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CORPORATE LITIGATION WHITE PAPER



Requests to Waive Corporate Attorney-Client Privilege: History and Analysis

Criticism has been directed at the US government's perceived policy requiring waiver of an investigated entity's attorney-client and work-product privileges as a condition of being deemed cooperative. We trace the history of this perceived policy, review recently proposed legislative solutions, and address factors to consider during an investigation.

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Requests to Waive Corporate Attorney-Client Privilege: History and Analysis

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Table of Contents

3	Introduction
3	History of Governmental Waiver Requests
3	The Holder Memo
4	The Thompson Memo
4	The McCallum Memo
5	The KPMG Case
5	The Specter Bill and the McNulty Memo
7	Effects of the McNulty Memo
7	Recent Legislative Efforts and the DOJ's Response
8	Handling Waiver Requests Today
9	Conclusion
9	Endnotes

Introduction

In recent years, the Department of Justice (DOJ) and other federal agencies have been criticized for the perception, whether real or imagined, that they increasingly demand corporations waive attorney-client and work-product privileges as a condition of being deemed to have cooperated with a governmental investigation. Despite attempts by the DOJ to alter its policies in response to these criticisms, many critics continue to perceive a culture in which such waivers are expected, and counsel feel obligated to waive privileges in order to avoid indictment or other negative repercussions.

This paper traces the history of the DOJ's policy regarding waiver, as well as recently proposed legislative solutions, and addresses some of the factors corporate counsel should consider when faced with a governmental investigation.

History of Governmental Waiver Requests

The government's practice of rewarding voluntary disclosures and cooperation from the business organizations they investigate is longstanding. The 1970s saw both the Securities and Exchange Commission (SEC) and the Antitrust Division of the DOJ experiment with offering cooperation credit to the first person or entity to report wrongdoing.¹ By the late 1980s, the practice spread to the Fraud Sections of both the Criminal and Civil divisions of the DOJ.

The government's consideration of an organization's decision to waive its legal privileges when determining that organization's level of cooperation credit, however, is a relatively recent development—at least as a matter of formal DOJ policy.

The Holder Memo

In June 1999, to counter the growing belief that US Attorneys' offices and DOJ branches were inconsistently exercising their prosecutorial discretion in the context of corporate investigations, Deputy Attorney General Eric Holder issued the "Holder Memo."² This memorandum articulated several "non-mandatory" factors meant to guide DOJ attorneys as they determined whether to bring charges against a business entity.

One of these factors instructed that "[i]n gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness...to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges."³ Thus, from the Holder Memo came the first official DOJ policy statement to expressly promote this practice. As one practitioner noted, "[t]he Holder Memo essentially revolutionized the prosecution of corporations. Federal prosecutors are now seeking waivers of the attorney-client privilege and work product immunity at the very outset of an investigation."⁴

The memo made an immediate impact. With the waiver of privilege now linked with cooperation, the defense bar feared that an attorney hired by a company under investigation essentially would become the government's agent. Moreover, although a corporation's decision to waive its privileges was only a "non-mandatory" factor⁵ in the government's charging calculus, most attorneys representing organizations were reluctant to counsel their clients against waiving privilege given that such a waiver, especially when requested by the government, could prevent a corporate indictment.

The result of the memo's impact was significant: it curbed the willingness of employees to speak to internal investigators; it discouraged the inclusion of detail in investigative memoranda drafted by counsel; and it generally constrained the advice lawyers were able to provide a company under the threat of investigation.

The Thompson Memo

As high-profile corporate scandals ushered in the new decade, Congress and the DOJ were under pressure to address the perception of corporate corruption. In the wake of Enron and WorldCom, Deputy Attorney General Larry D. Thompson issued a January 2003 memorandum establishing a more-aggressive posture toward potential corporate defendants.⁶ The "Thompson Memo" expressed a deep skepticism toward corporate cooperation, explaining that the DOJ intended to place increased "emphasis on and scrutiny of the authenticity of a corporation's cooperation" because it felt that corporations "too often" claim to cooperate but "in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation." Thus, not only did the "Thompson Memo" reaffirm the factors established in the "Holder Memo," it cast them as *mandatory* rather than as optional guidelines.⁷ Further, prosecutors now were to consider "whether the corporation appears to be protecting its culpable employees" by engaging in activities such as advancing attorneys' fees, failing to sanction employees, and participating in joint defense agreements.⁸

Armed with the "Thompson Memo," federal prosecutors began requesting waivers earlier and more frequently. Confirming this, a 2005 survey of outside counsel conducted by the National Association of Criminal Defense Lawyers found: "[a]n overwhelming number of respondents—approximately 85 percent—reported that [the] DOJ and the SEC frequently require 'discussions' of waiver as part of 'settlement' negotiations[.]"⁹ The survey described a climate where "waiver is often offered before it is requested—at the cost of individual employees."¹⁰

The Thompson Memo represented another progression in the DOJ's evolving policy toward an organization's waiver of privilege and increased the tension between a corporation's duties and loyalties to its employees and the fear of being viewed as obstructionist by the government. Not surprisingly, a backlash followed.¹¹

The McCallum Memo

Responding to the many critics of the Thompson Memo, in October 2005, Acting Deputy Attorney General Robert D. McCallum, Jr., issued a one-page memorandum directing US Attorneys and DOJ department heads to "establish a written waiver review process" for their respective offices.¹²

However, the “McCallum Memo” not only failed to establish a uniform standard for this process, its language sanctioned a problem the Holder Memo first sought to rectify: namely, under the McCallum Memo the procedures employed to request a waiver could vary across departments and districts resulting in an inconsistent set of rules to which a corporate defendant could be subjected.¹³

The KPMG Case

By 2006, criticism of the “culture of waiver” produced by the DOJ’s evolving policy statements grew louder. A broad coalition of diverse organizations and individuals spoke out against the practice of demanding waivers as a condition for receiving credit for cooperation.¹⁴ As one critic argued: “Continued erosion of the attorney-client privilege will, without improved oversight, uniform policy guidance, and stricter limits, ultimately undermine, rather than promote, more responsible corporate conduct in the post-Enron world.”¹⁵ Anxious for change, these groups lobbied Congress to enact legislation and participated in House Judiciary Committee hearings discussing corporate fraud prosecutions and attorney-client privilege waivers. They also persuaded the US Sentencing Commission to delete from the Sentencing Guidelines a reference stating that a corporation’s willingness to waive privilege factored into whether it should receive a downward sentencing adjustment for cooperation.¹⁶

The push-back against the DOJ’s policy was not limited to the legislative and executive branches: ultimately, the critics would have their day in court. In 2006, many opponents of the DOJ’s stance filed *amicus* briefs in *United States v. Stein*,¹⁷ also known as the “KPMG case.” In *Stein*, the government investigated the creation and marketing of allegedly illegal tax shelters involving KPMG employees. In keeping with another tenet of the Thompson Memo—that paying for an employee’s legal fees may be a sign of non-cooperation—the government pressured KPMG to cease paying the fees of attorneys representing the KPMG employees. KPMG agreed, and while the government entered into a deferred prosecution agreement with it, several KPMG employees were later indicted. The employees—supported by several *amici*¹⁸—argued successfully that the Thompson Memo violated the Fifth and Sixth Amendments by denying them due process and unduly impinging on their right to counsel.¹⁹ On appeal, the Second Circuit affirmed the lower court’s decision in *Stein*, holding that government pressure on a company to demonstrate its cooperation by refusing to indemnify the legal fees of its officers and directors violated the Sixth Amendment right to counsel.²⁰

Eventually, more former DOJ officials—including several past Attorneys General and Solicitors General—joined the chorus opposing the Thompson Memo.²¹ Even Eric Holder, the author of the first memo explicitly linking waiver with cooperation, called the environment facing defense counsel “maddening.” As Holder explained, “[y]ou’ll go into a prosecutor’s office...and fifteen minutes into our first meeting they say, ‘Are you going to waive?’”²² Armed with a growing body of critics and a favorable holding in *Stein*, lobbying efforts against the waiver policy increased. It was not long before the Congress waded into the fray.

The Specter Bill and the McNulty Memo

The Senate, along with the Judiciary Committee, conducted hearings on the Thompson Memo and its effect on the right to counsel. In December 2006, Senator Arlen Specter introduced *The Attorney-Client Privilege Protection Act of 2006*, which sought to roll back portions of the Thompson Memo and address the concerns expressed by critics of the DOJ's policy.²³ The bill would have prohibited any government agent—in “any Federal investigation or criminal or civil enforcement matter”—to “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[.]”²⁴

In addition to addressing privilege-waiver requests, the bill sought to prohibit prosecutors, in both their charging decisions and cooperation determinations, from considering a company's payment of attorneys' fees for an employee under investigation, entering into a joint defense agreement with employees, or refusing to terminate an employee who does not cooperate with a government investigation.

Within a week of this proposed legislation, the DOJ took action. In an attempt to temper the Department's stance, Deputy Attorney General Paul J. McNulty issued a memorandum limiting the context in which prosecutors were permitted to seek waivers.²⁵ The “McNulty Memo” explicitly acknowledged the importance of the attorney-client privilege and instructed that waiver of the privilege would not be a prerequisite to a finding of cooperation. The McNulty Memo announced: “Prosecutors may only request waiver of attorney-client or work product protections when there is a legitimate need for the privileged information to fulfill their law enforcement obligations.”

The memo explained that prosecutors could not demonstrate “legitimate need” by showing that “it is merely desirable or convenient to obtain privileged information.” Rather, legitimate need would be judged with reference to four factors, which seemingly cut in favor of requesting waiver:

- (1) the likelihood and degree to which the privileged information will benefit the government's investigation;
- (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;
- (3) the completeness of the voluntary disclosure already provided; and
- (4) the collateral consequences to a corporation of a waiver.

Where a legitimate need existed, prosecutors were directed to seek “the least intrusive waiver necessary” to complete their investigation.²⁶

The McNulty Memo divided into two categories the information that prosecutors seeking a waiver could try to obtain. “Category I” information was described as “purely factual information, which may or may not be privileged, relating to the underlying misconduct,” while “Category II” information was defined as “attorney-client communications or non-factual attorney work product.” Before seeking a waiver of Category I information, prosecutors were to obtain written authorization from their US Attorney, who was required to present the request to, and consult

with, the Assistant Attorney General for the Criminal Division. Under the McNulty Memo framework, “[a] corporation’s response to the government’s request for waiver of privilege for Category I information [could] be considered in determining whether a corporation has cooperated in the government’s investigation.”²⁷

In contrast, Category II information could be sought only in those “rare circumstances” where “purely factual information provides an incomplete basis to conduct a thorough investigation.” Further, before a prosecutor could seek a waiver of Category II information, the US Attorney was to obtain written authorization from the Deputy Attorney General. The memo directed that prosecutors may not consider a corporation’s refusal to waive privilege as to Category II information; however, they “may always favorably consider” a corporation’s waiver.²⁸

Finally, the McNulty Memo stated that “[p]rosecutors generally should not take into account whether a corporation is advancing attorneys’ fees to employees or agents under investigation and indictment.”²⁹ Nevertheless, the memo allowed prosecutors to continue to weigh whether a company retains such employees without sanction and whether it joins with them in a joint defense agreement.

Critics remained unsatisfied. One commentator noted that the memo “leaves several notable gaps that in practice may very well undermine any appreciable benefit.... [E]ven the most fundamental privileged communications between attorney and client may still be demanded by prosecutors to facilitate government investigations.”³⁰

Effects of the McNulty Memo

Anecdotal evidence suggests that some prosecutors are continuing to pressure corporations to waive privilege, though perhaps less directly. In some instances, line assistants were sidestepping the formalities called for by the McNulty Memo by broaching the subject without explicitly requesting a waiver. One method said to be employed is to inquire whether defense counsel had conducted an investigation and, if so, whether any portions of the results of that investigation were not privileged. Prosecutors likewise might have a “preliminary” discussion of whether the corporation was interested in waiving privilege, without making a formal waiver request, always stating in the same sentence that they are aware of the strictures of the McNulty Memo.

In September 2007, former Delaware Supreme Court Chief Justice E. Norman Veasey submitted a report to the Senate Judiciary Committee collecting similar accounts from corporate counsel.³¹ The persons relaying accounts through the Veasey Report believed “that practices under the [McNulty] Memorandum fall short of providing meaningful protections from prosecutorial abuses” and that the memo “may not be fully effective in erasing practices that it was designed to address.”³² The Report asserted, moreover, that “other federal agencies not governed by the McNulty Memorandum (such as the SEC, HUD, IRS, FCC, EPA, DOL, and FERC) continue to engage unabated in privilege waiver and employee coercion modeled on DOJ practices,” often during parallel investigations with US Attorney’s offices.³³

Recent Legislative Efforts and the DOJ's Response

In June 2008, Senator Specter reintroduced yet another version of the Attorney-Client Privilege Protection Act.³⁴ This most recent proposed bill would apply to *all* governmental attorneys that conduct civil or criminal investigations and would prohibit those attorneys from requesting a waiver or from punishing or threatening to punish an entity for refusing to waive privileges.³⁵ The bill would also prohibit the government from considering whether a corporation pays the attorneys' fees of its employees or participates in a joint defense agreement in deciding whether to indict. While it would not prohibit a corporation from making a voluntary and unsolicited offer to waive privilege, the text of the bill prevents the government from rewarding a corporation that does so. Some have suggested this is overly restrictive, though, because in those cases where a company does waive privilege, it wants to receive credit for it and hopefully avoid indictment.

Mindful of this legislative climate, Deputy Attorney General Mark Filip issued a September 2008 memorandum meant to replace the McNulty Memo. With the twin aims of assuaging fears that the DOJ is "anything other than fair and respectful of the attorney-client privilege,"³⁶ and discouraging Congress from enacting legislation to prevent prosecutors from seeking waivers,³⁷ the "Filip Memo" revisited, among other things, the issues of privilege waiver and corporate cooperation credit, of joint defense agreements, and of indemnification of employees' legal fees. Under the Filip Memo an organization's eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protections, but instead requires the disclosure of "relevant facts" concerning the alleged misconduct.³⁸ However, the Filip Memo displays indifference toward the possible privileged nature of any relevant facts.³⁹

The Memo prohibits federal prosecutors from requesting a waiver of attorney-client communications⁴⁰ (Category II using the McNulty Memo rubric) or from considering a corporation's practice of advancing attorneys' fees to its employees or entering into joint defense agreements.⁴¹ Nevertheless, the Filip Memo expressly permits prosecutors to inquire as to a company's practice of indemnifying its employees' attorneys' fees.⁴²

It is uncertain whether the Filip Memo and the changes it proposes will convince Congress to stay its hand. Indeed, Senator Specter has stated that he will recommend that the Senate move ahead with legislation, notwithstanding the DOJ's most recent pronouncement.⁴³ He expressed concern that, unlike the legislation he proposes, any change in DOJ policy could be changed again with a new administration and would have no effect on such other law enforcement agencies as the SEC and IRS.⁴⁴ This is a position supported by former Attorney General Dick Thornburgh, who mused: "The [Filip Memo] guidelines are a victory that is hollow unless or until legislation is enacted that guarantees there will be no more experimenting by the Justice Department in this area."⁴⁵

Handling Waiver Requests Today

Despite the recent Filip Memo and potential Congressional legislation, it is likely that prosecutors will continue to look favorably on waivers. Thus, waiving privileges is likely to remain one way to

demonstrate cooperation. Still, corporate counsel should tread carefully in this area and should weigh the following considerations, among others.

Obviously, waiving the attorney-client or work product privileges may be an effective way to demonstrate the innocence of your client and its employees. Revealing an internal investigation may likewise highlight the measures your client has taken to remedy any past wrongdoing. Waiving has several key downsides, however. Aside from the obvious possibility that counsel may be handing the government damaging or incriminating material, there is the very real risk of forever waiving any right to claim privilege as to those materials if they are ever requested by other parties. Most courts have rejected the notion of “selective waiver,” holding instead that by disclosing privileged material to the government, you have waived any right to assert the privilege in later lawsuits.⁴⁶

When conducting an internal investigation, counsel should be sure to give “*Upjohn* warnings,” advising employees that counsel represents the corporation, not the employee.⁴⁷ Counsel might also consider performing a “dual-track investigation,” in which counsel would gather and record factual information that would be disclosed, and also would prepare separate privileged reports distilling and analyzing this information to assist in advising the corporation. Use of this technique would be in anticipation of a decision to turn over only factual information while preserving attorney-client communications.

Counsel may similarly decide to conduct separate interviews of company employees and draft separate memoranda based on purely factual information versus mental impressions. If these categories of information are clearly separated, it will prove much easier to disclose only purely factual information to the government if and when it becomes necessary.

Conclusion

It remains to be seen whether the Filip Memo represents the DOJ’s final position on this issue, or if a new administration, having tapped the author of the Holder Memo as the next US Attorney General,⁴⁸ will bring further change to the DOJ policy pronouncements. And though legislation is pending in Congress, it is not certain if, when, or in what form that legislation will pass. In the meantime, corporate counsel should proceed cautiously to balance the pros and cons of waiver, including those considerations described above.

Endnotes

¹ See William R. McClucas, Howard M. Shapiro & Julie J. Song, *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 621, 622 (2006).

² Memorandum from Eric Holder, Deputy Att’y Gen., US Dep’t of Justice, to All Competent Heads and United States Attorneys (June 16, 1999), available at <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html>.

³ *Id.*

⁴ Robert A. Del Giorno, *Corporate Counsel as Government’s Agent: The Holder Memorandum and Sarbanes-Oxley Section 307*, THE CHAMPION, August 2003, at 22.

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- 5 *See* Holder, *supra* note 3.
- 6 Memorandum from Larry D. Thompson, Deputy Att’y Gen., to Heads of Department Components and United States Attorneys, (Jan 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.
- 7 *See id.* at 3-4.
- 8 *Id.* at 7-8.
- 9 National Association of Criminal Defense Lawyers, Executive Summary, *National Association of Criminal Defense Lawyers Survey: The Attorney-Client Privilege Is Under Attack* (Apr. 2005), available at [http://www.nacdl.org/public.nsf/Legislation/Overcriminalization002/\\$FILE/AC_Survey.pdf](http://www.nacdl.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf).
- 10 *Id.* at 9.
- 11 For example, in the summer of 2005, the American Bar Association (ABA) House of Delegates approved a resolution opposing “the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the grant or denial of any benefit or advantage.” *See* Donald C. Klawiter, Statement on Behalf of the American Bar Association Appearing Before the US Sentencing Commission Concerning the Proposed Amendment of Commentary in Section 8C2.5 of the Federal Sentencing Guidelines (Nov. 15, 2005), available at http://www.ussc.gov/corp/11_15_05/Klawiter-ABA.pdf.
- 12 Memorandum from Robert D. McCallum, Jr., Acting Deputy Attorney General, to Heads of Department Components and United States Attorneys (Oct. 21, 2005), available at <http://www.corporatecrimereporter.com/documents/AttorneyClientWaiverMemo.pdf>.
- 13 *See id.*
- 14 Richard Ben-Veniste & Raj De, Federal Privilege Waiver Demands Impact Corporate Compliance, 21 Vol. 21 No. 6 Legal Backgrounder (Feb. 24, 2006), available at <http://www.wlf.org/upload/022406LBBen-Veniste.pdf>.
- 15 *Id.*
- 16 *See supra* note 13.
- 17 *U.S. v. Stein*, 435 F.Supp.2d 2d 330 (S.D.N.Y.2006), *aff’d* 541 F.3d 130 (2008).
- 18 Securities Industry Ass’n, Ass’n of Corp. Counsel, Bond Market Ass’n, & the Chamber of Commerce of the United States of America, as Amici Curiae Supporting Defendants, *U.S. v. Stein*, 435 F.Supp.2d 2d 330 (S.D.N.Y.2006), available at http://lawprofessors.typepad.com/whitecollarcrime_blog/files/200654_motion_and_brief_of_amicus.pdf.
- 19 *See Stein*, *supra* note 19.
- 20 *See U.S. v. Stein*, 541 F.3d 130 (2nd Cir. 2008).
- 21 Letter from Ten Former US Attn’y Generals to Alberto Gonzalez, US Attn’y Gen.(Sept. 5, 2006) available at http://lawprofessors.typepad.com/whitecollarcrime_blog/files/thompson_memo_letter_sept_5_2006.pdf.
- 22 Peter Lattman, *The Holder Memo and its Progeny*, Wall Street Journal Law Blog, Dec.13 2006, <http://blogs.wsj.com/law/2006/12/13/the-holder-memo/>.
- 23 *See* S. 30, 109th Cong. (2006).
- 24 *Id.*
- 25 Mem. From Paul J. McNulty, Deputy Att’g Gen., US Dep’t of Justice, *Principles of Federal Prosecution of Business Organizations* (Dec. 12, 2006), available at http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.
- 26 *Id.* at 8-9.
- 27 *Id.* at 8-9.
- 28 *Id.* at 10-11.
- 29 *Id.* at 11.
- 30 Richard Ben-Veniste & Raj De, *The ‘McNulty Memo’: A Missed Opportunity To Reverse Erosion Of Attorney-Client Privilege*, Vol. 22, No. 3 Legal Backgrounder (Jan. 19, 2007), available at <http://www.wlf.org/upload/1-19-07%20ben-veniste.pdf>.
- 31 Statement of the Coalition to Preserve the Attorney-Client Privilege Before the Sen. Judiciary Comm., 109th Cong. (2007), available at http://www.nam.org/~media/Files/s_nam/docs/239300/239292.pdf.ashx.
- 32 *Id.*
- 33 *Id.*
- 34 S. 3217, 110th Cong. (2008).

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- ³⁵ *See id.*
- ³⁶ Letter from Mark Filip to Senators Patrick J. Heahy and Arlen Specter (July 9, 2008), *available at* <http://www.acc.com/resource/v9892>.
- ³⁷ Paul J. McNulty, *Against Backdrop of Setback in KMPG Case, Feds Revise McNulty Memo*, 23 No. 1 White-Collar Crime Rep. 2 (2008).
- ³⁸ Mem. From Mark Filip, Deputy Att'g Gen., US Dep't of Justice, *Principles of Federal Prosecution of Business Organizations* (August. 28, 2009), *available at* <http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf>.
- ³⁹ *Id.* at 10 (“[A] corporation should receive the same credit for disclosing facts contained in materials that are not protected by the attorney-client privilege or attorney work product as it would for disclosing identical facts that are contained in the materials that are so protected.”).
- ⁴⁰ *Id.* at 11-12.
- ⁴¹ *Id.* at 13.
- ⁴² *See id.* at 13.
- ⁴³ Dan Slater, *On McNulty Memo, Specter Fires Back at DOJ*, Wall Street Journal Law Blog, July 11, 2008, <http://blogs.wsj.com/law/2008/07/11/on-mcnulty-memo-specter-fires-back-at-doj/>.
- ⁴⁴ *Id.*
- ⁴⁵ Sherry Karabin, *Thanks, But it's Not Enough: The Justice Department Won't Ask Companies to Waive Their Attorney-Client Privilege Anymore*, Corporate Counsel, 24 (Nov., 2008).
- ⁴⁶ *See, e.g., Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1127 (7th Cir. 1997) (“The cases, however, generally reject a right of ‘selective waiver’ [of privilege.]”)(citing cases).
- ⁴⁷ These warnings take their name from *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the landmark Supreme Court decision defining the scope of the attorney-client privilege in the corporate context.
- ⁴⁸ *See* Ashby Jones, *Report: Obama ‘Deeply Interested’ in Eric Holder as AG*, Wall Street Journal Law Blog, Nov. 18, 2008, <http://blogs.wsj.com/law/2008/11/18/report-obama-deeply-interested-in-eric-holder-as-ag/>.

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