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Thornburgh Monograph Urges Balance on Waiver of Attorney-Client Privilege Requests

In a MONOGRAPH released today by the Washington Legal Foundation (WLF), former Attorney General of the United States **Dick Thornburgh** examines prosecutorial requests for waiver of corporations' attorney-client privilege and urges a balanced approach on this critical business civil liberties issue. Federal enforcement officials' policies encouraging corporate cooperation in investigations, and the role privilege waiver plays in that process, have been a subject of intense debate in Congress, at the U.S. Sentencing Commission, and in regulatory and enforcement agencies.

WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE: A BALANCED APPROACH was authored *pro bono* by **The Honorable Dick Thornburgh**, counsel to the national law firm *Kirkpatrick & Lockhart Nicholson Graham LLP*, and who also serves as Chairman of WLF's Legal Policy Advisory Board. The MONOGRAPH features a foreword by **The Honorable John Engler**, President and CEO of the National Association of Manufacturers and former Governor of Michigan. It also includes an introduction by **Laura Stein**, Senior Vice President – General Counsel and Corporate Secretary, of The Clorox Company.

The MONOGRAPH's goal, General Thornburgh writes, is not to argue that corporations hold an "inviolable" privilege over lawyer-client communications, but "to find a path to preserving the benefits of the privilege, while recognizing legitimate needs of law enforcement." After stating that goal in a brief introduction, General Thornburgh provides a short background of the attorney-client privilege's history in the corporate context. He then describes the benefits of the privilege, first and foremost of which is business clients' ability to have frank and open discussions with their lawyers. This is especially critical today, the Monograph notes, when internal investigations have become an essential element of both corporate compliance and defense against government enforcement activities. General Thornburgh also discusses the costs related to the privilege, mainly that it complicates law enforcement activities and allows bad actors to shield information from the public.

The current debate, General Thornburgh notes, is not over the parameters of the attorney-client privilege, "which have been fixed for some time," but rather "on when the government should get access to material that is clearly privileged." He examines that subject at length in the MONOGRAPH's second section "Waiver and Erosion of the Attorney-Client Privilege." General Thornburgh feels that Justice Department and Securities and Exchange Commission policies on privilege waiver have directly contributed to an

atmosphere where confidentiality for corporate communications is no longer certain. He discusses these policies, including the Justice Department's series of Deputy Attorney General memos that tie the concept of "cooperation" to a waiver of the privilege. The MONOGRAPH also touches upon the government's justifications for seeking privilege waiver, the consequences to a corporation of agreeing to waiver, and specific instances where DOJ sought waivers.

General Thornburgh concludes the second section with an important examination of the broader effects of seeking attorney-client privilege waiver. Given the privilege's long history and its critical importance to corporate compliance, he writes that "it should not be undermined or limited without serious consideration as to the consequences." Those consequences include harm to corporate image for those labeled as "uncooperative;" the release of information to private plaintiffs' lawyers and competitors that otherwise could not be obtained; and the creation of perverse disincentives against vigorous corporate compliance programs.

In the MONOGRAPH's final section, General Thornburgh offers suggestions on how government and corporate defendants can balance the competing interests of protecting attorney-client communications and law enforcement. He urges the Justice Department to more closely review instances where U.S. Attorneys seek waiver of the privilege. He also offers some suggestions to corporations who face the difficult decision whether to risk the government's wrath and refuse to waive, or cooperate and accept the attendant risks of doing so.

Copies of this educational WLF Monograph can be obtained by forwarding a request and a check for \$10 per copy to: Publications Department, Washington Legal Foundation, 2009 Massachusetts Avenue, NW, Washington, D.C. 20036, or calling (202) 588-0302. Questions regarding the Monograph or WLF's publications can be directed to Legal Studies Division Chief Counsel Glenn Lammi.

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