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The Honorable Mark Filip
Deputy Attorney General
Department of Justice
Washington, DC 20530

July 10, 2008

Dear Judge Filip:

Thank you for your letter of July 9, 2008 addressed to Chairman Leahy and me concerning the issue of Attorney-Client Privilege.

I begin my consideration of this issue in the context of two fundamental legal principles:

1. The constitutional right to an attorney indispensably includes the attorney-client privilege; and
2. The Government has the burden of proof to produce non-privileged evidence in order to convict.

The importance of the attorney-client privilege was stated by Justice Rehnquist in Upjohn when he wrote that the privilege's:

“purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyers being fully informed by the client.”

I am concerned about the delay in enacting legislation while the Department of Justice is continuing to act under the McNulty Memorandum with individuals incurring enormous attorneys' fees including appellate litigation. The Committee's first hearing on this issue was held on September 12, 2006 and my legislation, now S.3217, was introduced on December 8, 2006. Thereafter, there was a revision of the Thompson memorandum with the McNulty memorandum on December 12, 2006 and another hearing was held on September 18, 2007.

Then on October 17, 2007, this issue was raised at the confirmation hearings of Attorney General Mukasey. As you note in the opening line of your letter, last year you committed to review the issue during your confirmation hearings which were held on December 19, 2007. When you and I discussed this matter on June 26, 2008, I pressed as to when we would have something in writing and you responded that you expected it sometime later this summer.

I note illustratively the high legal fees which have been incurred by individuals as cited in the opinion of Judge Kaplan, in *United States v. Stein*, 495 F.Supp.2d 390 (SDNY 2007), who said that the litigation costs among the individual defendants had already averaged \$1.7 million. One defendant was cited as being "insolvent." The costs cited by Judge Kaplan were all before trial and appellate costs, which will be much higher. The Department of Justice conceded to Judge Kaplan that \$3.3 million would be "a very conservative estimate" of the average defense costs going forward, and the defendants' lawyers cited an average expected cost of \$13 million. This squares with the New York Law Journal's report last year, which said, "[r]ecent court decisions have revealed the cost of an individual's defense can reach as high as \$20 million to \$40 million." I would be interested to know what is happening in the other cases, besides KPMG, which involve this issue and what kind of expenditures have been required of individuals who have been subjected to the implementation of the Thompson/ McNulty memoranda.

In the context of these lengthy delays and the potential prejudice which is involved in these matters, I think it is too much to ask for the legislative process to await a written revision of McNulty and then await a review of the implementation of a new memorandum for a "reasonable amount of time" which could be very long.

While I understand that the revised memorandum you are preparing will be more explicit, the revisions set forth in your letter are unsatisfactorily vague. When you comment that cooperation will be measured by the disclosure of facts and evidence, not the waiver of privilege, such facts and evidence may have been obtained from an individual who expected the confidentiality of his disclosures of facts and evidence would be protected under the attorney-client privilege. I cite the example of the employees in the case, *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333 (4th Cir. 2005), who were confused about confidentiality because the company's counsel told them, "We can represent you as long as no conflict appears."

When you refer to "Category II" information and exclude "non-factual attorney work product," that leaves a large undefined area where factual and non-factual attorney work product may overlap.

In your statement that federal prosecutors will not consider the advance of attorneys' fees, would that standard lead the Department of Justice to abandon its appeal in the case of *United States v. Stein*? Beyond that specific case, what other cases and what cost to defendants is the Department of Justice pursuing under Thompson/McNulty because the corporation is paying defendants' attorneys fee?

On the question of federal prosecutors not considering whether the corporation has entered into a joint defense agreement, I am interested to know what relevance that factor has ever had and how often the Department of Justice opposed such joint defense agreements in the past.

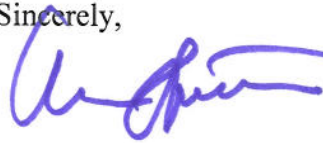
Similarly, as to federal prosecutors not considering sanctions against employees, I would be interested to know what relevance that ever had and what the Department of Justice has done on that matter in past cases.

Beyond these specific issues, there are other concerns. A Department of Justice statement of Principles would not bind any other federal agencies such as the SEC and IRS. Similarly, any Department of Justice statement of Principles would be subject to modification by subsequent Attorneys-General unlike legislation. It is worth noting that former Attorneys-General Edwin Meese and Dick Thornburgh testified in strong opposition to what the Department of Justice was doing with the Thompson and McNulty memoranda.

I am making this prompt response to your letter in an effort to move this matter along. These are my initial reactions to the outline of your new proposal which I may supplement as we get more input from other interested parties.

Shortly before the July 4th recess, Chairman Leahy commented that he may schedule Judiciary Committee action on the pending legislation. My recommendation to Chairman Leahy is that we move ahead in the Judiciary Committee to either come to some accommodation with the Administration on legislation or have Congress move ahead on its own. In the interim, I would appreciate it if you would complete a more explicit statement on a "Filip memorandum" to supplement Thompson/McNulty so that we may be in a position to move ahead as promptly as possible. I would further appreciate your informing the Committee on the specific cases which are pending under Thompson/McNulty including the costs incurred by companies and individuals.

Sincerely,



Arlen Specter