the request is denied.

This bill will protect the sanctity of the attorney-client relationship by prohibiting federal prosecutors and investigators from requesting waiver of attorney-client privilege and attorney work product protections in corporate investigations. The bill would similarly prohibit the government from conditioning charging decisions or any adverse treatment on an organization's payment of employee legal fees, invocation of the attorney-client privilege, or agreement to a joint defense agreement. This bill will hopefully force the Department of Justice to issue a meaningful change to its corporate charging policies beyond the changes in the McNulty Memorandum, which came "a day late and a dollar short" according to Frederick Krebs, the president of the Association of Corporate Counsel.

There is no need to wait to see how the McNulty memorandum will operate in practice. The flaws in that memorandum are already apparent. Moreover, before the issuance of the McNulty memorandum last month, the Thompson memorandum has been undermining the attorney-client relationship in the corporate context for nearly 4 years. In January 2003, then-Deputy Attorney General Larry Thompson issued a memorandum to all Justice Department components throughout the United States entitled "Principles of Federal Prosecution of Business Organizations." This memorandum, which was prepared on the heels of the establishment of the President's Corporate Fraud Task Force, set forth various factors for federal prosecutors to consider when deciding to prosecute corporations or other business organizations. The so-called "Thompson memorandum" lists a corporation's "cooperation and voluntary disclosure" as one of the chief factors to be considered in making a charging decision.

Just as the Thompson memorandum was issued with laudable goals in mind, the McNulty memorandum was, no doubt, the product of good intentions. Nevertheless, it continues to threaten the viability of the attorney-client privilege in business organizations by allowing prosecutors to request privilege waiver upon a finding of "legitimate need"—a standard that should guide the most basic of prosecutorial requests, not sensitive requests for privileged information.

Just as the standard is inadequate, so is the level of internal review. Although the McNulty memorandum establishes some internal review for such waiver requests, it does so in a way that diminishes the importance of a corporate client's ability to communicate with its lawyers. The memo creates two different categories of privileged information and provides very little protection to client communications to the attorney while providing significant protection and DOJ internal review for attorney communications to the client. The memo identifies the two subcategories of privileged information as: (1) "purely factual information," which consists of witness statements, interview memoranda, factual chronologies and summaries, and reports containing investigative facts documented by counsel; and (2) attorney advice to the client, including attorney notes, memoranda, and notes.

The first category of information, formally labeled Category 1 information by DOJ, may be requested with approval at the U.S. Attorney-level with consultation with the Assistant Attorney General for the Criminal Division. The consultation requirement is not de-

finied in any way in the memo. By failing to define what it means "to consult" with the Assistant Attorney General, the McNulty memo fails to say whether the Assistant Attorney General can overrule the U.S. Attorney's decision. Unless there is a meaningful review of the U.S. Attorney's decision, it is difficult to see how the McNulty memo provides better safeguards for Category 1 information than the interim-McCallum memo, issued in October 2005, which mandated a U.S. Attorney-level "written waiver review process" for all attorney client privilege waiver requests.

As noted above, the new McNulty memo does provide greater protections for attorney advice and communication to the client, which the memo labels "Category 2" information. The McNulty memo protects Category 2 information in the first instance by making clear that it may be sought only if the prosecutor thinks Category 1 information provides an incomplete basis for the investigation. If such a request is deemed necessary, the request for Category 2 information must be approved by the Deputy Attorney General.

Although the McNulty memo provides greater protection for Category 2 information, the memo does not explain why such information will ever be needed by prosecutors outside of attorney advice in furtherance of a crime or fraud or where the advice is subject to an advice of counsel defense, both of which are expressly exempted from the waiver request process outlined in the memorandum. Thus, the only two types of attorney advice that are likely to be relevant in a criminal investigation are exempted from the memo's coverage. With that exception, I fail to see why Category 2 information is needed at all. Prosecutors do not need to know what attorneys are advising their clients unless the advice is in furtherance of a crime or the client puts the advice in issue by raising it as a defense.

No less than the Thompson memo, the new McNulty memo discourages corporate employees from having frank conversations with lawyers, which makes it difficult for companies who desire to prevent possible corruption from making appropriate remedies. The Department of Justice will not prevent corporate misconduct if it continues to inadvertently discourage the types of internal investigations and dialogues corporate officials need to detect and prevent corporate fraud.

In the next rewrite of its corporate prosecution guidelines, the Administration needs to look in the mirror. If the President refused to disclose documents or information after invoking a claim of executive privilege, it would not consider itself to be "uncooperative." Rather, the executive would simply be doing its job in representing a client. Yet, when the tables are turned, the Justice Department has memorialized a policy instructing its prosecutors to discourage attorneys from doing their job effectively.

The right to counsel is too important to be passed over for prosecutorial convenience. It has been engrained in American jurisprudence since the 18th century when the Bill of Rights was adopted. The 6th Amendment is a fundamental right afforded to individuals charged with a crime and guarantees proper representation by counsel throughout a prosecution. However, the right to counsel is largely ineffective unless the confidential communications made by a client to his or her lawyer are protected by law. As the Supreme Court observed in *Upjohn Co. v. United States*, "the attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." When the *Upjohn* Court affirmed that attorney-client privilege protections apply

to corporate internal legal dialogue, the Court manifested in the law the importance of the attorney-client privilege in encouraging full and frank communication between attorneys and their clients, as well as the broader public interests the privilege serves in fostering the observance of law and the administration of justice. The *Upjohn* Court also made clear that value of legal advice and advocacy depends on the lawyer having been fully informed by the client.

As a former prosecutor, I am acutely aware of the enormous power and tools a prosecutor has at his or her disposal. As former Supreme Court Justice and then Attorney-General Robert Jackson stated in his 1940 speech to U.S. Attorneys, "The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations." Thus, the federal prosecutor has enough power without the coercive tools of the privilege waiver, whether that waiver policy is embodied in the Holder, Thompson, McCallum, or McNulty memorandum. I see no need to have the Justice Department publicly express a policy that encourages waiver of attorney-client privilege, especially where the policy is backed by the heavy hammer of possible criminal charges. Cases should be prosecuted based on their merits, not based on how well an organization works with the prosecutor. As Justice Jackson warned in the same speech, "the most dangerous power of the prosecutor [is] that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted."

Just as the Holder and Thompson memoranda before it, the McNulty memorandum embodies bad public policy by empowering federal prosecutors at the expense of the attorney-client relationship. Consequently, I echo the comments of the following organizations and individuals who have criticized the McNulty memorandum:

"The Justice Department's new corporate charging guidelines for federal prosecutors fall far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product, and employee protections during government investigations."—Karen Mathis, ABA President.

"While containing some improvements, this new policy does not adequately protect the right to attorney-client privilege, and unwisely ignores many of the recommendations of former senior Justice Department officials, the American Bar Association, and a massive coalition of some of the nation's most prominent business, legal, and civil rights groups."—Stanton Anderson, U.S. Chamber of Commerce.

"The McNulty Memorandum still falls short of protecting the attorney-client privilege, and the related work product doctrine, which derives from it."—Martin Pinales, President, National Association of Criminal Defense Lawyers.

"[T]his memo is a day late and a dollar short. Asking prosecutors to get permission before formally requesting that companies waive their attorney-client privilege will not put an end to the 'culture of waiver' that exists within DOJ. Our research shows that more often than not, requests for waiver are not asked for outright, but are coercively inferred."—Frederick Krebs, President, Association of Corporate Counsel.

"Deputy Attorney General Paul McNulty's memorandum is a disappointment. It perpetuates the dynamic that compels companies to "voluntarily" waive their rights in order to get favorable treatment or to avoid the

death penalty of a federal indictment.”—Caroline Fredrickson, Director, ACLU Washington legislative office; George Landrith, President, Frontiers of Freedom; Stephanie A. Martz, Director, White Collar Crime Project, National Association of Criminal Defense Lawyers; Daniel J. Popeo, Chairman, Washington Legal Foundation, in a letter to the editor of USA Today.

My bill amends title 18 of the United States Code by adding a new section, §3014, that would prohibit any agent or attorney of the United States government in any criminal or civil case to demand, request or condition treatment on the disclosure of any communication protected by the attorney-client privilege or attorney work product. The bill would also prohibit government lawyers and agents from conditioning any charge or adverse treatment on whether an organization pays attorneys’ fees for its employees or signs a joint defense agreement.

While I am glad that the Justice Department revised the Thompson memorandum, I am hopeful that the Department will act again to reform the McNulty memorandum. In the absence of such action, this legislation is needed to ensure that basic protections of the attorney-client relationship are preserved.

I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the text of the bill was ordered to be printed in the RECORD, as follows:

S. 186

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Attorney-Client Privilege Protection Act of 2007”.

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—Congress finds the following:

(1) Justice is served when all parties to litigation are represented by experienced diligent counsel.

(2) Protecting attorney-client privileged communications from compelled disclosure fosters voluntary compliance with the law.

(3) To serve the purpose of the attorney-client privilege, attorneys and clients must have a degree of confidence that they will not be required to disclose privileged communications.

(4) The ability of an organization to have effective compliance programs and to conduct comprehensive internal investigations is enhanced when there is clarity and consistency regarding the attorney-client privilege.

(5) Prosecutors, investigators, enforcement officials, and other officers or employees of Government agencies have been able to, and can continue to, conduct their work while respecting attorney-client and work product protections and the rights of individuals, including seeking and discovering facts crucial to the investigation and prosecution of organizations.

(6) Despite the existence of these legitimate tools, the Department of Justice and other agencies have increasingly employed tactics that undermine the adversarial system of justice, such as encouraging organizations to waive attorney-client privilege and work product protections to avoid indictment or other sanctions.

(7) An indictment can have devastating consequences on an organization, potentially eliminating the ability of the organization to survive post-indictment or to dispute the charges against it at trial.

(8) Waiver demands and other tactics of Government agencies are encroaching on the

constitutional rights and other legal protections of employees.

(9) The attorney-client privilege, work product doctrine, and payment of counsel fees shall not be used as devices to conceal wrongdoing or to cloak advice on evading the law.

(b) PURPOSE.—It is the purpose of this Act to place on each agency clear and practical limits designed to preserve the attorney-client privilege and work product protections available to an organization and preserve the constitutional rights and other legal protections available to employees of such an organization.

SEC. 3. DISCLOSURE OF ATTORNEY-CLIENT PRIVILEGE OR ADVANCEMENT OF COUNSEL FEES AS ELEMENTS OF COOPERATION.

(a) IN GENERAL.—Chapter 201 of title 18, United States Code, is amended by inserting after section 3013 the following:

“§3014. Preservation of fundamental legal protections and rights in the context of investigations and enforcement matters regarding organizations

“(a) DEFINITIONS.—In this section:

“(1) ATTORNEY-CLIENT PRIVILEGE.—The term ‘attorney-client privilege’ means the attorney-client privilege as governed by the principles of the common law, as they may be interpreted by the courts of the United States in the light of reason and experience, and the principles of article V of the Federal Rules of Evidence.

“(2) ATTORNEY WORK PRODUCT.—The term ‘attorney work product’ means materials prepared by or at the direction of an attorney in anticipation of litigation, particularly any such materials that contain a mental impression, conclusion, opinion, or legal theory of that attorney.

“(b) IN GENERAL.—In any Federal investigation or criminal or civil enforcement matter, an agent or attorney of the United States shall not—

“(1) demand, request, or condition treatment on the disclosure by an organization, or person affiliated with that organization, of any communication protected by the attorney-client privilege or any attorney work product;

“(2) condition a civil or criminal charging decision relating to a organization, or person affiliated with that organization, on, or use as a factor in determining whether an organization, or person affiliated with that organization, is cooperating with the Government—

“(A) any valid assertion of the attorney-client privilege or privilege for attorney work product;

“(B) the provision of counsel to, or contribution to the legal defense fees or expenses of, an employee of that organization;

“(C) the entry into a joint defense, information sharing, or common interest agreement with an employee of that organization if the organization determines it has a common interest in defending against the investigation or enforcement matter;

“(D) the sharing of information relevant to the investigation or enforcement matter with an employee of that organization; or

“(E) a failure to terminate the employment of or otherwise sanction any employee of that organization because of the decision by that employee to exercise the constitutional rights or other legal protections of that employee in response to a Government request; or

“(3) demand or request that an organization, or person affiliated with that organization, not take any action described in paragraph (2).

“(c) INAPPLICABILITY.—Nothing in this Act shall prohibit an agent or attorney of the

United States from requesting or seeking any communication or material that such agent or attorney reasonably believes is not entitled to protection under the attorney-client privilege or attorney work product doctrine.

“(d) VOLUNTARY DISCLOSURES.—Nothing in this Act is intended to prohibit an organization from making, or an agent or attorney of the United States from accepting, a voluntary and unsolicited offer to share the internal investigation materials of such organization.”.

(b) CONFORMING AMENDMENT.—The table of sections for chapter 201 of title 18, United States Code, is amended by adding at the end the following:

“3014. Preservation of fundamental legal protections and rights in the context of investigations and enforcement matters regarding organizations.”.

By Mr. SPECTER:

S. 187. A bill to provide sufficient resources to permit electronic surveillance of United States persons for foreign intelligence purposes to be conducted pursuant to individualized court-issued orders for calls originating in the United States, to provide additional resources to enhance oversight and streamline the procedures of the Foreign Intelligence Surveillance Act of 1978, to ensure review of the Terrorist Surveillance Program by the United States Supreme Court, and for other purposes; to the Committee on the Judiciary.

Mr. SPECTER. Mr. President, I am reintroducing the text of S. 4051, which I originally introduced on November 14 of last year. And the title articulates it in a succinct way, so I will read that. It is: a bill to provide sufficient resources to permit electronic surveillance of United States persons for foreign intelligence purposes to be conducted pursuant to individualized court-issued warrants for calls originating in the United States, to provide additional resources to enhance oversight and streamline the procedures of the Foreign Intelligence Surveillance Act of 1978, and to ensure review of the Terrorist Surveillance Program by the United States Supreme Court.

I made a number of efforts in the 109th Congress to subject the President’s surveillance program to judicial review in accordance with the existing law that a search-and-seizure warrant or a wiretap ought not to be issued without a judge making a finding of probable cause and authorizing that kind of a search and seizure or that kind of a wiretap.

Without going into the entire history, that bill was refined to the point where it is articulated in S. 4051 of the 109th Congress, which would provide for individualized warrants for calls originating in the United States and going out. That can be accomplished, according to the CIA, if there are additional resources, which this bill provides, and if the time for retroactive approval is extended from 3 days to 7 days.

With respect to calls originating outside the United States and coming in,