Returning to First Principles of Privilege Law: Focusing on the Facts in Internal Corporate Investigations

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ABSTRACT

In the aftermath of the worst economic downturn since the Great Depression, it is necessary and appropriate to ask some fundamental questions on the economic laws and regulations that, for better or worse, played a contributing role in the recent financial crisis. Although the ongoing financial reform efforts have already resulted in significant changes in applicable laws, a further discussion regarding the principles and practices that existed within the enforcement of law is worthy of consideration. Specifically stated, are there any improvements that can be made to the current federal securities enforcement regime that would work to the benefit of the U.S. economy and, as a consequence, to all actors therein? The answer that shall be presented in this article is, simply, yes. In particular, this article focuses on the longstanding debate regarding the appropriate limits of the attorney-client privilege within the context of an internal corporate investigation, and whether the corporation may selectively waive the privilege as a means of effectively cooperating with federal securities enforcement agencies.

The argument presented is that courts and federal securities enforcement agencies should return to the first principles of privilege doctrine, and more specifically to the “facts-communication” distinction as enunciated by the Supreme Court in Upjohn v. United States. In making such an argument, this article will: (i) provide an overview of the relevant historical development of the attorney-client privilege; (ii) address the evolution of the current securities enforcement regime and its interplay with attorney-client privilege issues, which will include a statistical analysis of recent trends in securities law enforcement; and (iii) argue for a “facts-communication” model in contrast to other possible alternatives in doctrine.

This article is the first in a series that will explore the intersection of corporate law and legal ethics. For purposes of the present discussion, however, the relevant subject matter will be the corporate attorney-client privilege as first enunciated by the Supreme Court in Upjohn v. United States, and as later interpreted by the lower courts and the enforcers of federal securities laws—namely, the Securities and Exchange Commission and the Department of Justice.

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I. Introduction

_Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence._


What a difference a decade makes. At the turn of the last century, the general mood in public discourse and perceptions was, in large part, optimistic. Although there were concerns regarding the Y2K problem as well as an attempted millennial bombing by international terrorists, the U.S. and the world maintained a fairly positive outlook on the future. Technology stocks were doing well—the NASDAQ would reach its all-time high in March 2000. President Clinton was serving his last years in office, and the future debates regarding the 2000 election cycle were still in the offing. However, the facts, what John Adams once dubbed those “stubborn things”, would soon take a different turn from what one might envision on the eve of the new millennium.

Now, clearly, things are different. After two foreign wars and two economic bubbles of historic magnitude, there is a general sense of fatigue with the course of recent events as well as the vicissitudes of fortune in the globalized economy. In the world of high finance, the landscape fundamentally changed. The days of the independent Wall Street investment bank, born out of a form created by law in the midst of the Great

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3 As David McCullough recounts in his biography, after Adams made this statement as part of his closing argument, “The jury remained out for two and a half hours. Of the eight soldiers, six were acquitted and two found guilty of manslaughter, for which they were branded on their thumbs…Years later, reflecting from the perspective of old age, [Adams] himself would call [Rex v. Wemms] the most exhaustive case he ever undertook…” See David McCullough, _JOHN ADAMS_ 68 (2001).

4 A recent cover article in _TIME_, of a crying baby complete with a party hat and surrounded by confetti, provides an apt depiction of this mood. See Andy Serwer, _The ‘00s: Goodbye (at last) to the Decade from Hell_, _TIME_ (November 24, 2009), http://www.time.com/time/nation/article/0,8599,1942834,00.html; see also Cover Photo: Shooting the ‘Decade from Hell’, _TIME VIDEO_ (2010), http://www.time.com/time/video/player/0,32068,52630343001_1943210,00.html (“We can assure you that no babies were harmed during the creation of this week’s Time magazine cover. But, all was not quiet on the set.”)
Depression—the last period of economic turmoil in American history on such a scale—are now over. Of the five “bulge bracket” investment banks that existed prior to the financial crisis of 2008, only two—Goldman Sachs and Morgan Stanley—remain independent business enterprises.

First to fold was Bear Stearns, which became subject to a classic bank run in March 2008 when investors lost confidence in its portfolio of collateralized debt obligations, or CDOs, as a result of the onset of the subprime mortgage crisis. After a hurried sale to JPMorgan Chase, however, things seemed fine. In a deal that would later prove quite controversial, the Federal Reserve Bank of New York arranged $30 billion in special financing for Bear Stearns, which provided that JP Morgan Chase would assume

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5 This said, the fact that economic booms will, in due time, be followed by what then seem to be inevitable busts, and that fortunes will be made only to then be subsequently lost, is nothing new in the American experience. As Tocqueville wrote in one of his many moments of insight, “The Americans dwell in a land of wonders in which everything is in a constant state of motion and every movement seems a step forward. The concept of newness is, therefore, intimately bound up in their minds with that of improvement…This universal activity which prevails in the United States, these frequent reversals of fortune, these unforeseen shift of public and private wealth, all combine to entrench in men’s minds a kind of feverish agitation, which predisposes them to make every possible effort and keeps them, so to speak, above the common level of humanity. For Americans, their whole lives are spent as if in a game of chance, in a time of revolution or a day of battle.” Alexis de Tocqueville, DEMOCRACY IN AMERICA 475 (Gerald E. Bevan tr., 2003).


7 A collateralized debt obligation can be generally defined as an “investment-grade bond backed by a pool of variously rated bonds, including junk bonds.” BARRON’S DICTIONARY OF FINANCE AND INVESTMENT TERMS 121 (7th ed. 2006).

8 As we now know, however, the problem with CDOs was that they frequently received an investment-grade or AAA rating from the rating agencies, when in truth these securities were much more speculative in nature. The role the rating agencies played in the recent financial crisis is an issue that is outside the scope of this article. This said, Michael Lewis may have gained a revealing, if somewhat discomforting, insight in his recent reporting. As recounted by Lewis, at a Las Vegas trade convention in January 2007, Steve Eisman (a noted hedge fund manager and one of the few investors who correctly called the market) met with representatives from the rating agencies and recalled, “I remember sitting there thinking, Jeez, this is really pathetic. You know when you’re with someone who is intellectually powerful: You just know it. When you sit down with Richard Posner, you know it’s Richard Posner. When you sit down with the rating agencies you know it’s the rating agencies.” Michael Lewis, THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE 157 (2010) (emphasis in original).
the first $1 billion of any losses associated with the assets of Bear Stearns, and that the Federal Reserve would fund the remaining $29 billion on a non-recourse basis to JP Morgan Chase. At the time, a commonly held view was that a widening financial crisis had been averted, and that the Federal Reserve took the necessary actions to avoid the spread of contagion from the subprime mortgage market to the financial markets as a whole. Indeed, amongst many observers in practice and the press there was the sense that the Federal Reserve orchestrated a settlement that echoed the actions taken during the last moment of crisis on Wall Street—the almost $4 billion bailout back in 1998 of Long-Term Capital Management, a leading hedge fund that engaged in complex arbitrage transactions.

This confident viewpoint, however, was short-lived. Things would get much worse, and much sooner than most could envision. Throughout the summer of 2008, confidence in the capital markets remained uneven as market watchers continued to

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10 The definitive treatment of the crisis involving Long-Term Capital Management, or LTCM, which includes a compelling narrative of the characters involved, remains Robert Lowenstein’s WHEN GENIUS FAILED: THE RISE AND FALL OF LONG-TERM CAPITAL MANAGEMENT (2000). “If one looks at the Long-Term episode in isolation, one would tend to agree that the Fed was right to intervene, just as, if confronted with a suddenly mentally unstable patient, most doctors would willingly prescribe a tranquilizer. The risks of a breakdown are immediate; those of addiction are long term. But the Long-Term Capital case must be seen for what it is: not an isolated instance but the latest in a series in which an agency of the government (or the IMF) has come to the rescue of private speculators.” See id. at 230.

11 As in every crisis in history, however, there were a number of observers who were ahead of the curve, in a manner of speaking. See, e.g., Robert J. Shiller, IRRATIONAL EXUBERANCE xiv (2nd ed. 2009) (“Underlying all the disruptions that we are facing is an aspect of human nature that is not consistent with our ideal of rational man.”); Frontline, THE WARNING (PBS television broadcast Oct. 20, 2009), http://www.pbs.org/wgbh/pages/frontline/warning/ (interview with former Commodity Futures Trading Commission chairperson Brooksley Born who notes that during her tenure in government in the late 1990s, “We didn’t truly know the dangers in the [derivates] market. There was no transparency.”); Nouriel Roubini and Brad Setser, BAILOUTS OR BAIL-INS? RESPONDING TO FINANCIAL CRISSES IN EMERGING MARKETS 377 (2004) (“Predicting future crises can be a fool’s errand. But it is not a stretch to say that the IMF is likely to be forced to confront more crises of domestic confidence.”); Nassim Nicholas Taleb, THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE xvii (2007) (“One single observation can invalidate a general statement derived from millennia of confirmatory sightings of millions of white swans. All you need is one single (and, I am told, quite ugly) black bird.”)
ponder whether the proverbial next shoe might drop. As the Federal Reserve continued to provide new facilities to increase liquidity in the credit markets, the question of subprime mortgage debt exposure continued to cast a pall over the capital markets. Although some market watchers called the turn in the market earlier than others, by and large most investors thought that the global economy would continue its upward trend that began with the deflating of the previous asset bubble—the Internet bubble of the late 1990s. Even though uncertainty is always a given when investing, what were the chances that, in the famous words of Yogi Berra, we could experience déjà vu all over again with another historic bubble in asset prices?

On September 15, 2008, the air finally came out of the greatest financial bubble in history. On this date, Lehman Brothers announced its intention to file a petition under Chapter 11 of the U.S. Bankruptcy Code in the Southern District of New York. Shortly thereafter, the news of Lehman’s bankruptcy unleashed the Furies on global capital markets. In a moment, credit—the lifeblood of modern financial markets—just stopped. What happened? How did a bubble in the subprime housing markets infect the overall health of the economy and take down long-standing financial institutions that weathered the bleak days of the past economic downturns, including the darkest moments of the

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12 As a matter of taxonomy, scholars in law, economics and related disciplines have used different terms to define the recent financial crisis and the resulting economic downturn. For instance, Carmen Reinhart and Kenneth Rogoff define the entire economic crisis as the “Second Great Contraction” in reference to the influential work of Milton Friedman and Anna Schwartz in their A MONETARY HISTORY OF THE UNITED STATES, 1867-1960 (299) (1963). See Carmen Reinhart and Kenneth Rogoff, THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY xxix, 393, n.7 (2009) (“Contraction provides an apt description of the wholesale collapse of credit markets and asset prices that has marked the depth of these traumatic events, along with, of course, contracting employment and output.”) (emphasis in original). For purposes of this article, however, I adopt the more commonly used phrase of “financial crisis” that is frequently used in current public discourse.

Great Depression? Why did the commercial paper markets suddenly freeze up and even blue chip companies with solid, longstanding credit ratings have no access to the credit markets? Who was in charge? What would happen next?

As we now know, a credit bubble of historic proportions, which initially formed in the housing markets through excessive subprime lending, eventually infected the overall financial markets through a complex web of transactions on the books of financial institutions both in the U.S. and abroad. Specifically, these transactions involved the purchase and sale of CDOs and associated hedging instruments (in essence, insurance policies) on these CDOs in the form of a security known as a credit default swap, or a CDS. Once the news of Lehman’s bankruptcy became public, a cascade of bank failures came in rapid succession.

Bank of America agreed to purchase all outstanding stock of Merrill Lynch in a transaction valued at approximately $50 billion. Shortly thereafter, the Federal Reserve approved the conversion of Goldman Sachs and Morgan Stanley into bank holding companies, bringing to an end the era of the independent securities firm. Washington Mutual, at the time the largest savings and loan association, went into government receivership in what would become the largest bank failure in U.S. history. Wachovia,

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14 A credit default swap can be defined as “a form of insurance on debt; the ‘buyer’ of the swap pays a fixed premium to the ‘seller,’ who agrees to pay off the debt if the debtor fails to do so. Typically the debt is a bond or a similar fixed income security, and the debtor is the issuer of the bond.” Simon Johnson and James Kwak, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 81 (2010).

then the fourth largest bank holding company in the U.S., initially considered a takeover proposal from Citigroup, but later decided on its sale to Wells Fargo for approximately $15 billion. In concert with this fundamental reordering of the economic landscape, the federal unemployment rate peaked at 10.1% in October 2009.\textsuperscript{16}

We have witnessed and continue to experience what many consider to be the worst economic downturn since the Great Depression. In such circumstances, it is necessary and appropriate to ask some fundamental questions on the economic laws and regulations that, for better or worse, played a contributing role in the financial crisis. Although the ongoing financial reform efforts have already yielded significant changes in applicable financial regulation,\textsuperscript{17} a further discussion regarding the principles and practices that existed within the enforcement of law is worthy of consideration. Specifically stated, are there any improvements that we can make to the current federal securities enforcement regime that would work to the benefit of the U.S. economy and, as a consequence, to all the actors therein?\textsuperscript{18}

The answer that shall be presented in this article is, simply, yes. In particular, I focus on what has been a longstanding debate—both in legal scholarship and the wider realm of public discourse—regarding the appropriate limits of the attorney-client privilege within the context of an internal corporate investigation, as well as waiving the privilege in such cases as a means of effectively cooperating with federal securities


\textsuperscript{18}In this article, I focus on the enforcement of federal securities laws, and do not address the issues associated with financial regulation enforcement. While such issues are of great importance to the future “re-regulation” of the capital markets, in order to facilitate a detailed discussion of the relevant issues of law, this analysis is limited to issues primarily relating to the enforcement of federal securities laws.
regulators, under the existing doctrine as set forth by the Court in *Upjohn v. United States*. This two-part inquiry—into the limits of the attorney-client privilege in the first instance and the scope of waiver doctrine as most notably discussed under the “selective waiver” line of cases—will proceed in the following parts.

In Part II, I will provide an overview of the relevant historical development of the attorney-client privilege as enunciated by English and American jurists. Part III addresses the evolution of the current securities enforcement regime and its interplay with attorney-client privilege issues, starting with the increasing role of attorneys as “gatekeepers” as first enunciated by the SEC in the case of *In re Carter & Johnson*, and ending with the evolution of policy positions taken by the SEC and DOJ in respect of the enforcement of federal securities laws and the weight placed on possible waiver of the attorney-client privilege by corporate defendants as part of the settlement determination. Further, Part III provides a statistical analysis of recent trends in securities law enforcement as a means of providing additional insight into the waiver issue to the extent that may be determined from publicly available information.

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19 449 U.S. 383 (1981). This article is the first in a series that will explore the intersection of corporate law and legal ethics. See, e.g., Geoffrey Hazard and Angelo Dondi, *LEGAL ETHICS: A COMPARATIVE STUDY* 3 (“‘Legal Ethics’ includes not only ethical conventions of the legal profession but also legal regulations prescribed by the authority of the state…”) While future articles will consider other topics of interest in this area of law, as well as any other issues that may arise as financial reform begins to take effect, for purposes of the present discussion the relevant subject matter will be the corporate attorney-client privilege as first enunciated by the Court in *Upjohn*, and as later interpreted by the lower courts and the enforcers of the federal securities law—namely, the Securities and Exchange Commission (hereinafter, the “SEC”) and the Department of Justice (hereinafter, the “DOJ”).

20 The influential scholarship on gatekeepers in corporate law as a method of third-party enforcement is extensive. See, e.g., Reiner Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2. J. L. ECON. & ORG. 53, n.3 (1986) (“In this essay, I restrict the term gatekeepers to third parties who can disrupt misconduct by withdrawing support, and the term gatekeeper liability to legal regimes that impose civil or criminal sanctions on gatekeepers who fail to withhold support”) (emphasis in original); John Coffee, *GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE* 2 (2006) (“[A] second and superior definition of the gatekeeper is an agent who acts as a reputational intermediary to assure investors as to the quality of the ‘signal’ sent by the corporate issuer. The reputational intermediary does so by lending or ‘pledging’ its reputational capital to the corporation, thus enabling investors or the market to rely on the corporation’s own disclosures or assurances where they otherwise might not.”).

Part IV presents the argument that current legal doctrine regarding the attorney-client privilege and internal corporate investigations should be reconsidered by returning to the first principles set forth by the Supreme Court in *Upjohn v. United States*, which remains the foundational case for this area of law. Specifically, I argue for the return to the facts-communication distinction as noted by the *Upjohn* court as an alternative means of resolving the key question of the appropriate boundaries of the corporate attorney-client privilege, while addressing the points raised by noted scholars on such topics. In returning to the first principles of the Court in *Upjohn*, I will argue that by focusing on the facts, or those “stubborn things” in the words of John Adams, makes possible an alternative solution to the decades-long discussion that surrounds the appropriate limits of the corporate attorney-client privilege in the context of securities law enforcement.

**II. The Historical Development of the Attorney-Client Privilege**

A good place to begin arguing for a return to first principles as set forth by the Court in *Upjohn* is at the beginning. Specifically, this section explores the historical development of the attorney-client privilege in the following areas of analysis: (a) the notable antecedents in an Anglo-American legal history; (b) the modern attorney-client privilege for corporations in *Upjohn v. United States*; and (c) a synopsis of the ongoing debate concerning the selective waiver rule.

**A. Notable Antecedents in Anglo-American Legal History**

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22 For purposes of this article, I will adopt the notion of a “first principle” as a foundational proposition that cannot be deduced from any other. *See, e.g., Metaphysics, THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION 1588, 1005b, 19-23, (Jonathan Barnes, ed. 1984) (“[T]he same attribute cannot at the same time belong and not belong to the same subject in the same respect; we must presuppose, in face of dialectical objections, any further qualifications which might be added.”) Thus, facts are facts, and communications are communications.*
The earliest recorded cases on the attorney-client privilege in Anglo-American jurisprudence that remain available to scholars, and the subsequent historical development of the prudential rules contained in these cases, provide a necessary background to the modern incarnation of the attorney-client privilege. This historical perspective is an appropriate method of inquiry in that the antecedents of the attorney-client privilege stretch for more than 400 years of Anglo-American history. In the words of Wigmore:

The history of the privilege goes back to the reign of Elizabeth I, where the privilege already appears as unquestioned. It is therefore the oldest of the privileges for confidential communications…The policy of the privilege has been plainly grounded since the latter part of the 1700s on subjective considerations. In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client’s consent. Such is the modern theory.

It initially appears that the history of the attorney-client privilege is one of fairly uniform progression from the historical antecedents to the modern form of the doctrine where the privilege, and more specifically the right to waive the privilege, now rests with the client in the first instance.

As a matter of legal history, it is significant to note that at its beginnings the attorney-client privilege did not look to the issue of the client’s consent, but rather to the barrister who represented the client before the relevant tribunal. This was a point of consequence for Wigmore, who noted that the initial theory behind the privilege “was an objective not a subjective one – a consideration for the oath and the honor of the attorney

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23 The importance of an historical perspective to the law remains a fundamental issue of method, as noted most memorably by Justice Holmes in his observation that “the rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of the rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules.” Oliver Wendell Holmes, The Path of the Law, 10 HAR. L. REV. 457, 469 (1897); see also New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (“[A] page of history is worth a volume of logic”).

24 8 J. Wigmore, EVIDENCE IN TRIALS AT COMMON LAW §§ 2290, 2291 (John T. McNaughton, ed. 1961).
rather than for the apprehensions of his client.”25 As the doctrine developed, however, Wigmore concluded “that the new theory looked to the necessity of providing
subjectively for the client’s freedom of apprehension in consulting his legal adviser.”26 Accordingly, as a matter of legal theory,27 the historical development of the attorney-client privilege can be seen as a movement from the protection of the professional reputation of the barrister to the interest of maintaining in confidence the communications between the client and her attorney.28 In its general perspective on the development of doctrine, such an observation undoubtedly contains the elements of truth.

Nevertheless, as Professor Geoffrey Hazard notes in his important article on the subject, the historical development of the attorney-client privilege was anything but certain or consistent:

[T]he historical foundations of the privilege are not as firm as the tenor of Wigmore’s language suggests. On the contrary, recognition of the privilege was slow and halting until after 1800. It was applied only with much hesitation, and exceptions concerning crime and wrong-doing by the client evolved simultaneously with the privilege itself…Taken as a whole, the historical record is not authority for a broadly stated rule of privilege or confidence. It is, rather, an invitation for reconsideration.29

25 8 J. Wigmore, EVIDENCE IN TRIALS AT COMMON LAW § 2290 (emphasis in original).
26 Id. at § 2290 (emphasis in original) (citation omitted).
27 In respect of legal theory and as to a possible definition of such a concept, for the purposes of this article I intend to adopt a specific term in order to facilitate further discussion. On these points, Professor Randy Barnett’s notion of what legal theory entails, and how such a concept interplays with a possible analysis of how problems in doctrine may be subsequently resolved, provides some illumination. “Theories are problem-solving devices. We assess the merits of a particular theory by its ability to solve the problems that gave rise to the need for a theory. We do not, however, assess a particular theory in a vacuum. No theory in any discipline, from physics to biology to philosophy, can be expected to solve every problem raised by the discipline. Rather, we compare contending theories to see which theory handles problems the best.” Randy Barnett, A Consent Theory of Contract, 86 COLUM. L. REV. 269, 269-270 (1986) (emphasis in original).
28 The impact of such an historical perspective is, one must imagine, a significant starting point for further discussion. See, e.g., Henry Sumner Maine, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 173-174 (Frederick Pollock ed., 10th ed., John Murray, Ablemarle Street, W., 1906) (“If we then employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of the agreement, we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract”) (emphasis in original).
In light of this more nuanced reading of legal history, it appears that what we would now consider the modern formulation of the attorney-client privilege is a much more recent development in doctrine. Specifically, the expansion of the attorney-client privilege began in earnest in the 1830s. In two cases heard before the Court of Chancery, Bolton v. Corporation of Liverpool\(^{30}\) and Greenough v. Gaskell,\(^{31}\) Lord Brougham expanded the scope of the attorney-client privilege. At the same time, these decisions provide the fundamental grounds in policy for such an expansion—namely, that the privilege promotes communication between the client and counsel, which furthers the interests of justice in connection with court proceedings.

i. **Bolton v. Corporation of Liverpool**

In *Bolton v. Corporation of Liverpool*, the plaintiffs were merchants and partners, and who were also defendants to an action at law by the Corporation of Liverpool “for the recovery of certain dues levied by the corporation upon the traders of that town.”\(^{32}\) After commencement of this initial action, the matter was then separately submitted to the courts of equity in a bill “filed for the purpose of obtaining discovery from the corporation in aid of the Plaintiff’s defence to the action at law.”\(^{33}\) In particular, the plaintiffs sought to compel production of certain cases that defendant had submitted to its counsel for their opinion, as well as any statements made by counsel in relation to such cases.\(^{34}\) Significantly, plaintiffs claimed that these cases concerned “the right of the

\(^{33}\) *Id.*, 39 Eng. Rep. at 615.
\(^{34}\) *Id.*, 39 Eng. Rep. at 615. These cases and opinions would probably have qualified as fact and/or opinion work product under the modern rules in the United States. Indeed, we learn from Lord Brougham that defendant laid the cases before its counsel “to have been prepared in contemplation of and with reference to the action and suit.” *Id.* at 617. Further, the specific communications, either oral or written, between the
corporation to receive the tolls and duties”\textsuperscript{35} that were claimed by defendant as being in arrears in the separate action at law. In reviewing the applicable precedents as well as additional arguments made by both parties, Lord Brougham observed:

If it be said that this Court compels the disclosure of whatever a party has at any time said respecting his case; nay, even wrings his conscience to disclose his belief, the answer is, that admissions not made, or thoughts not communicated to professional advisers, are not essential to the security of men’s rights in Courts of Justice. Proceedings for this purpose can be conducted in full perfection, without the party informing any one of his case except his legal advisers. \textit{But without such communication no person can safely come into a Court, either to obtain redress or to defend himself.}\textsuperscript{36}

As we shall later discover when assessing the ongoing debate on the appropriate limits of the attorney-client privilege for corporations under \textit{Upjohn} and its progeny, here is the fundamental argument in legal theory as to the justification for an expansive interpretation of the attorney-client privilege.

Assuming, \textit{arguendo}, that clients may seek professional legal representation as part of an adversarial process of law, the importance of uninhibited communication between the client and her counsel will become paramount. Further, if the client cannot communicate in confidence with her counsel, she may not be sufficiently prepared to make her case in front of the competent legal authority. In such cases, therefore, one cannot claim that the interests of justice (such as they are) will be served by a rule that will effectively disincentivize the full and open disclosure of information between clients and their counsel. In light of such concerns, Lord Brougham found that the plaintiffs in \textit{Bolton v. Corporation of Liverpool} would be denied their request for production of the cases submitted to defendant’s counsel and any statements or opinions that may have been given to defendant in connection therewith.

\textsuperscript{35} Id. at 615.
\textsuperscript{36} Id. at 617 (emphasis added).
ii. **Greenough v. Gaskell**

Similarly, in *Greenough v. Gaskell*, plaintiffs brought a bill that charged defendant, a solicitor who represented a client who later became bankrupt, of fraudulently concealing his client’s financial status in connection with the execution of a note. As part of the proceedings at the lower court, plaintiff moved to compel production by the defendant of “divers books, &c., containing entries and memorandum, and also divers papers and letters, relative to the matters in the bill” as were set forth by defendant in its answer, which were admitted as being in his possession in response to plaintiff’s charge. Notably, the defendant claimed that “such entries and memorandums were made, and such papers and letters were written, or received by him in his capacity of confidential solicitor for [his client], for whom he had been professionally concerned for a number of years.”

In declining to compel the production of these entries and memoranda, Lord Brougham cited his prior decision in *Bolton v. Corporation of Liverpool* and further elaborated on the grounds in legal theory that favor a more expansive treatment of the attorney-client privilege:

> To compel a party himself to answer upon oath, even as to his belief or his thoughts, is one thing; nay, to compel him to disclose what he has written or spoken to others, not being his professional advisers, is competent to the party seeking the discovery: for such communications are not necessary to the conduct of judicial business, and the defence or prosecution of men’s rights by the aid of skilful persons. To force from the party himself the production of communications made by him to professional men seems inconsistent with the possibility of an ignorant man safely resorting to professional advice, and can only be justified if the authority of decided cases warrants it…[I]t is out of regard to the interests of justice, which cannot be upheld, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. *If the privilege did not exist at all, every one would be thrown upon*

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his own legal resources; deprived of all professional assistance, a man would not venture
to consult any skillful person, or would only dare to tell his counselor half his case. 39

Here, one should note that Lord Brougham makes an important distinction between the
right of an opposing party to seek the discovery of information through testimony under oath, as opposed to the right to compel the production of communications with a client and his or her counsel. As will be further discussed infra, this distinction is of primary importance in assessing the distinction between facts, on the one hand, and communication, on the other, under the longstanding doctrine as set forth in the Upjohn line of cases. 40

In terms of the historical development of the attorney-client privilege, however, Lord Brougham’s opinions in Bolton and Greenough constitute a watershed in that the prior focus on “the oath and the honor” of the barrister was no longer determinative. 41

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39 Id. at 620-621 (emphasis added).
40 Indeed, one could argue that the facts-communication distinction is a necessary premise for Lord Brougham’s judicial reasoning in Bolton and Greenough. Given that these opinions dramatically expanded the potential scope of the attorney-client privilege to cover various instances of communications between clients and their counsel, by necessity it would seem that there must be a distinction between what remains a discoverable fact under examination in opposition to communications that fall within the protection of the privilege. As Professor Hazard notes, “Bolton and Greenough encompass a broad range of communications: from client to lawyer, and from lawyer to client; legal advice in a strict technical sense and business-financial assistance of the sort rendered by an office lawyer; communications between barrister and client and between solicitor and client; exchanges in contemplation of litigation and ones not occasioned by the specific prospect of imminent litigation; and communications as such and the transmission of tangible items, such as preexisting items, from client to lawyer. Brougham held all of these matters immune from disclosure.” Hazard, An Historical Perspective, 66 Cal. L. Rev. 1061, 1084. As one might expect, Lord Brougham did not achieve such a dramatic change in doctrine without distinguishing a number of cases and, in one instance, simply taking no notice of an adverse precedent. See id. (“In particular, he handled Annesley v. Anglesea in about the only way possible, that is by not citing it at all”); see also Annesley v. Anglesea, 17 How. St. Trials 1139 (1743) (permitting testimony of an attorney in connection with an action of ejectment). Nevertheless, such judicial “activism” was not without precedent in the English courts. See, e.g., Pillans and Rose v. Van Mierop and Hopkins, 3 Burr. 1663, 97 Eng. Rep. 1035 (K.B. 1765); but see Rann v. Hughes, 7 T.R. 350n, 101 Eng. Rep. 1014n (H.L. 1778).
41 In relation to this historical change in the doctrine, and in further discussion of Wigmore’s analysis of the attorney-client privilege, Professor Hazard observes that “Wigmore explained the transformation of the privilege from that of the lawyer to that of the client as a transformation of the underlying theory from ‘objective’ to ‘subjective.’ It seems at least equally plausible to attribute the change in the ‘holder’ of the privilege to the fact that the privilege came to extend to communications not only to barristers, who stood as members of the court, but as to attorneys, who did not.” Hazard, An Historical Perspective, 66 Cal. L. Rev. 1061, 1071 n.39.
Indeed, as Professor Hazard observes, the opinions in Bolton and Greenough “wholly disconnect the privilege from its point of origin—the fact that in court the client could not speak for himself and therefore had to inform someone to speak for him.”

Although the precise extent of the attorney-client privilege as enunciated by Lord Brougham was not fully accepted in later court decisions, what is of consequence is that the privilege now rested upon a more fully developed notion of the “interests of justice” as a theoretical justification for the doctrine. In this sense, the attorney-client privilege, in its previous incarnation, was dead—long live the attorney-client privilege. But how would the new doctrine apply to a newly created entity—the invisible, intangible corporation?

B. The Modern Attorney-Client Privilege for Corporations in Upjohn v. United States

Corporations are, in a phrase, legal fictions. In using such a phrase, I seek to highlight the fact that the corporation in its modern form is a distant descendant of the

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42 Id. at 1085.

43 For instance, the modern version of the attorney-client privilege is subject to numerous exceptions, including that the privilege does not extend to pre-existing documents, business advice or to any other matters that are not in furtherance of obtaining legal advice. See, e.g., Fisher v. United States, 425 U.S. 391, 403-4 (1976) (“[P]re-existing documents which can be obtained by court process from the client when he is in possession may also be obtained from the attorney by similar process following transfer by client in order to obtain more informed legal advice”); McCaugherty v. Siffermann, 132 F.R.D. 234, 238 (N.D. Cal 1990) (“No privilege can attach to any communication as to which a business purpose would have served as a sufficient cause, such as any communication that would have been made because of a business purpose, even if there had been no perceived additional interest in securing legal advice”) (citation omitted); 8 J. Wigmore, EVIDENCE IN TRIALS AT COMMON LAW § 2292 (requiring that “legal advice of any kind” be sought as an element of the attorney-client privilege).

44 In a similar manner, the development of modern contract law from its historical origins in the writ of assumpsit required, as the subsequent historical development would ultimately illustrate, an initial ruling (whether implicit or explicit) that the defense of wager of law would not lie. “The point was of the first importance: had the action of assumpsit been saddled with wager of law it could never have been developed into the general contractual remedy of the common law. But matters which seem important in retrospect do not always seem important at the time.” A. W. Brian Simpson, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 220 (1975). Similarly, in reviewing the development of the attorney-client privilege as a matter of doctrine, this critical pivot in the underlying theory—from the barrister’s professional reputation to the client’s interests in justice—would be difficult to underestimate.

45 In using the phrase “legal fictions”, I refer to Maine’s influential work and his definition of legal fictions. “I employ the word ‘fiction’ in a sense considerably wider than that in which English lawyers are accustomed to use it, and with a meaning much more extensive than that which belonged to the Roman
earliest corporate forms. Nevertheless, there remains a consistency to the corporate form precisely because it is a legal fiction. For reasons well beyond the scope of this article, and for better or worse, it appears that the modern corporation is a fixture of law for the foreseeable future.

i. Considering the Corporate Form

`‘fictiones’…But now I employ the expression ‘Legal Fiction’ to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. The words, therefore, include the instances of fictions which I have cited from the English and Roman law, but they embrace much more, for I should speak both of the English Case-law and of the Roman Responsa Prudentium as resting on fictions…The fact is in both cases that the law has been wholly changed; the fiction is that it remains what it always was. It is not difficult to understand why fictions in all their forms are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present.” Maine, ANCIENT LAW at 30-31 (emphasis in original). This said, the corporation itself is, of course, a creature of statute that may be as narrowly defined as that which the competent legislature provides. See, e.g., 8 Del. C. § 102 (contents of certificate of incorporation). Accordingly, here I employ the term corporation in a more expansive sense to include not only the narrow definition as set forth in statute, but also the attendant rights and obligations of such a legal form as may be determined under applicable decisional law.

46 For additional discussion in respect of Maine’s lasting impact in legal theory, see, e.g., E. Donald Elliott, The Evolutionary Tradition in Jurisprudence, 85 COLUM. L. REV. 38, 45 (1985) (“Some aspects of Maine’s work have withstood the test of time. His insights into the role legal fictions play in facilitating changes in the law, for example, are as brilliant today as when they were written.”); Daniel R. Coquillette, THE ANGLO-AMERICAN LEGAL HERITAGE: INTRODUCTORY MATERIALS 283 (2nd ed., 2004) (“The lesson, put simply, was that Maine was correct about how the law develops…We often prefer to pretend that something has stayed the same, when it has actually changed a great deal. The English monarchy is a legal fiction. So is the idea of the Constitution of the United States is unchanging. Fictions permit useful incremental reform, when wide scale reform is too threatening.”)

47 The earliest ancestor to the modern corporations is, one may credibly claim, the joint-stock corporation as invented by those with business interests in Amsterdam in the early 17th century. More specifically, the chartering of the United East India Company (i.e., the Vereenigde Nederlandsche Gecroyeerde Oostindische Compagnie, or VOC) in 1602 and the issuance of certificates in the years shortly thereafter, constituted what can be called the first public offering in history. “[T]he scale of the enterprise was unprecedented. Subscription to the Company’s capital was open to all residents of the United Provinces and the charter set no upper limit on how much might be raised…The certificates issued were not quite share certificates in the modern sense, but more like receipts; the key document in law was the VOC stock ledger, where all stockholders’ names were entered at the time of purchase.” Niall Ferguson, THE ASCENT OF MONEY: A FINANCIAL HISTORY OF THE WORLD 129-130 (Penguin Books, 2008).

48 In respect of the modern corporation, at least within the United States, here I have in mind the general scope and extent that currently exists under the Delaware General Corporation Law. See, e.g., Del. Code Ann. tit. 8, ch. 1 passim (2010). However, the critiques of the modern corporate form, most notably through the corporate social responsibility (or “CSR”) school of legal thought, remain an important area of scholarly debate and discussion. See e.g., Cynthia A. Williams, Corporate Social Responsibility in an Era of Economic Globalization, 35 U.C. DAVIS L. REV. 705 (2002); THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY (Andrew Crane et al., ed. 2008). This said, recent empirical analysis demonstrates that the limited liability company, or LLC, may be superior to the corporate form in every way other than historical path dependence. See Geoffrey Christopher Rapp, Preserving LLC Veil Piercing: A Response to Bainbridge, 31 J. Corp. L. 1063, 1068-1077 (2005-2006).
Before continuing with the general discussion of the historical development of attorney-client privilege as doctrine, it may be helpful to pause to consider the corporate form, in and of itself. Assuming for purposes of this discussion that the modern corporation is here to stay, the critical and indeed necessary question, when stated plainly, becomes—*to what extent should the modern corporation enjoy the rights and privileges that we reserve for natural persons?* An answer to this question is of increasing scholarly and public debate. Within the context of First Amendment law, should corporations have the right to make available through video-on-demand within the 30-day period prior to a presidential campaign a documentary about one of the presidential candidates? On this specific issue, the Court found the answer is yes in the case of *Citizens United v. FEC*.\(^49\) In the words of Justice Ginsburg, however, “a corporation, after all, is not endowed by its creator with inalienable rights.”\(^50\) At some point in the development of doctrine, therefore, a decision must be made as to the specific rights and privileges that will be granted to the corporation, and the specific rights and privileges that will not.

Without doubt, some rights and privileges are clearly *not* within the purview of the modern corporate form. Significantly, the modern corporation does not enjoy the Fifth Amendment right against self incrimination as determined by the Court in the 1906 case of *Hale v. Henkel*.\(^51\) Recent scholarship by Professor Julie O’Sullivan, however, has


\(^{51}\) See, e.g., *Hale v. Henkel*, 201 U.S. 43 (1906). Of particular importance, the Court in *Hale* held, “The right of a person under the *Fifth Amendment* to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person…The question whether a
provided new insight into the *Hale* case and the weaknesses inherent in the court’s opinion. With this notable caveat to the precedential value of *Hale*, the fact remains that, as of the present, the modern corporation cannot generally claim the right against self incrimination under the Fifth Amendment. What then of the attorney-client privilege? Can the testimonial privilege that first came into existence to protect the professional reputation of the barrister in England, which was then turned on its head to read in the interests of the client, now be extended to apply to that “artificial being, invisible, intangible and existing only in the contemplation of the law” – that is, the modern corporation?53

This was the issue that, as a matter of historical development of doctrine, squarely faced the Court in *Upjohn v. United States*. This is also the reason why the Court’s holding in *Upjohn* – that indeed there is an attorney-client privilege for the corporation – is of critical importance in doctrinal development on a level that can be seen as comparable, at least in respect of the corporate form, to Lord Brougham’s turnabout on legal theory in *Bolton* and *Greenough* back in 1833. Simply stated, as a matter of doctrine there was the attorney-client privilege before and the attorney-client privilege

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53 Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 636 (1819) (Marshall, C.J.) (“A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”)
after *Upjohn*. And the new contours of this doctrine set forth in the Court’s opinion in *Upjohn* have, in this sense, made the difference.

**ii. *Upjohn v. United States***

Although the facts in *Upjohn* are relatively straightforward, they should be considered within the context of corporate and securities practice that then prevailed.\(^{54}\) As a starting point, the political environment was not hospitable for corporations in the late 1970s, and in many cases was outright hostile. In the aftermath of the Watergate investigations and the general distrust of government and its policies, questionable payments made by or on behalf of corporations to certain foreign interests ultimately resulted in the enactment of the Foreign Corrupt Practices Act (“FCPA”).\(^{55}\) It was within this context that the Upjohn Corporation, a pharmaceutical manufacturer that initially gained success through the sale of certain “friable” pills,\(^{56}\) found itself in the midst of an internal corporate investigation regarding certain questionable payments in connection with an ongoing investigation by the Internal Revenue Service (“IRS”).

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\(^{54}\) Given my more recent entry into the practice and study of law, I readily confess a lack of personal knowledge on corporate and securities practice in the late 1970s. Accordingly, I am indebted to Phil Parker, a former Deputy General Counsel at the SEC, for his recounting of such events during my early training in practice. Any errors in the historical account contained herein, however, remain solely my own.  

\(^{55}\) See, e.g., 15 U.S.C. §§ 78dd-1; 78dd-2; 78dd-3; 78m (2010). “The FCPA is a response to real and perceived harm to U.S. foreign relations with important, developed friendly nations, and the interest of the United States to prevent persons from making payments which embarrass the United States in conducting foreign policy…There was also a more general distrust of business during the Carter Administration. All was not attributable to the President; Senator Frank Church and others in Congress appeared to view multinational corporations as inherently evil, and the FCPA as a law necessary to govern their immoral behavior.” Folsom, Ralph H., et al., *INTERNATIONAL BUSINESS TRANSACTIONS* § 17.2 (2nd ed. 2001).  

\(^{56}\) The founder of the company, Mr. William E. Upjohn, as a “young physician loved to tinker. One of his projects was working on a way to make pills ‘friable,’ or easy to dissolve. At that time, pills were hard and many went through the digestive system before their ingredients could do any good.” Roger Kullenberg, *Upjohn Made His Mark on Kalamazoo*, KALAMAZOO GAZETTE, Jan. 1, 2000, at A2. Mr. Upjohn passed away in 1932 and thus never knew of the eponymous case for which, at least among legal scholars and practitioners, he may be best remembered. In 1995, the Upjohn Corporation merged with Pharmacia AB and thus ceased its existence as a stand-alone business enterprise. *See id.*
Upjohn begins with what is, by now, a fairly familiar fact pattern for internal corporate investigations—the corporation received notice from its independent accountants\(^{57}\) that, in connection with an audit of a foreign subsidiary, that “the subsidiary made payments to or for the benefit of foreign government officials in order to secure government business.”\(^{58}\) This notice from the accountants to management typically constitutes a triggering event for an internal corporate investigation to determine the nature and extent of any “questionable payments” that may be subject to sanction by the SEC and the DOJ.\(^{59}\) Of particular note at this time, the SEC initiated what became known as its “voluntary disclosure program” in order to incentivize corporations to voluntarily assess their compliance with applicable federal securities laws.\(^{60}\) As a means

\(^{57}\) As evidence of the development of law in this area, note that in modern practice the accounting firm would most like send a “10A letter” to management under the auspices of Section 10A of the Securities Exchange Act of 1934, which requires, *inter alia*, that the accounting firm inform management of any “illegal act” discovered in the course of an audit and, if necessary, resign from the engagement or report to the SEC in the event that the company fails to take “timely and appropriate remedial actions.” See 15 U.S.C. § 78j-1 (2010).

\(^{58}\) *Upjohn*, 449 U.S. at 386.


\(^{60}\) In a revealing description of the development of the voluntary disclosure program in the 1970s, the D.C. Circuit observed, “As early as 1974 the SEC was engaged in investigating the political ‘slush fund’ practices of some corporations. Initially the SEC staff carried out its own investigations, but as the scope of the payments problem became apparent, extending to foreign as well as domestic payments, the SEC realized that it did not have the resources to investigate each case carefully. In several 1974 enforcement actions, the SEC thus sought and obtained consent decrees in which corporate defendants agreed to appoint special committees of their boards of directors—composed entirely of directors unaffiliated with management—to carry out independent investigations of the defendants’ payments practices. These investigations were to be performed by outside counsel hired for that purpose and responsible only to the special committee. The results of the investigation would be embodied in a report to the special committee, which would also be shared with the SEC staff. As the benefits of this method of investigation became apparent, the SEC began to encourage corporations to come forward voluntarily and perform the same type of independent investigation that the consent decrees had required. This effort to induce corporate self-investigation became known as the voluntary disclosure program.” In re: Sealed Case, 676 F.2d 793, 800 (D.C. Cir. 1982) (emphasis added). Thus, an effort to extend the reach of certain investigation methods by federal securities regulators because of its potential benefits subsequently caused tension with the underlying principles of the attorney-client privilege. In this sense, the policy considerations at odds with one another in the current debate over the appropriate limits of the attorney-client privilege for corporations can be seen as being “baked into” the doctrine from its very beginnings. See infra Part IV.
of complying with this voluntary disclosure program, the Upjohn board of directors
decided to tap its General Counsel to “conduct an investigation for the purpose of
determining the nature and magnitude of any payments made by the Upjohn Company or
any of its subsidiaries to any employee or official of a foreign government.”61 After
completing the investigation, which involved the sending of questionnaires to employees
and interviews by the General Counsel or outside counsel of 86 present and past
employees,62 the company disclosed its preliminary report to the SEC on Form 8-K and
provided the IRS with a copy of the report to determine any tax consequences of such
payments.63 In the end, the total amount of questionable payments came in at
$4,098,000, or approximately $22,130,000 in today’s dollars.64

Unfortunately for Upjohn, its compliance with the voluntary disclosure program
with the SEC did not settle the ongoing IRS investigation into the tax effects of the
questionable payments. However, to the ultimate benefit of the further development of
document in the area of the corporate attorney-client privilege, the Special Agents at the
IRS decided to press the issue and summoned Upjohn to produce “all files relative to the
investigation” including, without limitation, any “written questionnaires sent to managers
of the Upjohn Company’s foreign affiliates, and memorandums or notes of the

61 Upjohn, 449 U.S. at 387.
62 See Affidavit of Gerard Thomas [General Counsel of the Upjohn Company], Exhibit 1 Foreign Payments
63 Upjohn, 449 U.S. at 387.
64 This calculation comes from the US Bureau of Labor Statistics inflation calculator, which is available at:
http://data.bls.gov/cgi-bin/cpicalc.pl. Specifically, assuming that the total payments were for $4,098,000 in
1971 results in a figure of $22,130,313.04 in 2010 dollars. Note, however, that the payments in question
were reported by the company as having been incurred “since January 1, 1971” in its amended Form 8-K,
and thus the payments may have been made over the period 1971-1976. See Amendment No. 1 of the
Upjohn Company, Form 8-K, 1980 U.S. S. Ct. Briefs LEXIS 1920, at *196. Nevertheless, this figure in
2010 dollars may provide some indication of the economic interests at issue.
interviews.” In essence, the IRS sought to obtain the fruits of the investigation—i.e., the information that counsel generated and obtained in connection with the internal investigation—without the invocation of the protection afforded by the attorney-client privilege.

On appeal, the Sixth Circuit applied the “control group” test—holding that Upjohn must produce any documents outside of the scope of the firm’s control group. The privilege would be limited to “communications made by the so-called ‘control group’ of the corporation, namely, those officers, usually top management, who play a substantial role in deciding and directing the corporation’s response to the legal advice given.” The control group test stood in contrast to the “subject matter” test, which would consider all communications made by corporate employees to counsel as being privileged under the traditional principles of the attorney-client privilege. In reviewing the Sixth Circuit, however, the Court reversed and thereby declined to adopt the control group test but ruled in favor of a more expansive interpretation of the privilege, subject to certain conditions that are now commonly referred to as “Upjohn warnings.”

65 See Upjohn, 449 U.S. at 387-388.
66 United States v. Upjohn, 600 F.2d 1223, 1227 (6th Cir. 1979).
67 See id.
68 Upjohn, 449 U.S. at 395-396.
69 As a matter of practice, the Upjohn warnings function in a manner similar to Miranda warnings in the criminal law context and thus, one supposes, the invention of such a phrase in this area of law. See, e.g., Miranda v. Arizona, 384 U.S. 436 (1966). Typically, the Upjohn warning provides, inter alia, that prior to interviewing any employees of the corporation, the interviewing counsel (whether as part of the corporation’s law department or from an outside law firm) must advise the interviewee that such counsel represents the corporation and not the interviewee, and thus the interviewee should consult with his or her own counsel in respect of any legal issues that may obtain in his or her own circumstance. See, e.g., Julie Rose O’Sullivan, Symposium: Corporate, Criminality: Legal, Ethical and Managerial Implication: The Challenge of Cooperation: The DOJ Risks Killing the Golden Goose Through Computer Associates/Singleton Theories of Obstruction, 44 AM. CRIM. L. REV. 1447, 1467 n.78 (2007).
More significantly, however, the Court offered three justifications\textsuperscript{70} for broadly interpreting the scope of the attorney-client privilege: (1) the fundamental distinction between facts and communication; (2) the availability of discovery for the governmental authorities; and (3) the policy interest of preserving full and frank communications between attorneys and their clients.

1) **Facts-Communication Distinction**

A critical aspect of the Court’s decision in *Upjohn* is the fundamental distinction between facts and communication.\textsuperscript{71} At first glance, such a distinction may appear rather straightforward and thus does not require further attention or elaboration. However, the argument presented herein is that the facts-communication distinction is not only fundamental, but could also be determinative of whether the attorney-client privilege should apply to corporations in given cases. On this precise point, and in reviewing the development of the attorney-client privilege as doctrine, one recalls that the *Bolton* and *Greenough* opinions set forth the necessary premise of first distinguishing facts from communication.\textsuperscript{72} Accordingly, the question becomes whether such a premise, when considered as part of a longer strand of judicial reasoning, can indeed become the deciding factor in a prudential analysis when determining the applicability of the privilege in given cases. As argued herein, such an approach to this area of law is not only possible, but may well be preferable in its application.\textsuperscript{73}

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\textsuperscript{70} The notion of justification in the law remains a key area of inquiry in jurisprudence, and while outside the scope of this article, may provide some insight in which to consider the reasoning of the Supreme Court in *Upjohn*, and in particular the grounds on which it decided to reject the control group test. See e.g., Ronald Dworkin, *Law’s Empire* 190 (Harvard University Press 1986) (“A conception of law must explain how what it takes to be law provides a general justification for the exercise of coercive power by the state, a justification that holds except in special cases when some competing argument is specially powerful”).

\textsuperscript{71} See supra note 22.

\textsuperscript{72} See supra note 40.

\textsuperscript{73} See infra Part IV.
In deciding to reject the control group test for the attorney-client privilege, the

_Upjohn_ Court reasoned:

The privilege only protects disclosure communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney: “The protection of the privilege extends only to _communications_ and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, ‘What did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.”

In setting forth this explication of the facts-communication distinction, the Court quoted at length the opinion of the District Court for the Eastern District of Pennsylvania in

_Philadelphia v. Westinghouse Electric Corp._

Interestingly, in reviewing the pleadings submitted to the Court, Upjohn’s counsel cited the above passage from _Westinghouse_ and noted that “Judge Kirkpatrick, who originated the control group test, explained the rule [of distinguishing facts and communication] in an earlier opinion in that same case.” Further, counsel for Upjohn reasoned, “[Upjohn] simply exercised the right, held by any client, to disclose certain facts known to it after first discussing them with its attorneys. Under established authorities, such disclosure does not result in a waiver of the privilege.” Accordingly, in an interesting turn in doctrinal development, the facts-communication distinction is a shared premise for both the control group test and subject matter test.

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75 _Westinghouse_, 205 F.Supp. at 830.


78 Id.

79 Such an analysis accords with the reading of _Bolton_ and _Greenough_ previously discussed, whereby the facts-communication distinction is a necessary premise (and, indeed, a first principle) for the privilege. See supra notes 22, 40.
The Westinghouse case involved a set of interrogatories that sought “detailed information (date, place, individuals present, etc.) of meetings of officials of the defendant corporations and competitors at which prices, territories and terms of sale of electrical equipment were discussed.” In response, the defense refused to answer the interrogatories by invoking the attorney-client privilege. The district court in Westinghouse quickly dispensed of the issue in a decision not exceeding five paragraphs in a manner that reads almost positively civilian. Noting that its decision rested on “practically horn-book law and require[s] no elaboration or citation of authorities,” the district court focused on the facts-communication distinction as being determinative. As an additional wrinkle in this line of reasoning, the Westinghouse court further elaborated:

It is too clear to require much discussion that a corporation cannot disclaim knowledge of a fact on the ground that the fact in question has not been communicated to its chief executive officers and board of directors. A corporation acquires knowledge through its officers and agents and is charged with knowledge of all material facts of which they acquire knowledge while acting in the course of their employment and within the scope of their authority, even though they do not in fact communicate it.

Although this language was not specifically quoted by the Court, this further distinction between the knowledge of facts and the communication of such facts to counsel (where, presumably, the communication would be protected by the attorney-client privilege) is consistent with the passage cited with approval in Upjohn. Indeed, this distinction

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80 Westinghouse, 205 F.Supp. at 830.
81 See id.
82 For further discussion of a comparative perspective on the style of judicial opinions in civil law countries, see, e.g., Mattei, Ugo A., et al., SCHLESINGER’S COMPARATIVE LAW 555 (7th ed. 2009) (“[M]ost importantly, civil-law countries generally adhere to the rule that every final judgment must be accompanied by a reasoned opinion detailing the position of the court on every major issue of fact and law…An ambiguous, incomplete, or contradictory reasoning is reversible error.”) (emphasis in original)
83 Westinghouse, 205 F.Supp. at 831.
84 See Upjohn, 449 U.S. at 395-396.
85 Westinghouse, 205 F.Supp. at 831 (emphasis added).
86 See Upjohn, 449 U.S. at 395-396.
between the knowledge and communication to counsel of facts may help clarify the Court’s emphasis in the *Upjohn* opinion that the protection of the privilege does not extend to “underlying facts.”\(^{87}\) As will be discussed *infra*, this concept of underlying facts can serve as the foundational premise in a renewed theoretical approach to the problems attending to the privilege in the corporate context.\(^{88}\)

2) **Availability of Discovery**

The second justification upon which the Court in *Upjohn* rested its decision was the availability of discovery by governmental agencies through existing court and administrative procedures. Although this justification resembles the facts-communication distinction in that it specifically focuses on the *facts* that may be obtained in the discovery process, one can interpret this strand of thought as constituting separate grounds of justification because of its normative implication—namely, that adversaries in the judicial process should, in a phrase, do their own work.\(^{89}\) As the *Upjohn* court explained:

> Here the Government was free to question the employees who communicated with [Upjohn’s General Counsel] and outside counsel. Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them. While it would probably be more convenient for the Government to secure the results of [Upjohn’s] internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner’s attorneys, *such considerations of convenience do not overcome the policies served by the attorney-client privilege*. As Justice Jackson noted in his concurring opinion in Hickman v. Taylor, 329 U.S., at 516: “Discovery was hardly intended to enable a learned profession to perform its functions on wits borrowed from the adversary.”\(^{90}\)

\(^{87}\) *Id.*

\(^{88}\) *See infra* Part IV.


\(^{90}\) *Upjohn*, 449 U.S. at 396 (emphasis added). For further discussion of the work product doctrine as enunciated by the Court in *Hickman*, *see infra* Part II.B.ii.4.
Accordingly, in making clear that the protection afforded by the privilege extended to corporations when conducting internal investigations, the Court made the normative assessment that governmental authorities should conduct their own investigation into the relevant facts and, further, that any “considerations of convenience” do not trump the policy considerations in support of the attorney-client privilege. The precise nature and scope of these policy considerations constitute the third primary justification in *Upjohn*—namely, that the privilege exists to promote “full and frank communication” between an attorney and her client.

3) **Preservation of Full and Frank Communications**

The third and perhaps most compelling justification set forth in *Upjohn* in favor of the attorney-client privilege is that “its purpose is to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” In making this claim, the Court cited Wigmore’s description of the attorney-client privilege and further noted that “the attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.” As previously discussed, however, this

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91 *Id.*
92 In an amicus brief, the point was more forcefully put as follows: “In civil cases, the subject matter test does not change the fact that the full panoply of discovery devices made available by the Federal Rules of Civil Procedure may be used by parties opposing a corporate client to discover facts which may also have been communicated to counsel…The only ‘burden’ the privilege imposes is that of requiring each party to do its own discovery.” Brief Amici Curiae on Behalf of the American College of Trial Lawyers and 33 Law Firms in Support of Petitioners, 1980 U.S. S. Ct. Briefs LEXIS 2151, at *28 n16. *See also* Brief Amici Curiae for the Committee on Federal Courts and the Committee on Corporate Law Department of the Association of the Bar of the City of New York, 1980 U.S. S. Ct. Briefs LEXIS 2148, at *15 (“[N]othing prevents the IRS from determining all of the relevant facts and circumstances concerning questionable payments by Upjohn”); Brief of the American Bar Association as Amicus Curiae, 1980 U.S. S. Ct. Briefs LEXIS 2152, at *12 (“The attorney-client privilege appropriately fosters and protects the relationship between lawyer and client, but it does not bar discovery of the facts”).
93 *Upjohn*, 449 U.S. at 389.
94 *Id.*
95 *Upjohn*, 449 U.S. at 389 (quoting 8 J. Wigmore, EVIDENCE IN TRIALS AT COMMON LAW § 2290).
assessment of the historical development of doctrine is subject to the criticism that the
attorney-client privilege—in the sense of maintaining in confidence communications
between attorney and client, as opposed to initial position of protecting the reputation of
the barrister—is anything but a clear and consistent line.  

What is clear, therefore, from this language in the Upjohn opinion is that the
Court subscribed and fully extended to the corporate form the theoretical justification for
the attorney-client privilege as first enunciated by Lord Brougham in Bolton and
Greenough. Recall that Lord Brougham spoke to “the interests of justice, which cannot
be uphelden, and to the administration of justice, which cannot go on, without the aid of
men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting
rights and obligations which form the subject of all judicial proceedings.” In this sense,
one can quite naturally draw a line starting with these words from Lord Brougham in
Bolton and Greenough and ending at the language from Justice Rehnquist in Upjohn that
the purpose of the privilege is to “promote broader public interests in the observance of
law and administration of justice.” And once this theoretical determination in law has
been made, then the result becomes somewhat natural—the privilege must be protected
from compelled disclosure by governmental authorities so that we may uphold the
interests in observing law and administering justice. As a consequence, the historical

96 Here, one recalls Kant’s famous observation, “Out of the crooked timber of humanity no straight thing
was ever made,” as quoted in, Isaiah Berlin, THE CROOKED TIMBER OF HUMANITY 19 (1990). The precise
quotation reads: “Out of timber so crooked as that from which man is made nothing entirely straight can be
built [Aus so krummem Holze, als woraus de Mensch gemacht ist, kann nichts ganz Gerades gezimmert
warden].” Id. at v (quoting, Immanuel Kant, Idee zu einer allgemeinen Geschichte in weltbürgerlicher
Absicht (1784), KANT’S GESAMMELTE SCHRIFTEN, vol. 8 (Berlin, 1912), p. 23). See also
http://crookedtimber.org/ (widely-read blog on politics and other matters).
98 Upjohn, 449 U.S. at 389.
99 The slight variation in Lord Brougham’s language of the “interests of justice” and “administration of
justice” as opposed to Justice Rehnquist’s phrase “public interests in the observance of law and

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development of the attorney-client privilege up until its extension to the corporate form in 
*Upjohn* illustrates quite vividly the importance of first principles in judicial thought.  In 
this manner, the judicial reasoning of Lord Brougham in *Bolton* and *Greenough*, as of 
1833, echoes to this day within the text of *Upjohn* and its progeny.

4) **Distinction of the Work Product Doctrine**

In addition to the issues that often arise in relation to the theoretical underpinnings of the attorney-client privilege as set forth in the *Upjohn* line of cases, a distinction must be made between the attorney-client privilege and the work product doctrine as enunciated by the Court. 100 Indeed, the Court in *Upjohn* specifically noted that the work product doctrine, 101 while at issue in the lower court proceedings, was largely a moot point because of the Court’s determination that the attorney-client privilege extended to the subject matter of the internal investigation. 102 Nevertheless, the Court noted, in relation to the now standard test under Rule 26(b)(3) of substantial need/undue

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100 See, e.g., Hickman v. Taylor, 329 U.S. 495 (1947). As a matter of doctrine, the work product protection is afforded to materials that were prepared in anticipation of litigation. See id. at 499-500. Further, work product can either be “factual” work product or “opinion” work product, with latter receiving a heightened level of protection. See id. at 512-513. Indeed, the *Hickman* Court noted that if the work product in that case were considered as opinion work product, “[W]e do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production.” Id. at 512.

101 In this article, I have invoked the term “work product doctrine” since this appears to be the more commonly used phrase. See, e.g., Edna Selan Epstein, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE* 792 (5th ed., 2007) (“The words ‘doctrine,’ ‘immunity,’ and ‘privilege’ (among others) have been used in naming the protection given work product. Any of the terms is probably appropriate.”) This said, the precise phraseology of a given legal rule or action is often subject to one’s particular time and circumstance. See, e.g., Christopher T. Hines, Tatsuya Tanigawa and Andrew P. Hughes, *Doing Deals in Japan: An Analysis of Recent Trends and Developments for the U.S. Practitioner*, 2006 COLUM. BUS. L. REV. 355, 393, n. 94 (2006) (noting that the U.K. term of “takeover bids” in contrast to “tender offers” in the U.S. is the preferred language in Japan).

102 *Upjohn*, 449 U.S. at 397.
hardship,\(^\text{103}\) that “a far stronger showing of necessity and unavailability by other means…would be necessary to compel disclosure.”\(^\text{104}\)

More specifically, the Court in *Upjohn* noted how the protections afforded by the attorney-client privilege and the work product doctrine often overlap within the context of internal investigations.\(^\text{105}\) Making clear this important distinction in doctrine, the Court observed:

> The notes and memoranda sought by the Government here, however, are work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney-client privilege. To the extent they do not reveal communications, they reveal the attorneys’ mental processes in evaluating the communications. As Rule 26 and *Hickman* make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.\(^\text{106}\)

While the Court refrained from finding that “such material is always protected by the work-product rule,” it did consider the materials as comprising “opinion” work product.\(^\text{107}\)

The importance of this doctrinal difference between the attorney-client privilege and the work product doctrine is that, in cases involving the work product doctrine, a party has the possibility of discovering what otherwise may be *protected facts* under the longstanding test of substantial need/undue hardship as set forth by the Court in *Hickman* and as now codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure.\(^\text{108}\) While some may reasonably argue that this *possibility* of discovery in such cases is cumbersome and difficult as a practical matter, the point still remains that, under the auspices of the

\(^{103}\) Rule 26(b)(3) of the Federal Rules of Civil Procedure codified the holding of the Court in *Hickman*, and provides that a party may discover work product upon a showing of having “substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.” Fed. R. Civ. P. 26(b)(3)(ii).

\(^{104}\) *Id.* at 402.

\(^{105}\) See *Upjohn*, 449 U.S. at 397-402.

\(^{106}\) *Upjohn*, 449 U.S. at 401.

\(^{107}\) *Upjohn*, 449 U.S. at 401-402; See *supra* note 100.

\(^{108}\) See *supra* note 103.
substantial need/undue hardship test, a discovering party—in this context, typically the SEC or DOJ in their capacities of enforcing federal securities law—has an avenue for obtaining the facts (or, in the *Upjohn* Court’s phraseology, the underlying facts) in certain circumstances.\(^{109}\) Indeed, it is this focus on *exceptions* to the general rules of protection, either by means of the attorney-client privilege or the work product doctrine, which in recent years has generated the most heated discussion amongst scholars and practitioners alike. The specific exception of substantial need/undue hardship, as discussed above, applies to the work product doctrine by federal rule. In contrast, the exception to the attorney-client privilege that has received the most praise and criticism in recent years is the selective waiver rule, which is the next topic of discussion.

**C. The Ongoing Debate Concerning the Selective Waiver Rule**

A recent debate has been whether the attorney-client privilege should be subject to a “selective waiver” exception in cases where a corporation selectively waives the privilege to federal securities regulators as a means of exhibiting greater cooperation with the government—and thus, one supposes, a more lenient penalty or final settlement.\(^{110}\)

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\(^{109}\) This variation in the line of argument, although it may seem negligible upon first glance, *necessarily* results in a different debate. Specifically, the issue is no longer whether the material in question (in *Upjohn*, the notes and memoranda in connection with the internal investigation, or in *Hickman*, the interview notes by counsel of witnesses to a shipping accident) is protected or not. Rather, the debated point is whether *an exception* to the general rule of protection should be granted, and if so what should be the precise contours of such an exception. In calling for a return to first principles in privilege law, therefore, the argument herein is that the debate over exceptions (whether the substantial need/undue hardship test for the work product doctrine, or the selective waiver rule for the attorney-client privilege) is, in a sense, an ongoing debate over first principles by proxy. Accordingly, in order to provide clarity to doctrine and theory, I place the prudential decision squarely where it belongs—in first determining whether a “fact” or “communication” is at issue.

The origins of the selective waiver rule lie with the decision of the Eighth Circuit in the case of *Diversified Industries, Inc. v. Meredith*. However, a close reading of *Diversified Industries* reveals how the selective waiver rule—this curious exception to the attorney-client privilege—began in an almost accidental fashion.

The facts in *Diversified Industries* resemble those in *Upjohn* to a considerable degree—a corporation in the copper business was accused of maintaining a “slush fund” in order to “bribe purchasing agents of other business entities including Weatherhead [one of its counterparties in the copper orders], and perhaps for other improper purposes.” In turn, Weatherhead sued Diversified on numerous grounds, such as conspiracy, tortious interference with contractual relationships, as well as Section 4 of

the Clayton Antitrust Act for treble damages. At the same time, the SEC commenced an investigation into Diversified and its activities, and in connection with such an investigation Diversified produced to the SEC its internal investigation report “without protest” in response to an SEC subpoena.

In light of this factual and procedural background, one can view Diversified and Upjohn as being cases from the same geological strata in legal development – both these cases involved companies that found themselves wrapped up in a questionable payments scandal, which ultimately resulted in the enactment of the FCPA and the advent of the SEC’s voluntary disclosure program. However, it is important to note that the Eighth Circuit handed down its ruling in Diversified approximately three and a half years before the Court restated the first principles of privilege law in Upjohn. Thus, Diversified and its counsel did not have the Court’s guidance in Upjohn upon which to further substantiate their claims.

It is therefore somewhat curious that Diversified, a decision by the Eighth Circuit that pre-dated the Court’s ruling in Upjohn, would in time be considered as espousing the greatest exception to the attorney-client privilege in this line of cases, i.e., the selective waiver rule. Indeed, the Eighth Circuit only briefly addressed this issue in its en banc opinion, after first determining that the materials in question were protected by the attorney-client privilege:

113 See id.
114 See id. at 599-600.
115 See id. at 599. Diversified did not assert, therefore, the protection of the attorney-client privilege or the work product doctrine in relation to the subpoena from the SEC.
116 See supra notes 55 and 60.
117 In particular, Diversified and its counsel did not have the Court’s guidance on the “Upjohn warnings” that often come into play when one seeks to protect the privilege when conducting an internal investigation. See supra note 69.
As Diversified disclosed these documents in a separate and nonpublic SEC investigation, we conclude that only a limited waiver of the privilege occurred...To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers. In concluding, we note that the litigants are not foreclosed from obtaining the same information from non-privileged sources.  

The primary argument, therefore, in support of the selective waiver rule as enunciated by the Eighth Circuit in *Diversified* is a theoretical justification in favor of internal investigations performed by independent outside counsel. As will be further discussed infra, however, there are other means by which to accomplish these same ends.

As to the selective waiver rule, its limitations are a matter of frequent discussion and for good reason—the limitations, real and imagined, are quite considerable. Simply stated, the problem with the selective waiver rule is that it runs afoul of the first principles of privilege law. The question, therefore, as to the selective waiver rule becomes—how can one selectively waive the privilege when, as a matter of first principles, the communication must be confidential between the attorney and the client? Further to this line of reasoning, how can one claim that the SEC or DOJ in the context of enforcing federal securities laws be viewed either as the client itself or its attorney?

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118 *Diversified*, 572 F.2d at 611 (emphasis added) (citations omitted).

119 Although the Eighth Circuit in *Diversified* spoke of a “limited waiver,” in time the more commonly used phrase became “selective waiver,” which is the term used throughout this article. *See id. See generally supra* note 101.

120 *See infra* Part IV.A.

121 *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000) [hereinafter RESTATEMENT (THIRD)]. The Restatement (Third) observes that the attorney-client privilege extends to “(1) a communication, (2) made between privileged persons, (3) in confidence, (4) for the purpose of obtaining or providing legal assistance for the client.” *Id.* (emphasis added)

122 In the language of the RESTATEMENT (THIRD), the question would be whether the SEC or DOJ qualified as “privileged persons.” *See id. at 70* (“privileged persons within the meaning of § 68 are the client (including a prospective client), the client’s lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation”). Although one could make an argument that the SEC or DOJ might qualify as an “agent” of either the client or its attorney, such an argument does not appear to be particularly persuasive.
The problem for the selective waiver rule, unfortunately, is that these questions do not appear to have any satisfactory answers. In truth, the selective waiver rule is not so much a rule for waiving the privilege, but instead operates in a manner similar to a safe-harbor for certain disclosures to governmental entities. And in turn this dilutes the primary justification for the privilege in the first instance—the “interests of justice” and “administration of justice” as explicated by Lord Brougham in Bolton and Greenough. For what is the privilege worth as a principle of law if it can be selectively applied in some cases, and selectively waived in others? It should not be surprising, therefore, that the federal circuit courts have in large measure rejected the application of the selective waiver rule. In one of the more recent opinions that sharply criticized the selective waiver rule, the Sixth Circuit squarely framed the issue in noting that it could not find any reason in law or policy to transform either the attorney-client privilege or work product doctrine into “another brush on the

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123 See supra note 39.
124 On this point, it may be helpful to recall that the attorney-client privilege in its operation often serves as a rule of evidence by deeming certain materials or testimony as beyond the permissible scope of discovery by private litigants or governmental authorities. Accordingly, a rule that would permit certain adverse parties, here the federal securities regulators, to obtain the “fruits of the investigation” while others (most likely private securities class action plaintiffs, or plaintiffs in a derivative suit on behalf of the corporation) may not would, one may argue, strike at the very heart of the integrity of the adversarial process.
attorney’s palate, used as a *sword rather than a shield*. This notion of using privilege law as either a sword or a shield, depending on the particular litigation strategy in a given case, is—one must believe—the precise theoretical weakness of the selective rule. In permitting a corporation to *selectively* invoke privilege law to further its particular interests, the theoretical foundation of the attorney-client privilege (and by extension the work product doctrine) begins to crack. And as Lord Brougham first observed in *Bolton* and *Greenough*, the modern attorney-client privilege must speak to the larger interests and administration of justice. Accordingly, there exists a void in the existing doctrine and theory because, I will argue, the debate has moved from the first principles of privilege law.

III. The Evolution of the Federal Securities Enforcement Regime and the Waiver of the Attorney-Client Privilege

In concert with the historical development of the attorney-client privilege, as discussed in Part II above, in the 30 years since the Court decided *Upjohn* we have witnessed significant change as to how the waiver of the attorney-client privilege often works as a matter of practice as part of the greater evolution of the federal securities enforcement regime. Accordingly, this section summarizes some of the more notable changes in law and practice, by addressing the following points of interest: (a) the advent of attorneys as “gatekeepers” of the corporation as described by the SEC in *Carter & Johnson*; (b) the changes in SEC and DOJ enforcement guidelines which, in form and

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126 *In re Columbia/HCA*, 293 F.3d at 307, (quoting *In re Steinhardt*, 9 F.3d at 235) (emphasis added).
127 See *supra* note 39.
substance, highlighted the possible waiver of the attorney-client privilege; and (c) an analysis of selected SEC enforcement actions to the extent discernible from the publicly available data.\textsuperscript{129}

A. The Advent of the Attorney as Gatekeeper

A significant starting point in considering the development of what has been deemed a “culture of waiver”\textsuperscript{130} in federal securities law enforcement in recent years is the emerging role of the attorney as gatekeeper for the corporate enterprise.\textsuperscript{131} Although the intersection of legal ethics and federal securities law is clearly a complex topic,\textsuperscript{132} for purposes of this discussion one can focus on two seminal events—the SEC’s action against two attorneys in \textit{Carter & Johnson} that first developed the notion of an attorney as gatekeeper in the federal securities context, and the ultimate triumph of such an approach with the enactment of Section 307 of the Sarbanes-Oxley Act.\textsuperscript{133}

Although \textit{Carter & Johnson} may be viewed as a vestige of history,\textsuperscript{134} it sets the stage for the development of the current view of attorneys in securities regulation. The SEC brought an action against two attorneys who represented a corporate client under what is now Rule 102(e) of the SEC Procedural Rules, seeking possible suspension or

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\textsuperscript{129} See infra note 183 and accompanying text. The specific methodology employed in this statistical analysis is discussed later in the article.

\textsuperscript{130} See Seigel, \textit{supra} note 110, at 5, n.30 (noting that although 75% of corporate counsel in a 2006 study by the Association of Corporate Counsel and the National Association of Criminal Defense Lawyers subscribed to the notion of a culture of waiver, “in light of the obvious bias of the surveyors and the population surveyed, this statistic is meaningless”).


\textsuperscript{132} See \textit{id.} at 209-212; Milton C. Regan, Jr., \textit{Professional Responsibility and the Corporate Lawyer}, 13 GEO. J. LEGAL ETHICS 197, 205 (2000).


\textsuperscript{134} See Coffee, \textit{supra} note 131, at 212 (“The SEC has not subsequently brought an enforcement action against an attorney under Rule 102(e), except in cases where the attorney has been criminally convicted.”)
disbarment in respect of appearing or practicing before the SEC.\textsuperscript{135} The facts of the case involved disclosure issues surrounding a corporation that was seeking additional financing due to its dire business results, which eventually reached the point that the firm was forced into bankruptcy.\textsuperscript{136} As to the specific allegation that Carter and Johnson aided and abetted securities law violations perpetrated by their client when issuing misleading and incomplete disclosures,\textsuperscript{137} the SEC found that neither of the defendants had the necessary level of intent to substantiate such a charge since they “…did not intend to assist the violations by their inaction or silence.”\textsuperscript{138} Instead, the SEC arrived at what appears to be the reasonable conclusion that the attorneys “seemed to be at a loss for how to deal with a difficult client.”\textsuperscript{139}

The SEC, however, did set forth what was then new interpretative guidance on the standards of professional conduct for attorneys practicing before the SEC.\textsuperscript{140} Specifically, while noting that “precise standards have not yet emerged,”\textsuperscript{141} the SEC thereafter observed:

\textsuperscript{136} For the experienced securities regulation attorney, such a fact pattern will appear quite familiar. A more recent example of this type of case can arguably be seen in the dispute concerning alleged misstatements made by Bank of America in connection with its merger with Merrill Lynch at the height of the financial crisis. Specifically, the misstatements in question concerned certain bonus payments due to Merrill Lynch executives as well as mounting losses at Merrill Lynch that ultimately coincided with a second government bailout of $20 billion. After rejecting an initial settlement that included $33 million in penalties, Judge Jed S. Rakoff of the Southern District of New York approved a $150 million settlement, which he deemed as “half-baked justice at best.” Louise Story, Judge Accepts SEC’s Deal With Bank of America, N.Y. TIMES, Feb. 23, 2010, www.nytimes.com/2010/02/23/business/23bank.html. As Judge Rakoff further observed, “This court, while shaking its head, grants the SEC’s motion and approves the proposed consent judgment.” \textit{Id}.
\textsuperscript{137} Specifically, the violations in question were in respect of Section 10(b) and 13(a) of the Exchange Act, and Rules 10b-5, 12b-20 and 13a-11 thereunder. \textit{Carter & Johnson, supra} note 135, at *75.
\textsuperscript{138} \textit{Id}. at *88.
\textsuperscript{139} \textit{Id}. One may assume that this is a circumstance in which many securities attorneys can, whether through general knowledge or past experience, readily empathize.
\textsuperscript{140} See \textit{id}. at *89-102.
\textsuperscript{141} \textit{Id}. at *93.
When a lawyer with significant responsibilities in the effectuation of a company’s compliance with the disclosure requirements of the federal securities laws becomes aware that his client is engaged in a _substantial and continuing failure_ to satisfy those disclosure requirements, his continued participation violates professional standards unless he takes prompt steps to end the client’s noncompliance.\(^\text{142}\)

This new standard of a “substantial and continuing failure” as the trigger for a possible violation of the legal ethics of securities attorneys is the lasting impact of _Carter & Johnson._\(^\text{143}\) However, this new approach to the intersection of federal securities law and legal ethics only came to full fruition with the passage of Section 307 of the Sarbanes-Oxley Act.

In the aftermath of the accounting scandals of Enron, WorldCom, Adelphia, Tyco International and others, Congress enacted the Sarbanes-Oxley Act as a means of enhancing federal criminal and securities laws.\(^\text{144}\) As part of these reforms, Section 307 of Sarbanes-Oxley – a provision inserted into the bill by then Senator John Edwards of North Carolina – provided for the SEC to promulgate, no later than 180 days after the enactment of the Act, rules of professional responsibility for attorneys appearing and practicing before the SEC.\(^\text{145}\) The resulting final rules set forth the now famous “up-the-ladder” reporting requirements under the Attorney Conduct Rules.\(^\text{146}\) Although the final rule omitted the controversial “noisy withdrawal” requirement as set forth in an early draft of the rule, the realization of the potential of _Carter & Johnson_ in the promulgation

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142 _Id._ at *98 (emphasis added).
143 As Professor Coffee further explains, however, “The bar knew that _Carter & Johnson_ had been issued by the ‘old’ SEC under its Democratic chairman, Harold Williams, in early 1981, just days before a new Republican SEC chairman appointed by newly elected President Ronald Reagan was to replace Chairman Williams. That new Commission, under Chairman John Shad, showed no inclination to implement _Carter & Johnson_ with proposed rules. Not only was the decision’s name rarely spoken, but in 1982 the Commission’s general counsel delivered a conciliatory speech in which he predicted that the Commission would normally limit its discipline of attorneys to instances where the conduct also violated established ethical rules of state bar organizations.” Coffee, _supra_ note 131, at 211-212.
144 _See generally_ Stephen M. Bainbridge, _THE NEW CORPORATE GOVERNANCE: IN THEORY AND PRACTICE_ 176-77 (2008).
145 _See_ Sarbanes-Oxley Act § 307; Coffee, _supra_ note 131 at 216-217.
146 _See_ Attorney Conduct Rules; Coffee, _supra_ note 131 at 218-220.
of specific rules on the professional conduct of attorneys appearing and practicing before the SEC, came to pass. The advent of the corporate attorney as gatekeeper was now at hand.

B. SEC/DOJ Enforcement Guidelines

In parallel with the advent of the corporate attorney as gatekeeper, we have witnessed the continuing evolution of policy positions taken by the SEC and the DOJ in respect of the regulation and enforcement of federal securities laws. Specifically, over the course of the past decade, we first saw both the SEC and the DOJ take an arguably aggressive position in that the waiver of the attorney-client privilege would be considered as a positive factor in the determination of an appropriate settlement with the defendant in question. However, this initial position softened over time as the outcry from industry and the bar over the “culture of waiver” effectively compelled the federal regulators to reassess their policies.

i. SEC Enforcement Guidelines

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147 See Attorney Conduct Rules. In brief, the Attorney Conduct Rules provide that an attorney appearing and practicing before the SEC has the duty to report “up-the-ladder” of her corporate client in the event that she becomes aware of evidence of a “material violation” of federal securities laws and there is not an “appropriate response” within a reasonable amount of time. Id.


149 See supra note 130 and accompanying text.

150 Admittedly, one may contest the assertion that the SEC and/or DOJ felt compelled or otherwise to change policy in light of the reaction of industry and the bar. On this point, please note that I do not necessarily take a position in favor or against any of the specific policies of the federal securities regulators. Rather, my effort here is to draw a light on the interplay between the SEC and DOJ and those that they regulate, and how the enforcement of federal securities laws remains an evolving process. See, e.g., supra note 96 and accompanying text.
The SEC first established its policy regarding the possible waiver of the attorney-client privilege in what has now been termed as the “Seaboard Report.”\(^{151}\) In notable part, the Seaboard Report sets forth guidance on “best practices” for public companies when confronted with possible violation of federal securities laws by one of its employees. In the case at issue in the Seaboard Report, a former controller at a subsidiary of a public corporation was alleged to have misstated certain periodic reports and then engaged in a cover-up.\(^{152}\) Once this came to the attention of the parent corporation, the Board initiated an internal investigation led by outside counsel, the former controller was dismissed as were two other employees for failure to adequately supervise, and the company disclosed to the market that its financial statements would be restated. Importantly, “the company pledged and gave complete cooperation to our staff…[and] produced the details of its internal investigation, including notes and transcripts of interviews…and it did not invoke the attorney-client privilege, work product protection or other privileges or protections with respect to any facts uncovered in the investigation.”\(^{153}\) As a result of the parent corporation’s cooperation with the SEC, no action was taken against the corporation in this matter.\(^{154}\)

As a means of further defining the appropriate extent of cooperation with the SEC, the Seaboard Report sets forth a series of questions for public corporations such as – “what is the nature of the misconduct involved?”\(^{155}\) – or, “how was the misconduct


\(^{152}\) Id. at *1.

\(^{153}\) Id.

\(^{154}\) Id.

\(^{155}\) Id. at ¶1.
detected and who uncovered it?" 156 Most importantly for privilege law, however, the SEC posed the question, “Did the company promptly make available to our staff the results of its review and provide sufficient documentation reflecting its response to the situation?” 157 The upshot, therefore, of the Seaboard Report is that public companies were effectively incentivized to waive the attorney-client privilege, or at the very least not seek to assert the attorney-client privilege or work product doctrine, in order to obtain a favorable settlement result with the SEC. 158

As a possible reaction to some of the perceived excesses of the policies set forth in the Seaboard Report, and in particular the concerns of industry regarding the increase in penalties that were being assessed, 159 the SEC provided further guidance in 2006 on the issue of financial penalties. 160 In particular, the new guidelines focused on “the

156 Id. at ¶6.
157 Id. at ¶11. In an extensive footnote 3 to the Seaboard Report, the SEC noted that “In some cases, the desire to provide information to the Commission staff may cause companies to consider choosing not to assert the attorney-client privilege, the work product protection and other privileges, protections and exemptions with respect to the Commission. The Commission recognizes that these privileges, protections and exemptions serve important social interests. In this regard, the Commission does not view a company’s waiver of a privilege as an end in itself, but only as a means (where necessary) to provide relevant and sometimes critical information to the Commission staff. Thus, the Commission recently filed an amicus brief arguing that the provision of privileged information to the Commission staff pursuant to a confidentiality agreement did not necessarily waive the privilege as to third parties. Brief for McKesson HBOC, Inc. as Amici Curiae Supporting Petitioners, McKesson HBOC, Inc. v. The Superior Court of San Francisco, No. 99-C-7980-3 (Ga. Ct. App. 2001). Moreover, in certain circumstances, the Commission staff has agreed that a witness’ production of privileged information would not constitute a subject matter waiver that would entitle the staff to receive further privileged information.” Id. at ¶11n.3 (emphasis added). Although the SEC’s explication of its reasoning on this point appears persuasive, the problem of course is that the courts have not necessarily agreed with the position that producing otherwise privileged documents to the federal securities regulators under the terms of a confidentiality agreement will ensure that such documents will remain privileged against, for example, private plaintiffs in a federal securities class action. Accordingly, it would appear that the selective waiver line of cases has effectively thwarted this potential comprise as noted in the Seaboard Report. See supra note 125 and accompanying text.
158 See Seaboard Report at ¶11 (“Did the company voluntarily disclose information our staff did not directly request and otherwise might not have uncovered? Did the company ask its employees to cooperate with our staff and make all reasonable efforts to secure such cooperation?”)
159 See infra Part III.C for additional discussion of certain statistical results during this time period.
presence or absence of a direct benefit to the corporation as a result of the violation” as well as “the degree to which the penalty will recompense or further harm the injured shareholders.”

Although an additional procedure announced in 2007 provided that attorneys in the Division of Enforcement would need the approval of Commissioners prior to negotiating corporate penalties, such efforts were terminated by Chairman Mary Schapiro in 2009. Accordingly, while much of the substance of the Seaboard Report is now subject to subsequent guidelines and policy directives, the essential question that the Seaboard Report presents in respect of the possible waiver of the attorney-client privilege remains, as of today, an unsettled one.

ii. DOJ Enforcement Guidelines

In a similar manner to the development of policy positions at the SEC, the DOJ first took the position that the waiver of the attorney-client privilege would be considered a positive factor in terms of corporate cooperation with federal authorities under certain guidelines for federal prosecution of corporations, or what came to be known as the “Holder Memo.” In many ways, the development of the DOJ enforcement guidelines

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161 Financial Penalties Guidelines at *3.
162 Id.
in respect of the waiver of the attorney-client privilege is the story of the multiple memoranda. Beginning with the Holder Memo, the issue of the waiver of the attorney-client privilege was identified as follows:

One factor the prosecutor may weigh in assessing the adequacy of a corporation’s cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel...The Department does not, however, consider waiver of a corporation’s privileges an absolute requirement, and prosecutors should consider the willingness of a corporation to waive the privileges when necessary to provide timely and complete information as only one factor in evaluating the corporation’s cooperation.  

Additionally, the Holder Memo noted that waiver requests made by prosecutors to corporations should typically be limited to factual work product and not address the core opinion work product for which the privilege is designed to protect. Subsequently, this language from the Holder Memo found its way into the next memorandum of interest, what came to be known as the Thompson Memo. 

Although the Thompson Memo tracked the language of the Holder Memo on the issue of the waiver of the attorney-client privilege, there is one noticeable difference between the two memoranda—the date. One must therefore consider the Thompson Memo as a document from its time—right after the popping of the Internet bubble, Sarbanes-Oxley had just been enacted, and the investigations into Enron and WorldCom

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167 Id. at *7 (emphasis added).
168 Holder Memo, supra note 166, at n.2 (“This waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government’s criminal investigation.”)
were in high gear. Accordingly, while the specific words contained in DOJ’s guidance may not have changed, certainly the context in which it applied was notably and thus necessarily different. In light of the aggressive response of federal prosecutors to the accounting fraud scandals, there was a reaction when certain quarters felt that the prosecutors were going too far. As a consequence, the Thompson Memo became something of a cause célèbre within the industry and the bar, which now includes Congressional proposals to mandate guidelines for waiver of the attorney-client privilege at the various federal agencies.

In an effort to address some of the concerns raised in response to the Thompson Memo, the DOJ issued a subsequent memorandum in 2005 that is commonly known as the McCallum Memo. While the McCallum Memo did not deviate from the language set forth in the Thompson Memo (and, by extension, the Holder Memo), it did provide for the additional direction that the recipients thereto “establish a written waiver review process for your district or component” but that “[s]uch waiver review processes may vary form district to district (or component to component)…” Unsurprisingly, this addendum did not satisfy the concerns raised, which had to wait until the arrival of the fourth memorandum—the McNulty Memo.

Indeed, the Thompson Memo itself clearly identifies its guidance as being an outgrowth of the work performed by the DOJ in connection with its Corporate Fraud Task Force. See id. at *1.


Id. at *1.

expressly overturned the Thompson Memo and McCallum Memo. Further, the McNulty Memo struck out the language concerning the waiver of the attorney-client privilege that harkened back to the Holder Memo, and provided for a new distinction between “Category I” and “Category II” privileged information—or the distinction between “factual” information and “opinion” information. Finally, the McNulty Memo provided for consultation with Main Justice prior to any of the field offices obtaining the requisite authority to make a waiver request to a given corporation.

The import of these reforms are clear— an effort by the DOJ, and specifically of Main Justice, to regain control of a process that, whether real or imagined, seems to have spun out of control. On these points, even Attorney General Holder has noted that the issue of the waiver of the attorney-client privilege evolved in ways that were unforeseen in 1999. Although it does appear that the McNulty Memo and its associated reforms have achieved some consensus amongst prosecutors, the industry and the bar,

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175 Id. at *2.
176 Id. at *4.
177 Category I information is defined as “purely factual information, which may or may not be privileged, relating to the underlying misconduct.” Id. at *9. In contrast, Category II information is defined as “attorney-client communications or non-factual attorney work product.” Id. at *10.
178 See id. at *9-10.
179 The reforms initiated by the McNulty Memo were subsequently augmented by additional guidelines drafted by Deputy Attorney General Mark R. Filip in 2008, which have been alternatively called the Filip Memo or the 2008 Guidelines. See Remarks Prepared for Delivery by Deputy Attorney General Mark R. Filip at Press Conference Announcing Revisions to Corporate Charging Guidelines, (Aug. 28, 2008), available at http://www.justice.gov/archive/dag/speeches/2008/dag-speech-0808286.html (“[C]redit for cooperation will not depend on whether a corporation has waived attorney-client privilege or work product protection, or produced materials protected by attorney-client or work-product protections. It will depend on the disclosure of facts.”)
180 See Peter Lattman, The Holder Memo and Its Progeny, Law Blog, THE WALL STREET JOURNAL (Dec. 23, 2006), http://blogs.wsj.com/law/2006/12/13/the-holder-memol (“I thought it was a worthwhile endeavor but didn’t expect these issues would become as big as they were,’ says Holder…”); see supra note 96.
181 See id. (“[Holder] applauds McNulty’s changes. ‘Today, it’s maddening,’ he says. ‘You’ll go into a prosecutor’s office…and fifteen minutes into our first meeting they say, ‘Are you going to waive?’”’); see also Cindy A. Schipani, The Future of the Attorney-Client Privilege in Corporate Criminal Investigations, 34 DEL. J. CORP. L. 921, 963 (2009) (“Yet it is possible that the 2008 Guidelines may strike a new balance between protection of the attorney-client privilege and the efficient prosecution of corporate crime.”)
nevertheless the question of when to seek a waiver request from a corporation remains one of substantial controversy within the profession.

C. **Analysis of Recent Trends in Securities Law Enforcement**

As a means of providing additional insight into recent trends in securities law enforcement, and in concert with the previous discussion of SEC and DOJ enforcement guidelines, this section sets forth a statistical analysis of selected SEC enforcement actions to the extent that can be determined from the publicly available data.\(^{182}\) Of note, this analysis is derived from a review of selected SEC enforcement actions that are available on Lexis-Nexis electronic resources from January 1, 2000 to December 31, 2010, which were subject to search terms that provided for a materiality threshold in the relevant settlement, fine or disgorgement amount.\(^{183}\) This search resulted in 1,471 positive returns or “hits” out of a total of 35,523 documents that, for the relevant timeframe, are available on Lexis-Nexis.\(^{184}\)

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\(^{182}\) I especially thank Brett D. Kolditz and Priti Nemani for their tireless assistance in respect of this review of the selected SEC enforcement actions. An unabridged copy of these research findings, consisting of a 405-page report, is available on file. See Index of Materials Reviewed: SEC Enforcement Actions (1/1/2000 to 12/31/2010), Jan. 31, 2011 (on file with author).

\(^{183}\) More specifically, within the “SEC Decisions, Orders & Releases” library of source materials as are generally available on the Lexis-Nexis website (www.lexis.com), the following search term was employed: “million! or billion! w/20 penalt! or settle! or fi ne! or disgorge! and date(geq (01/01/2000) and leq (12/31/2010)).”

\(^{184}\) The specific source material comes from the “SEC Decisions, Orders & Releases” library of documents in Lexis-Nexis. Accordingly, this analysis covers a sample size that equals approximately 4.14% of the materials that are available on this library of source materials for the relevant timeframe.
Although this analysis is necessarily limited by the amount of the sample size,\(^{185}\) the search terms were selected to set forth a materiality threshold that would capture the more significant amounts in settlements, penalties or fines that were agreed to or otherwise assessed in connection with the final resolution of the relevant SEC enforcement action. As a consequence, this analysis, as well as any conclusions that may be drawn from the underlying data, does not constitute a complete analysis of all the available public information.\(^{186}\) This said, the analysis was performed with the aim of providing specific statistical results that may be helpful in obtaining a more complete understanding of the various trends in federal securities law and practice.

The results of this statistical analysis are set forth in Figure 1 immediately below, which illustrates that out of the sample set of 1,471 SEC enforcement actions, only nine cases involved the waiver of the attorney-client privilege and/or work product doctrine, broadly stated.\(^{187}\)

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\(^{185}\) Additionally, this analysis is necessarily limited by the information that is publicly available. For instance, to the extent that a certain corporation waived the attorney-client privilege as part of an informal or formal SEC investigation that never resulted in an enforcement action, such a waiver will not have been disclosed in a final SEC enforcement release – that is to say, no enforcement proceedings commenced as a result of the investigatory process. See generally SEC Division of Enforcement, Office of Chief Counsel, ENFORCEMENT MANUAL ¶ 2.3 (Matters Under Inquiry (“MUIs”) and Investigations), 2.4 (The Wells Process), 2.5 (Enforcement Recommendations), 2.6 (Closing an Investigation) (Jan. 13, 2010), available at http://www.sec.gov/divisions/enforce/enforcementmanual.pdf. Further, even in cases where an SEC enforcement action commences, the possibility exists that the waiver of the attorney-client privilege was not an item that was specifically disclosed in the relevant SEC enforcement release. While this latter scenario may appear more remote, nevertheless such a limitation in the publicly available data remains a possibility.

\(^{186}\) Although reasonable minds may disagree on an appropriate search term for the relevant documents, the search term set forth supra in note 183 was chosen as a means of providing some limitation on the amount of materials to be reviewed, while at the same time providing for a sample size of such quantity that would comprise a useful set of data. As background, the review of these selected SEC documents took place over a period of five months, and constitutes approximately 400 total hours of research and related assistance. Assuming this rate in the research process, a complete review of all 35,523 documents would have required an additional 9,660 hours, or approximately one year and one month of additional, uninterrupted research and related assistance.

Accordingly, one may draw the conclusion that – at least based on this sample of publicly available data – the issue of the waiver of the attorney-client privilege and/or work product doctrine in SEC enforcement actions, while certainly extant, does not occur with the level of frequency that one might otherwise envision based solely on the tenor of the public discourse. This does not necessarily imply, however, that the concerns raised...

See supra note 130.
against the possible waiver of the attorney-client privilege and/or work product doctrine are without merit. Nevertheless, this analysis of publicly available sources does provide support to the inference that, at least for the time period reviewed, the waiver of the attorney-client privilege and/or work product doctrine was not an everyday occurrence.

One should note, however, that this inference is necessarily limited to an assessment of SEC enforcement actions. Further, this data does not address any actions taken by the DOJ during the relevant time period, although recent scholarship by Professor Leonard Orland suggests that federal prosecutors may have been “overly aggressive” in that nearly 80% of deferred prosecution agreements prior to 2006 contained a waiver of the privilege. Although it is not completely clear how much, if at all, the customary practices of the SEC and DOJ may have diverged over the past decade in respect of waiver requests, additional analysis of SEC enforcement actions

189 On the contrary, the concern over a possible expansion of the practice of compelling the waiver of privilege materials can fairly be noted as precisely the issue of debate.

190 Indeed, based solely on these figures, one could make the claim that the waiver of the attorney-client privilege and/or work product was an immaterial issue in SEC enforcement during the relevant time period. See, e.g., Basic Inc. v. Levinson, 485 U.S. 224, 231-232 (1988). This said, such a claim would be subject to the rejoinder that while such a statistical analysis may provide some indication in respect of quantitative materiality, there remains an open question as to the qualitative materiality of the waiver issue. See generally SEC Staff Accounting Bulletin: No. 99 – Materiality, 17 CFR Part 211, Staff Accounting Bulletin No. 99, at *3, n.5 (Aug. 12, 1999), available at http://www.sec.gov/interps/account/sab99.htm. It is my belief that, given the substantial attention given to the waiver issue in both practice and scholarship, a further inquiry into such matters is, at a minimum, warranted.

191 See supra note 183.

192 See Leonard Orland, The Transformation of Corporate Criminal Law, 1 BROOK. J. CORP. FIN. & COM. L. 45, 78-79 (2006-2007) (“This empirical data reinforces the conclusion of the American Corporate Counsel Association that it is ‘the regular practice of U.S. Attorneys to require corporations to waive their attorney-client privileges and divulge confidential conversations and documents in order to prove cooperation with prosecutors’ investigations.’”) (citation omitted); but see Mary Beth Buchanan, supra note 110, at 598 (survey conducted in 2002 of U.S. Attorneys “revealed that requests for waiver of the attorney-client privilege or work product protection were the exception rather than the rule: waivers were requested in a very small number of cases…”). Note, however, that Professor Orland’s analysis focuses on non-prosecution and deferred prosecution agreements from 1993 to 2006, which number 44 in the aggregate, and thus constitutes a different sample than is the case with the statistical analysis set forth herein, which addresses 1,471 “hits” in response to specific search terms. See supra notes 183 and 184 and accompanying text. Accordingly, the difference between the 80% cited by Professor Orland and the 0.61% set forth above should not be taken as an apples-to-apples comparison.
during the relevant timeframe does reveal that settlement figures have substantially
increased in aggregate amount.\textsuperscript{193} These statistical results, therefore, offer a more
nuanced picture of federal securities law enforcement and the waiver issue, which may
suggest that the contrary opinions – that there is indeed a “culture of waiver”\textsuperscript{194} or not –
may be the by-product of a more fundamental difference of perception in the issues of
applicable privilege doctrine. If this is in fact the case, then it would appear that a
reformulation of the question, rather than an extended debate on the possible answer, may
yield more promising results.

IV. Returning to the First Principles of Upjohn v. United States

It appears that the critical question in determining, and hopefully to some extent
resolving, the issue of waiver of the attorney-client privilege and/or work product
document in federal securities law enforcement is—what are the appropriate boundaries
of the corporate attorney-client privilege?\textsuperscript{195} Without some workable or satisfactory
answer to this foundational question, it would appear that any subsequent debate on the

\textsuperscript{193} See Jan Larsen, Elaine Buckberg, and Baruch Lev, \emph{SEC Settlements: A New Era Post-SOX}, NERA
Economic Consulting, at *1 (Nov. 10, 2008) (“In recent years the [SEC] has imposed unprecedented
penalties in enforcement actions…Our research has shown that since the [Sarbanes-Oxley Act], the SEC
has imposed penalties of $10 million or more against 115 parties, including 14 that were penalized at least
$100 million”), \textit{available at} http://www.nera.com/extImage/Settlements_Report_8.5x11_1108.pdf; cf. Jan
Larsen, Elaine Buckberg, James A. Overdahl, \emph{SEC Settlement Trends: 2H10 Update}, NERA Economic
Consulting, at *1-2 (Dec. 7, 2010) (“Settlements with companies, however, declined 12% to 168 in FY10
from 190 in FY09; the 168 company settlements were the second fewest in any fiscal year since the
passage of [the Sarbanes-Oxley Act]…The highest-value settlement of 2H10, as well as of the SEC’s entire
fiscal year, was the much-publicized $550 million settlement with Goldman Sachs”), \textit{available at}
\textsuperscript{194} See supra note 130.
\textsuperscript{195} See supra Part II.B.i. Such a question is, one might argue, a follow-on question to the more general
inquiry as to the extent to which the modern corporation should enjoy the rights and privileges customarily
reserved for natural persons. See supra note 19 and accompanying text. While future articles will explore
such matters in greater detail for present purposes the question of the appropriate boundaries of the
corporate attorney-client privilege is the focus of inquiry.
waiver issue will likely yield limited results. But in what manner should this important question be addressed? As noted previously, much of the debate in practice and scholarship has focused on the specific exceptions rather than the more general rule—namely, the possibility of selective waiver of materials generated as a result of an internal corporate investigation, or the SEC/DOJ policies in respect of such waiver as part of assessing the cooperation of a given corporation that may be under federal investigation.

Rather than continue to debate the costs and benefits of selective waiver and the policies of the SEC and DOJ in relation thereto, I argue that the question should turn not on its exceptions, but on the first principles in doctrine that define the object in question—namely, the corporate attorney client-privilege. Accordingly, the discussion below focuses on these first principles in an effort to determine whether they may be of some utility in more clearly framing the debate. When assessing these first principles, one must return to the reasoning of the Court in *Upjohn v. United States*; and, more specifically, its fundamental distinction between facts, on the one hand, and communication, on the other.

A. The Facts-Communication Model

In respect of the attorney-client privilege, the distinction between facts and communication is, it would appear, one of primary importance. Indeed, the Restatement

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196 As an elaboration, this is likely so since the discussion would then become one of opposing viewpoints as to the nature and purpose of the corporate form, in and of itself. *See supra* note 48. While such a discussion is of great importance to any understanding of law and its consequences, the effort here is, hopefully, to provide some method by which one can settle upon a criterion that, while perhaps not perfect, is at least an improvement over the current doctrinal debate.

197 *See supra* Part II.C.

198 *See supra* Part III.B.

199 *See supra* Part II.B.

200 *See supra* note 22.
(Third) of the Law Governing Lawyers clearly makes this distinction in providing that the attorney-client privilege extends only to: “a communication…made between privileged persons…in confidence…for the purpose of obtaining or providing legal assistance for the client.”

Further, the Restatement (Third) defines a communication as “any expression through which a privileged person…undertakes to convey information to another privileged person and any document or other record revealing such an expression.” In considering these definitions, one arrives at the conclusion that an expression constitutes a category of human behavior that can be viewed as separate and distinct from a fact or, to more fully state this line of reasoning, any knowledge of facts. Indeed, the Restatement (Third) plainly provides, “The attorney-client privilege protects only the content of the communication between privileged persons, not the knowledge of privileged persons about the facts themselves.” So far, much of this discussion would appear to be non-controversial and rather self-evident. But can a more general model be derived from the facts-communication distinction with the purpose of addressing, and perhaps to some extent resolving, the question as to the appropriate boundaries of the corporate attorney-client privilege?

A review of the relevant literature of practitioners and scholars alike suggests that, at least amongst those persons who are in the field of federal securities law enforcement, the primary purpose for seeking a waiver of the corporate attorney-client privilege in the

201 See RESTATEMENT (THIRD) at § 68 (emphasis added).
202 Id. at § 69 (emphasis added). For additional discussion of the definition of a privileged person, see supra note 122.
203 On the matter of knowledge of facts and its resulting implications on the corporate attorney-client privilege, the reasoning of the Westinghouse court, as discussed previously, provides the most compelling account in the case law. See supra Part II.B.ii.(1).
204 RESTATEMENT (THIRD) at § 69, Illustration d (emphasis added). In further explicating this point, the Restatement Third notes that “the client thus may invoke the privilege with respect to the question ‘Did you tell your lawyer the light was red?’ but not with respect to the question ‘Did you see that the light was red?’” Id.
specific case is to ascertain the relevant facts as part of the investigatory process. Indeed, former Deputy Attorney General James Comey noted in 2003, “Prosecutors are not generally seeking legal advice or opinion work product; they are just seeking the facts, including factual attorney work product.” Although this particular statement included the possibility of waiver of factual attorney work product, it would appear that the DOJ position has evolved to the point where, in Congressional testimony in 2008, then Deputy Attorney General Mark Filip stated:

Cooperation will be measured by the extent to which a corporation discloses relevant facts and evidence, not its waiver of privileges. The government’s key measure of cooperation will be the same for a corporation as for an individual: to what extent has the corporation timely disclosed the relevant facts about the misconduct? That will be the operative question—not whether the corporation waived attorney-client privilege or work product protection in making its disclosures.

Accordingly, there appears to be an acknowledgement that the proper focus should be on the gathering of facts as part of the investigatory process, rather than a more exclusive fixation on the waiver issue. Such developments in DOJ policy appear encouraging since they highlight the importance of obtaining the facts and, therefore, that the possibility of waiver is merely one means to such an end.  

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205 Daniel Richman, supra note 110, at 300 (quoting Interview with U.S. Attorney James B. Comey Regarding Department of Justice’s Policy on Requesting Corporations under Criminal Investigation to Waive Attorney Client Privilege and Work Product Protection, 51 U.S. ATTORNEYS’ BULL. 1 (Nov. 2003)); see also Mary Beth Buchanan, supra note 110, at 596 (“[T]he information disclosed pursuant to waiver is nearly always attorney work product concerning the underlying facts, rather than privileged communications.”) On this point, former U.S. Attorney Buchanan’s argument in respect of the waiver of the work product doctrine is revealing—if the purpose is to obtain the underlying facts as the Court defined in Upjohn, see supra note 74, then perhaps a more feasible alternative is to return to the first principles of Upjohn as opposed to entering into the doctrinal thicket of the waiver issue.  

206 O’Sullivan, supra note 52, at 1274 (quoting Letter from Deputy Attorney General Mark Filip to Senator Patrick Leahy (July 9, 2008), at 2) (emphasis in original).  

207 The primary importance of facts as part of the investigatory process is aptly explained in the following exchange in Christopher Nolan’s film Memento, where the protagonist, Lenny, suffers from short-term memory loss (i.e., anterograde amnesia) and thus cannot form new memories. His counterpart in this scene, Teddy, is a police officer and recurring character in the film:

Leonard: …I go on facts, not recommendations, okay?
Teddy: Lenny, you can’t trust a man’s life to your little notes and pictures.
Leonard: Why?
Nevertheless, there does remain the concern of how one can distinguish between facts and communication in the close case. This problem may be best illustrated in a simple Venn diagram, as set forth in Figure 2 immediately below.

**Figure 2: The Facts-Communication Distinction**

![Venn diagram showing the distinction between facts, communicated facts, and communications]

In many cases, what are non-privileged facts – or underlying facts in the phraseology of the Court in *Upjohn* – will be beyond much doubt. For instance, if the chief executive officer of a given corporation has knowledge of securities fraud that occurred within the corporate enterprise, she cannot shield herself from a question during a deposition on her knowledge of this fact. However, if this same chief executive officer *communicated* this.

Teddy: Because you’re relying on them alone. You don’t remember what you’ve discovered or how. Your notes might be unreliable.

Leonard: Memory’s unreliable. [Teddy snorts.] No, really. Memory’s not perfect. It’s not even that good. Ask the police, eyewitness testimony is unreliable. The cops don’t catch a killer by sitting around remembering stuff. *They collect facts, make notes, draw conclusions. Facts, not memories: that’s how your investigate.* I know, it’s what I used to do. Memory can change the shape of a room or the color of a car. It’s an interpretation, not a record. Memories can be changed or distorted and they’re irrelevant if you have the facts.


208 See *supra* note 74.
knowledge to her counsel, then the SEC or DOJ attorney, as the case may be, cannot question the chief executive officer or such counsel with respect to such communication without raising an issue of waiver of the attorney-client privilege. What then of the case where the SEC or DOJ attorney seeks to discover certain facts that constitute communicated facts that may not be otherwise obtainable in the investigatory process or can only be ascertained at great expense? Supposing that the communicated facts concerned those facts that were obtained as part of an internal investigation that spanned numerous foreign jurisdictions, is a purported claim for efficiency in federal securities enforcement a sufficient argument in favor of waiver?\footnote{209}

It would appear that, standing by itself, such an argument cannot make the case for the whittling away of the attorney-client privilege.\footnote{210} And the reason why this must be, or at least should be, is two-fold: first, obtaining factual work product in certain cases is already subject to the substantial need/undue hardship test as enunciated in Hickman v. Taylor and as mandated in Rule 26(b)(3) of the Federal Rules of Civil Procedure;\footnote{211} and second, if indeed the corporate attorney is a gatekeeper for the corporate enterprise,\footnote{212} she must be provided with the necessary tools and resulting methods by which she can, at least to some degree, provide a check on the otherwise uncontrolled impulses of would-be violators of the federal securities laws.

In response, one might argue that the substantial need/undue hardship test of Rule 26(b)(3) is too onerous, and thus cannot work as a practical matter. Although this may be

\footnote{209}{This, of course, was precisely the case in Upjohn, where the General Counsel or outside counsel interviewed 86 present and past employees. See supra note 62.}
\footnote{210}{As a clarification, this is not because of any disagreement with respect to the importance of efficiency as part of a broader discussion of legal theory. See, e.g., Richard A. Posner, ECONOMIC ANALYSIS OF LAW (8th ed. 2010). Rather, the question is whether in this particular case the notion of prosecutorial convenience, which may or may not be necessarily efficient, should be the desired end.}
\footnote{211}{See supra Part II.B.ii.(4).}
\footnote{212}{See supra Part III.A.}
true to an extent, this does not necessarily mean that it would be impossible for the SEC and/or DOJ to obtain, for example, factual work product under the requirements of Rule 26(b)(3).\textsuperscript{213} All this would mean is that the SEC and/or DOJ would have to satisfy the procedural requirements that would apply to any potential plaintiff against the corporation, which would be the case, for instance, in a federal securities class action.

More importantly, however, is the notion that if we are to deem the corporate attorney as a gatekeeper – and thus accountable for any failure to address federal securities law violations as a matter of legal ethics – then the gatekeeper must be empowered to carry out her appointed task.\textsuperscript{214} Perhaps it may be a bit unfair to expect the corporate attorney to become the “conscience of the enterprise” as Professor Michael Seigel has observed,\textsuperscript{215} but once that decision has been made – which, at least according to the Attorney Conduct Rules,\textsuperscript{216} is in fact the case – then it becomes imperative to ensure that the requirements of legal ethics are matched by the safeguards of law. If, indeed, the corporate attorney as gatekeeper must now speak truth to power, then such a discussion must be protected by the attorney-client privilege in order to have its desired effect. An honest conversation that is not held in confidence will, one must imagine, not have much honesty at all.

B. **Comparison to Possible Alternatives**

The facts-communication model as presented above, while far from a perfect solution, hopefully has the benefit of simplifying the discussion to turn on one key

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\textsuperscript{213} See, e.g., In re: Vitamins Antitrust Litigation, 211 F.R.D. 1, 2002 U.S. Dist. Lexis 21430 (D.D.C. Oct. 21, 2002) (factual work product generated in connection with Rule 30(b)(6) witness statements satisfies substantial need/undue hardship test of Rule 26(b)(3) and is subject to \textit{in camera} review).

\textsuperscript{214} See generally Regan, \textit{supra} note 132, at 214.

\textsuperscript{215} Seigel, \textit{supra} note 110, at 45 (“In effect, lawyers do not want to be cast in the role of the conscience of the enterprise. And for good reason: no one likes being a killjoy. History demonstrates, however, that corporations are in desperate need of consciences, and who better to serve in this capacity than counsel?”)

\textsuperscript{216} See \textit{supra} note 133.
determinant—whether the object in question is a non-privileged or underlying fact, or whether it constitutes a privileged communication between a client and counsel. The upshot of such an approach is that it has the potential of creating a workable solution for both the federal securities law enforcers and the corporations that may be subject to federal investigation.

In particular, the given corporation will have a more identifiable means by which to establish its cooperation—disclose the underlying facts, but not the privileged communication. Thus, for instance, the corporation may keep the final internal investigation report confidential, but it may also make available to the SEC and/or DOJ such corporate officers and employees, together with such non-privileged materials that may provide the necessary background, so that the SEC and/or DOJ may “follow in the footsteps” of the internal corporate investigation. And if the focus should be on the facts in the investigatory process, could not this change in method allow for a result that satisfies the notable concerns raised while also following the dictates of Upjohn and its progeny?

This is, at least, the intent behind the facts-communication model as presented herein. Nevertheless, one can imagine a number of possible alternatives to the question of the appropriate boundaries of the attorney-client privilege. In particular, Professor Lonnie Brown has recently proposed a fascinating solution to this issue by calling for a variation of the “control group” test. As Professor Brown explains, the control group test can be refashioned along the lines of Comment 7 to Rule 4.2 of the ABA Model.

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217 See supra note 74.
218 Brown, supra note 110, at 951-957.
Rules of Professional Conduct.\textsuperscript{219} As a consequence, under such a modified control group test, the corporate attorney-client privilege may then be limited to “only those communications with those employees who exercise managerial responsibility in the matter, who are alleged to have committee wrongful acts [that are] at issue…or who have authority on behalf of the corporation to make decisions about the course of the [representation].”\textsuperscript{220} As Professor Brown further explains, in following such an approach:

\begin{quote}
[T]he proposed corporate attorney-client privilege will protect that about which corporations are primarily concerned—legal advice and incriminating statements attributable to the corporation—while leaving unprotected that which is reportedly of most interest to the government—factual information. The result is that corporations can be deemed “cooperative” by turning over the unprotected factual materials without the necessity of waiver and the related concerns that accompany it—i.e., subject matter waiver and waiver as to third parties.\textsuperscript{221}
\end{quote}

In this sense, therefore, Professor Brown’s approach and the facts-communication model are quite similar in their intended goals.\textsuperscript{222}

There does, however, appear to be a slight but significant difference in these two approaches, as illustrated in Figure 3 immediately below.

\textbf{Figure 3: Modified Control Group and Facts-Communication Models}

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\textsuperscript{219} \textit{Id.} at 952-953.


\textsuperscript{221} \textit{Id.} at 956.

\textsuperscript{222} Indeed, the facts-communication model should be considered as being in concert with the sentiment expressed by Professor Brown that, “When something appears to be dead or dying, the proper solution is not merely proclaim that it is alive and well or behave as if band-aid type remedies will do the trick. The only solution is to breath [sic] new life into the declining vessel.” \textit{Id.} at 957. In this sense, Lord Brougham’s opinion in Bolton and Greenough may be instructive in their effect—the attorney-client privilege is dead, long live the attorney-client privilege. \textit{See supra} Parts II.A.i and II.A.ii.
The diagram on the left presents the implications of Professor Brown’s proposal, and stands in contrast to the diagram on the right, which sets forth the facts-communication model. The key difference is the determination as to the precise ambit of the corporate attorney-client privilege. Under Professor Brown’s proposal, the critical question is whether the specific agent of the corporation, or the “privileged person” in the terminology of the Restatement (Third), is an individual that will fall within the definition of the “control group” as informed by Comment 7 to Rule 4.2 of the ABA Model Rules of Professional Conduct. Thus, in the diagram on the left, the dotted-line with corresponding arrows to indicate that the question of the limits of the control group is the critical issue under such a criterion.

In contrast, however, the diagram on the right indicates that the focus under the facts-communication model is not the control group, but on the fundamental distinction between an underlying fact and a privileged communication. Accordingly, the dotted line runs along the second of the three circles—which is precisely the line that the Court set

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223 See Restatement (Third) § 70.
224 See supra notes 218 and 219.
down in *Upjohn*.

And while the distinction between an underlying fact and a privileged communication may be far from clear in an individual case—and thus the corresponding arrows in the diagram on the right—the advantage of such an approach is that it does not require the Court to overturn *Upjohn* and move from the “subject matter” test to the “control group” test.

The notable difference, therefore, is in the focal point as denoted in the shading in each of the diagrams—while Professor Brown focuses on the most sensitive information that rests within the control group, the facts-communication model widens the scope of vision to capture, as John Adams once called, those “stubborn things”—that is to say, the facts.

V. Conclusion

The question of the appropriate boundaries of the corporate attorney-client privilege is not a matter that is capable, or perhaps even suitable, of being resolved by a simple solution. If, in fact, there were such an elusive solution, one must imagine that the law would have already arrived at such an endpoint. In the case of the possible waiver of the attorney-client privilege and/or work product doctrine, however, there may be some utility in returning to the start. At the conclusion of the oral argument before the Court, counsel for *Upjohn* observed:

In closing, Your Honor, I would just like to say that I think Justice Stevens’ questions about why the Internal Revenue Service didn’t go after the people who were interviewed and who signed these questionnaires really discloses what the Internal Revenue Service is doing here. They’re not

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225 See supra note 74.

226 On this point, Professor Julie O’Sullivan notes the possible difficulties with an approach that would seek to move from the subject matter test, as set forth in *Upjohn*, to the control group test. See O’Sullivan, supra note 52, at 1265 (“Professor Brown’s proposal is fairly new, but, given the high regard in which the bar holds *Upjohn* and, more important, the bar’s reaction to one outstanding proposed ‘solution’ to the lack of a selective waiver doctrine—proposed Federal Rule of Evidence 502(c)—it is fair to assume that the bar will not be rushing to endorse this ‘fix.’”).
interested in the facts, they either have them or they can get them. What they want is the lawyer’s input. And that’s what we’re fighting about here.\textsuperscript{227}

Although it is likely that the debate concerning the waiver issue will continue for a number of years to come, there is also the sense that the fundamental questions have already been asked and that the long arc of judicial opinions—beginning with Lord Brougham in \textit{Bolton} and \textit{Greenough} and ending with the Court in \textit{Upjohn}—has provided a rather consistent response. The challenge, therefore, is to seek to apply these judicial first principles in practice, which is an endeavor that – when cast in the light of the historical development of the privilege – has no end.